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CALIFORNIA REPORTER

155 PACIFIC REPORTER

SECOND SERIES

RICHFIELD OIL CORPORATION v. STATE BOARD OF EQUALIZATION. *

Sac. 5640.

Supreme Court of California.

Dec. 30, 1944.

Rehearing Granted Jan. 29, 1945.

1. Commerce ⇐77

Goods not intended for export when general tax is laid by state on all property alike are not exempt therefrom because they happen to be exported afterward. U.S.C.A.Const. art. 1, § 10, cl. 2.

2. Commerce ⇐77

Goods are not exempt from general tax laid by state on all property alike merely because they are intended for exportation or manufactured under a contract for export. U.S.C.A.Const. art. 1, § 10, cl. 2.

3. Commerce ⇐77

Goods in actual course of transportation to a foreign destination and goods delivered to common carrier for that purpose are in process of exportation and constitutionally cannot be taxed by state. U.S.C.A.Const. art. 1, § 10, cl. 2.

4. Commerce ⇐77

Goods exported to a foreign country do not cease to be part of common property of state of their origin for tax purposes until they have been shipped or entered with a common carrier for transportation, or have been started upon such transportation in a continuous route or journey. U.S.C.A.Const. art. 1, § 10, cl. 2.

5. Commerce ⇐77

Where foreign corporation authorized to do business in state entered into contract in New Zealand with New Zealand Government for sale of oil produced in California to be delivered to tank steamer in California for foreign transportation at a price f. o. b. Los Angeles, payment in London, the sale was a step in exportation of the oil, so that it could not be subjected to state retail sales tax. St.1941, pp. 532, 536, 540, §§ 6006, 6051, 6052, 6351, 6352; U.S.C.A.Const. art. 1, § 10, cl. 2.

6. Commerce ⇐77

The prohibitions contained in provision of Federal Constitution prohibiting Congress from laying taxes on articles exported from any state and in provision prohibiting state from laying imposts or duties on imports or exports, are identical. U.S.C.A.Const. art. 1, § 9, cl. 5; art. 1, § 10, cl. 2.

7. Commerce ⇐77

Delivery of goods to a common carrier for transportation is regarded as beginning of export journey, within provision of federal Constitution prohibiting states from laying any imposts or duties on imports or exports, since destination of goods is thereby fixed. U.S.C.A.Const. art. 1, § 10, cl. 2.

8. Commerce ⇐77

The imposition of state retail sales tax upon gross receipts from sale of oil for exportation by foreign corporation authorized to do business in state to New Zealand Government could not be upheld on ground that it was not an "impost" or "duty" on export, within meaning of prohibition contained in federal Constitution. St.1941, pp. 532, 536, 540, §§ 6006, 6051, 6052, 6351, 6352; U.S.C.A.Const. art. 1, § 10, cl. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Duty" and "Impost".

9. Commerce ⇐77

The prohibition of Federal Constitution against state taxation of exports applies both to exports originating within and outside the taxing state. U.S.C.A.Const. art. 1, § 10, cl. 2.

CARTER, J., dissenting.

* Subsequent opinion 163 P.2d 1.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Richfield Oil Corporation against State Board of Equalization to recover, with interest, a sum paid under protest as a retail sales tax and as interest thereon. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and H. H. Linney, Adrian A. Kragen, and John L. Nourse, Deputy Attys. Gen., for appellant.

Robert E. Paradise, Norman S. Sterry, and Gibson, Dunn & Crutcher, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is an appeal from a judgment for plaintiff in an action to recover, with interest, a sum paid under protest as a retail sales tax and as interest thereon.

Plaintiff is a foreign corporation authorized to do business in California and engaged in producing, refining and selling crude oil and crude oil products. On December 3, 1936, the New Zealand Government, acting through its official purchasing agency, the Stores Control Board, invited bids for the supply of fuel oil required by the New Zealand Division of the Royal Navy. The invitation provided that bids were to be for delivery "f.o.b. N.Z. Government tank steamer at any port beyond New Zealand specified by the tenderer." Plaintiff instructed its agent in New Zealand to submit a bid specifying that the price quoted was f.o.b. ship's rail of buyer's tanker at the Richfield Marine Terminal at Long Beach, California. Plaintiff's bid was accepted and a written contract for the sale of oil was entered into in New Zealand on Februray 4, 1937. The contract contained, among others, the following provisions: "(1). Price * * * Fob Los Angeles, payment in London. * * * (3). Delivery shall be given to the order of the Naval Secretary, Navy Office, Wellington, into N.Z. Naval tank steamer R.F.A. 'Nucula' at Los Angeles, California. (7). The Richfield Oil Co. shall advance to the Master of the 'Nucula' at Los Angeles a sum in dollars the equivalent of up to £300 to meet disbursements at port of loading * * *, such advance to be repaid when payment is made for the fuel oil. (8). Bills of lading and other customary shipping documents shall be handed to the Master of the 'Nucula' and the oil consigned to the Naval-Officer-In-Charge, Auckland, New Zealand.

On May 14, 1937, pursuant to the contract, plaintiff delivered the oil into the "Nucula" at Long Beach, California. The oil was processed at plaintiff's refinery at Watson and piped to its storage tanks at Long Beach, from which it was loaded aboard the vessel. Following such delivery, plaintiff handed to the master of the vessel customary shipping documents, including a bill of lading designating plaintiff as shipper and providing for delivery unto the Naval Officer in Charge at the Port of Auckland, New Zealand. Plaintiff also filed with the United States Collector of Customs a Shipper's Export Declaration, which reported the shipment by plaintiff from Long Beach, California, to Auckland, New Zealand. Thereafter, the entire supply of oil was delivered to the New Zealand Division of the Royal Navy at Auckland, and payment therefor was made to plaintiff in London, England.

On September 25, 1940, defendant assessed a retail sales tax against plaintiff measured by gross receipts from the foregoing transaction. Plaintiff paid the tax with interest, a total of $1,514.78, under protest on July 7, 1942. In September, it filed a claim for refund which was denied. The present action was then commenced.

The cause was submitted to the trial court on the pleadings and on stipulation of fact entered into by the parties. The trial court found, in addition to the facts heretofore recited that oil had never been produced in New Zealand in sufficient quantities to supply the needs of the New Zealand Division of the Royal Navy, that plaintiff had previously made a shipment of oil to New Zealand under identical circumstances, and that it had always been the intent of the parties to the contract that the oil would be exported to New Zealand without interruption. The court concluded that plaintiff was entitled to a refund of the amount paid, together with interest thereon, and entered judgment accordingly. This appeal followed.

The California Sales Tax Law imposes a tax upon retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail," and authorizes retailers to collect the tax from the consumers. Revenue and Taxation Code, §§ 6051, 6052, St.1941, p. 536. A sale is defined therein as "any transfer of title or

possession * * * in any manner or by any means whatsoever, of tangible personal property * * *." § 6006. By express provision of the law, gross receipts from sales of property which the state is prohibited from taxing under the Constitution of the United States are exempt from computation of the amount of tax imposed. §§ 6351, 6352.

The sale or taxable event in the present case occurred when the fuel oil was loaded aboard the tanker "Nucula" at Long Beach, California, it being conceded that title to the oil passed to the New Zealand Government at that time. In support of the judgment, however, plaintiff contends that gross receipts from the sale were not subject to taxation under the law by reason of the prohibition of the federal Constitution that "No State shall * * * lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [its] Inspection Laws." Art. I, § 10, cl. 2. Defendant contends, on the other hand, that the sale of oil preceded its exportation and consequently was a local transaction subject to state taxation. It further contends that even if the oil attained the status of an export prior to the sale, the "export-import" clause of the Constitution does not prohibit the imposition of a sales tax based on that transaction.

[1-4] It is admittedly difficult to ascertain the precise point at which the products of a state which are exported to foreign countries cease to be a part of the general mass of property of that state, subject to nondiscriminatory taxation as such, and become "exports" entitled to the constitutional protection against the imposition of taxes or duties. Clearly, goods not intended for export when a general tax is laid on all property alike, are not exempt therefrom because they happen to be exported afterwards. Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 29 L.Ed. 257. And, goods are not exempt from such taxation merely because they are intended for exportation or manufactured under a contract for export. Turpin v. Burgess, 117 U.S. 504, 6 S.Ct. 835, 29 L.Ed. 988; Cornell v. Coyne, 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504. On the other hand, goods in the actual course of transportation to a foreign destination and goods delivered to a common carrier for that purpose are in the process of exportation and constitutionally cannot be taxed. A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865; see William E. Peck & Co. v. Lowe, 247 U.S. 165, 175, 38 S.Ct. 432, 62 L.Ed. 1049; Turpin v. Burgess, supra, 117 U.S. at page 506, 6 S.Ct. 835, 29 L.Ed. 988; Coe v. Errol, 116 U.S. 517, 527, 6 S.Ct. 475, 478, 29 L.Ed. 715. It was said in Coe v. Errol, supra, that goods exported to a foreign country do not cease to be part of the common property of the state of their origin for tax purposes until they "have been shipped or entered with a common carrier for transportation * * * or have been started upon such transportation in a continuous route or journey." Cf. Railroad Commission v. Texas & P. R. Co., 229 U.S. 336, 33 S.Ct. 837, 57 L.Ed. 1215; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U.S. 111, 33 S.Ct. 229, 57 L.Ed. 442; Southern P. Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310.

[5] Applying these general principles or formulas to the facts of the present case, we are of the opinion that the sale of oil was a step in its exportation and that the tax in question was improperly levied. The case of A. G. Spalding & Bros. v. Edwards, supra, is substantially on all fours with the present case and the decision of the United States Supreme Court therein is, of course, controlling. In that case, Delgado & Compania, a Venezuelan firm, requested New York commission merchants to buy certain sporting goods for their account. The commission merchants ordered the goods from the plaintiff, instructing it to deliver the same to a specified exporting carrier in New York addressed to Delgado & Compania. The plaintiff delivered the goods as directed and received a receipt from the carrier which it sent to the commission merchants, who exchanged it for a bill of lading in their own name. The commission merchants paid plaintiff and in due time the goods were transported and delivered to Delgado & Compania in Venezuela. In holding that a tax based on that sale could not constitutionally be imposed upon plaintiff, the court stated, 262 U.S. at page 69, 43 S.Ct. at page 486, 67 L.Ed. 865, in language equally applicable to the case at bar, "The very act that passed the title, and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The expected and

accomplished effect of the act was to start them for that port."

[6, 7] It is true that the Spalding case involved article 1, section 9, clause 5 of the Constitution, which prohibits Congress from laying taxes on articles exported from any state, rather than section 10, clause 2, but it has been repeatedly said that the prohibitions of those sections are identical. Turpin v. Burgess, 117 U.S. 504, 506, 6 S.Ct. 835, 29 L.Ed. 988; Brown v. Maryland, 12 Wheat. 419, 6 L.Ed. 678, 687. Defendant seeks to distinguish the case, however, on the ground that while delivery therein was to a common carrier, delivery in the present case was to the purchaser's carrier. The distinction is one of form rather than substance. Delivery of goods to a common carrier for transportation is regarded as the beginning of the export journey because the destination of the goods is thereby fixed and certain. Cf. Turpin v. Burgess, supra, 117 U.S. at page 507, 6 S.Ct. 835, 29 L.Ed. 988; Superior Oil Co. v. Mississippi, 280 U.S. 390, 396, 50 S.Ct. 169, 74 L.Ed. 504; Coe v. Errol, 116 U.S. 517, 527, 6 S.Ct. 475, 29 L.Ed. 715. But delivery of the oil to the "Nucula" in this case as effectively fixed its destination as did the delivery of the goods to the common carrier in the Spalding case. Here, as there, title passed upon delivery, and the passage of title enables the purchaser to change the destination of goods and thereby evade the tax. But, as stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U.S. at page 70, 43 S.Ct. at page 486, 67 L.Ed. 865, "There was not the slightest probability of any such change and it did not occur," and "theoretical possibilities may be left out of account."

The law is not concerned with the means of shipment except to inquire whether the means chosen reasonably guarantees continuity of the export journey and foreign delivery in good faith. The means selected in this case, in the light of all the circumstances, satisfies that inquiry. The transaction in issue featured a contract negotiated and entered into in New Zealand for the sale of fuel oil to supply foreign needs. Under that contract plaintiff was obligated to deliver the oil to the order of "Naval Secretary, Navy Office, Wellington" into the tanker "Nucula" at Long Beach, furnish the master of the tanker with customary shipping documents, including a bill of lading consigning the oil to the "Naval-Officer-In-Charge, Auckland, New Zealand," and advance a sum equal to £300 to the master to meet disbursements at the port of loading. Plaintiff performed the obligations of its contract. It also executed an export declaration, and, as provided in the contract, received payment for the oil in London, England. From the inception of negotiations the parties contemplated an exportation of oil, and the oil was in fact exported to New Zealand. The only local phase of the sale was the delivery to the carrier in this state, and that delivery was the first step in the exportation. As stated in A. G. Spalding & Bros. v. Edwards, supra, 262 U.S. at page 70, 43 S.Ct. at page 486, 67 L.Ed. 865, "To put it at any later point would fail to give to exports the liberal protection that hitherto they have received."

The present case is even stronger than the Spalding case, for whereas here, the alleged local transaction was a direct sale to the foreign consumer and the oil was actually loaded aboard the carrier, the sale in the Spalding case was to an intermediary and the goods were merely delivered to the carrier.

Defendant argues that unless the Spalding case is distinguished or overruled an anomalous situation will exist in that the sale in the present case would have been taxable had the oil been intended for and transported in interstate commerce. It cites Department of Treasury v. Wood Preserving Corp., 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188; Superior Oil Co. v. Mississippi, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504; and Standard Oil Co. v. Johnson, 56 Cal.App.2d 411, 132 P.2d 910, in support of the constitutionality of such a tax under the commerce clause. While a few cases have suggested that the prohibitions of the commerce and export-import clauses of the Constitution are substantially identical insofar as taxation is concerned (Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 295, 38 S.Ct. 126, 62 L.Ed. 295; Brown v. Maryland, 12 Wheat. 419, 6 L.Ed. 678), other cases have rejected even an analogy between the two. Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095 [refusing to apply original package doctrine to sales of articles transported in interstate commerce]; Woodruff v. Parham, 8 Wall. 123, 19 L.Ed. 382; cf. Fairbank v. United States, 181 U.S. 283, 306, 21 S.Ct. 648, 45 L.Ed. 862. And, in two of the three cases involving the commerce clause cited by defendant, the Spald-

ing case was expressly distinguished on the ground that it involved the export-import clause of the Constitution. Superior Oil Co. v. Mississippi, supra; Standard Oil Co. v. Johnson, supra. The distinction thus drawn between cases involving exports and cases dealing with interstate commerce is not without basis. Section 10, clause 2 in terms prohibits state taxation of exports, while section 8, clause 3 merely commits the regulation of commerce to the federal government. Modern authorities recognize that those engaged in interstate commerce must pay their just share of state tax burdens, and that a state tax infringes the authority of Congress over interstate commerce only when it discriminates against or directly burdens such commerce. McGoldrick v. Berwind-White Coal Min. Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876. Defendant itself asserts that under the commerce clause "The question of where interstate or foreign commerce begins is wholly separate and apart from the question of what events occurring within a state are taxable."

[8, 9] Defendant advances two arguments in support of the contention that the tax imposed in the present case, although based upon gross receipts from the sale of oil in the process of exportation, does not violate article I, section 10, clause 2 of the Constitution: First, the tax is one imposed on retailers for the privilege of selling and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition. Second, the constitutional prohibition against state taxation of exports does not apply to exports originating in the taxing state. In our opinion, neither argument is sound.

In the early case of Brown v. Maryland, 12 Wheat. 419, 444, 6 L.Ed. 678, 687, where the state argued that a license tax on importers did not contravene article I, section 10, clause 2 since it was a tax on the person rather than the article, the Supreme Court said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that, a tax on the sale of an article * * * is a tax on the article itself. * * * So, a tax on the occupation of an importer is * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made." By way of dictum the court announced that a license tax on exporters would likewise contravene the prohibitions of the Constitution. And in the more recent case of Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295, it was expressly held that a state license tax on wholesale venders of merchandise, measured by gross receipts, is in effect an impost on exports when applied to merchandise sold and shipped to customers in foreign countries. Cf. United States v. Hvoslef, 237 U.S. 1, 35 S.Ct. 459, 59 L.Ed. 813, Ann.Cas.1916A, 286; Fairbank v. United States, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862.

The case of Crew-Levick Co. v. Pennsylvania, supra, is also authority for the proposition that the constitutional protection of exports is not limited to exports originating outside the taxing state. There, the State of Pennsylvania unsuccessfully sought to tax exports originating in that state. While it may be conceded that article I, section 10, clause 2 was conceived in the desire to prevent the seaboard states from exacting tribute from their sister states (see Cook v. Pennsylvania, 97 U.S. 566, 574, 24 L.Ed. 1015; Woodruff v. Parham, 8 Wall. 123, 134, 135, 75 U.S. 123, 134, 135, 19 L.Ed. 382), the prohibition is general in its terms. As stated in Blount v. Munroe, 60 Ga. 61, 67, "The constitution does not prescribe that no state shall levy such a tax on exports of articles brought from other states to her seaport towns, but simply and without exception, it lays the ban of prohibition upon all exports."

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, and SCHAUER, JJ., concurred.

TRAYNOR, J., did not participate therein.

CARTER, Justice (dissenting).

I dissent. In arriving at the conclusion that the plaintiff is exempt from the payment of sales tax upon the transaction in controversy, the majority of this court has ignored the more recent cases decided by the United States Supreme Court, and has based its decision upon what may be termed the old approach as applied to interstate and foreign commerce. Under that ap-

proach a state is entirely inhibited from coming into contact with that commerce through its taxing power. On the other hand, cases decided by the United States Supreme Court since 1937 signify a new approach, whereby complete immunity from various state taxes which resulted from the earlier doctrine has been repudiated. See Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944; J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365, 117 A.L.R. 429; Gwin, White & Prince, Inc., v. Henneford, 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272; McGoldrick v. Berwind-White Coal Min. Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267, 130 A.L.R. 1229; Department of Treasury v. Wood Preserving Corp., 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188. The essence of these decisions is recognition that not all state taxation is to be condemned because, in some manner, it has an effect upon interstate commerce, and recognition that there may be local activities by a taxpayer within a state, which may be sufficient to support a tax independent of the character of the transaction as a whole, and though the tax may have some incidental effect on other than the purely local or intrastate aspects of that commerce.

In McGoldrick v. Berwind-White Coal Min. Co., supra, a New York City tax upon the sale of goods for consumption was upheld as applied to a Pennsylvania corporation engaged in the production of coal in Pennsylvania and delivered by it to customers in New York. The tax was held to be conditioned upon events occurring within the state—delivery or the transfer of title or possession. It was said that not all state taxation is to be condemned because, in some manner, it has an effect upon commerce, and it is only when the tax operates to regulate commerce between the states or foreign nations to an extent that infringes the authority of Congress that the tax can be said to exceed constitutional limitations.

In State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 250, 85 L.Ed. 267, 130 A.L.R. 1229, a tax on a foreign corporation's privilege of doing business was sustained. Liability was not imposed until the declaration of dividends payable to out-of-state stockholders. The court stated that, "The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

In Department of Treasury v. Wood Preserving Corp., 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188, the Indiana Gross Income Tax Act of 1933, c. 50, was upheld as applied to a foreign corporation engaged in the business of purchasing railroad ties and selling them to purchasers with whom it had a contract for treating the ties by creosoting them. As to the dealings in question it appeared that the taxpayer purchased and received the ties from local producers in Indiana and sold them to the Baltimore & Ohio Railroad Company, making delivery f.o.b. cars on the railroad tracks in Indiana, pursuant to contract. The ties were then forthwith transported to Ohio for treatment. It was held that the tax was predicated upon local transactions which were none the less intrastate because the ties were intended for interstate shipment. It was pointed out that the taxpayer did not pay the freight for the transportation and that there was a completed delivery to the railroad company in Indiana. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365, 117 A.L.R. 429, which arose under the same taxing act of Indiana, was distinguished. There the tax was laid upon receipts from sales where delivery was made to customers in other states and abroad.

The California sales tax here under discussion has been held applicable to a sale of petroleum products within the state to purchasers intending to transport the products out of state. Standard Oil Co. v. Johnson, 56 Cal.App.2d 411, 132 P.2d 910. In that case delivery of some of the items was made f.o.b. the purchasers tank cars. See, also, O'Kane v. State, 283 N.Y. 439, 28 N.E.2d 905, and Trotwood Trailers v. Evatt, 142 Ohio St. 197, 51 N.E.2d 645, upholding the validity of similar taxes, based upon local transactions prior to interstate transportation.

While all of the foregoing cases involved interstate commerce, and no case has arisen wholly concerned with foreign commerce since the advent of the modern view, yet those cases are authority in the field of foreign commerce, for the destination has no effect on the character of acts completed in a state. Otherwise the anomalous situation exists, that an act which is local if done where goods are intended for interstate commerce, is not local if done where goods are intended for foreign commerce, and California must accord a discriminatory favor to purchasers of commodities which go to a foreign country instead of a sister state or intrastate. If the imposition of a nondiscriminatory tax upon the privilege of selling, such as is the California sales tax, conditioned upon a sale and the passing of title by delivery within the borders of the state is not a regulation of commerce, nor a burden thereon, forbidden by article I, section 8, clause 3 of the federal Constitution, then it must follow as a matter of course that it is not an "impost" or "duty" on exports within the meaning of article I, section 10, clause 2 of that Constitution. It is to be noted that we do not have before us any form of direct tax on goods intended for export, or on the privilege of exporting, and the tax is not measured in terms of export or import. The California Retail Sales Tax is a general excise tax on the privilege of selling, a distinctly local activity, as distinguished from a personal property tax or a tax on the sale or because of the sale. Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 78 P.2d 731, 117 A.L.R. 838; Roth Drug, Inc., v. Johnson, 13 Cal. App.2d 720, 57 P.2d 1022. To export is to send merchandise from one country to a foreign country. Exportation is the act of sending or carrying merchandise from one country to another. 1 Bouv.Law Dict., Rawle's Third Revision, p. 1161; Black, Law Dictionary). An export tax falls upon the one who takes the goods out of the country. Krauter v. Menchacatorre, 202 App.Div. 200, 195 N.Y.S. 361. In Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091, 1095, 29 L.Ed. 257, the court said, "A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine." The California Retail Sales Tax is neither of these. The act of exportation in the case at bar is an immaterial consequence, subsequent to the occurrence of the taxable event, to wit: the transference of title and possession by delivery within the borders of this state. The mere fact that the goods were delivered on board a ship instead of inland to the purchaser does not transmute the fundamental nature of the tax. Furthermore, constitutional history discloses that the primary intent and purpose of article I, section 10, clause 2, was to prevent the seaboard states from benefiting, because of their location, at the expense and to the detriment of the remainder of the states. This much the majority opinion concedes. It was not intended to prevent the imposition of general taxes upon local privileges merely because goods were to be exported. Woodruff v. Parham, 8 Wall. 123, 134, 19 L.Ed. 382; The Federalist, No. 42; Story, Constitution, p. 714 (4th ed.); Warren, Making of the Constitution, p. 557. However, as pointed out in the majority opinion, the prohibition not being limited in terms has been applied to exports originating in the seaboard states. Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295. But the attitude of the United States Supreme Court, now recognizing the definitely local attributes of transactions also having foreign consequences, and the right of the states to deal therewith, makes possible more nearly the attainment of the original purposes of the constitutional provision, by preserving the right of the states to impose general taxes not aimed at foreign commerce, even though a state may still be prohibited from directly levying upon its own exports by virtue of the broad terms of the clause.

The majority opinion in reaching a contrary result relies principally upon the case of A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865. That case decided back in 1923 is distinguishable in a number of its aspects from the case at bar. The tax was not conditioned upon any local activity of the taxpayer or the consummation of any transaction within a state. It was not imposed by a state government but by the federal government itself, and was an excise tax upon the goods themselves. It was vitiated under article I, section 9, clause 5 of the Constitution. Further, delivery of the merchandise was made by the taxpayer to a common carrier which in turn transported the goods to the purchaser in a foreign

port. In the case at bar the purchaser came to this country, received the goods and was thereafter free to take them wherever it chose.

In rejecting appellant's contention that the tax imposed in the case at bar is one imposed on retailers for the privilege of selling, and is not an "impost" or "duty" on exports within the meaning of the constitutional prohibition, the majority opinion cites Brown v. Maryland, 12 Wheat. 419, 6 L.Ed. 678, and Crew-Levick Co. v. Pennsylvania, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295, both of which dealt with license taxes upon importers. In the former case the tax in the form of a license actually and potentially discriminated against domestic products or dealers therein, and in the latter case the tax was measured by gross receipts from sales and not conditioned upon the exercise of the taxpayer's franchise or any other local privilege. Cf. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 310, 312, 58 S.Ct. 913, 82 L.Ed. 1365, 117 A.L.R. 429; McGoldrick v. Berwind-White Coal Min. Co., supra, 309 U.S. at pages 57, 58, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876. A $3.00 imposition upon wholesale vendors doing business within the state in both internal and foreign commerce was not questioned. It was similarly urged in McGoldrick v. Berwind-White Coal Min. Co., supra, that the conclusion there reached was inconsistent with the line of decisions following Robbins v. Taxing Dist. of Shelby County, 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694, which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. It was noted that in some instances these taxes were aimed at suppression or placing at a disadvantage interstate business in favor of intrastate sales and otherwise these cases were tacitly disapproved, the court deeming it sufficient to say that the rule of Robbins v. Taxing District of Shelby County, 120 U.S. 489, 7 S.Ct. 592, 30 L.Ed. 694, had been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate and that the effect on commerce of such a tax was wholly wanting in the present case.

It follows from the foregoing considerations that I cannot agree with my associates in holding that the California Retail Sales Tax on the privilege of selling, which is accomplished within the state, and is nondiscriminatory in its elements, is an "impost" or "duty" within the purview of article I, section 10, clause 2, of the Constitution. Included in such a tax is no evil which the framers of the Constitution could be supposed to have intended to prevent. They were concerned with taxes which might be imposed because of the foreign character of the goods or resulting in the exaction of tribute because of that character. Woodruff v. Parham, supra; Cook v. Pennsylvania, 97 U.S. 566, 574, 24 L.Ed. 1015. To otherwise hold is to disregard the underlying concept of the late cases reviewed herein, recognizing that transactions completed wholly within a state may be so related to privileges which the state is authorized to grant or deny as to warrant sustaining of their existence solely because of such relationship.

To my mind, it is perfectly absurd to say that the framers of the Constitution of the United States ever contemplated the proscription of such a tax, and it requires a most conservative and strained interpretation of its provisions to arrive at the conclusion reached in the majority opinion.

Simply stated, we have a situation where a product—"oil"—was produced, refined and stored, and finally sold and delivered by plaintiff to a purchaser in California. The plaintiff as such producer has enjoyed the privilege of doing business in California, the protection of its laws, and the service of its governmental agencies. It now seeks to evade the payment of a purely nondiscriminatory excise tax on the privilege of selling its products, under the specious argument that because it is selling such products to a foreign government for foreign consumption, such tax amounts to an impost or duty on exports and is invalid as being in contravention of article I, section 10, clause 2, of the Constitution of the United States. I say without fear of refutation that no court in this country has ever held such a tax invalid under the factual situation here related. It is the modern concept that the tax burden should be distributed in accordance with the benefits received and the ability of the taxpayer to pay, but under the majority decision in this case the plaintiff is escaping its fair share of the tax burden of this state, which means the shifting of its share of such burden to other taxpayers. Furthermore, the effect of this decision will be to permit the oil companies of this state to recover

from the state all of the sales taxes which they paid on the huge quantities of oil sold by them to Japan prior to Pearl Harbor, if they have protected their right to such recovery, as I presume they have. Such recovery will no doubt amount to millions of dollars and will have a serious effect upon the revenues of the state. It seems clear to me that such a result should not be reached in the absence of a clear and positive constitutional mandate which is not present in this case.

In my opinion, the judgment should be reversed.



25 Cal.2d 652

IRVINE et al. v. BOSSEN, County Treasurer, et al. (JULIEN, Intervener).

Sac. 5651.

Supreme Court of California.

Dec. 30, 1944.

1. Limitation of actions ⇐65(1)

Where governmental agency's obligation is payable from particular fund or in particular way, statute of limitations generally does not commence to run until particular fund has been provided or required method pursued to provide such fund.

2. Limitation of actions ⇐48(6)

In respect to governmental agency's obligations, payable from general tax fund, as distinguished from particular source or fund, statute of limitations commences to run from time of obligation's maturity.

3. Limitation of actions ⇐65(1)

Where statute authorizing governmental agency to incur obligation or instrument representing such obligation merely stated that obligation is payable from particular fund or source of income or is based on established assessment or tax levy, no implication is warranted that obligation is not payable or that cause of action does not accrue thereon until such fund has been provided, especially where instrument states certain maturity date on its face.

4. Limitation of actions ⇐65(1)

The statute providing for issuance of reclamation district bonds does not make time for payment of bonds and interest thereon contingent on existence of money therefor in district bond redemption fund, nor postpone accrual of action on bonds until such fund is provided, so that insufficiency of fund to pay bonds after full enforcement of original and supplemental assessments on lands in district and unavailability of other sources for payment thereof do not stop running of statute of limitations, if right of action, whereby bondholders' rights may be protected, has accrued Pol.Code, § 3480.

5. Limitation of actions ⇐43

The statute of limitations runs from time cause of action accrues, and it accrues when there is a remedy available.

6. Mandamus ⇐115, 119

A holder of governmental agency's bonds may, by mandamus proceedings, compel proper officials of such agency to levy and collect taxes or assessments and do other things required by statute under which bonds were issued to obtain funds for payment thereof.

7. Mandamus ⇐110

Mandamus does not lie to compel governmental agency's disbursing officer to pay holder of agency's bonds from its bond redemption fund, if there is no money therein, but performance of steps required by statute to feed such fund may be compelled.

8. Limitation of actions ⇐104½

A holder of matured reclamation district bonds, for payment of which there are insufficient funds in district bond redemption fund, though all statutory steps have been taken to raise funds for payment of bonds, still has right of action on bonds in order to prevent running of statute of limitations, though judgment therein cannot be enforced by execution against district's property. Pol.Code, § 3480.

9. Waters and water courses ⇐222

Holders of reclamation district bonds should not be permitted to stand idly by after maturity of bonds, but their claim for amount thereof should be brought to district's attention and any questions as to their right to recover settled, so as to advise district of amount of bonds to be met and necessity for supplemental assessment against lands in district if original assessment proves insufficient to pay bonds. Pol. Code, § 3480.

10. Waters and water courses ⇐222

A holder of reclamation district bonds, four years overdue at time of passage of statute providing that bonds or interest coupons, presented to county treasurer for payment from funds in his custody and indorsed by him, "not paid for want of funds," shall be paid out of first money received by him, properly applicable to payment thereof, in order of presentation, should present bonds to county treasurer for registration within reasonable time after effective date of such statute. Pol.Code, § 3480; Code Civ.Proc. § 337, subd. 1; St.1935, p. 994; St.1937, p. 407.

11. Waters and water courses ⇐222

Holders of reclamation district bonds should present them to county treasurer for registration within four years after maturity thereof to be entitled to preferential payment of bonds from first money received applicable to their payment under registration statute. Pol.Code, § 3480; Code Civ.Proc. § 337, subd. 1; St.1935, p. 994; St.1937, p. 407.

12. Waters and water courses ⇐222

The relation between county treasurer and holder of reclamation district bonds payable from district bond redemption fund deposited with treasurer is fundamentally a contractual relation wherein maturity date is fixed for payment of bonds, though it has some aspects of trust relationship, and judgment may be obtained on bonds, though all statutory steps have been taken to produce sufficient funds for payment thereof. Pol.Code, § 3480.

13. Mandamus ⇐110

Mandamus is available to compel county treasurer to pay matured reclamation district bonds from district bond redemption fund deposited with him, if district officials do not perform their statutory duty to raise sufficient funds by assessments for payment of bonds, and such action must be commenced at least within four years after maturity of bonds and possibly before, if failure to perform occurs before such time. Pol.Code, § 3480; Code Civ.Proc. § 337, subd. 1.

14. Limitation of actions ⇐48(6)

Enforcement of obligation of reclamation district bonds is barred by statute of limitations, unless action thereon be commenced within four years after maturity of bonds or they are registered as provided in statute authorizing preferential payment of registered bonds. Pol.Code, § 3480; Code Civ.Proc. § 337, subd. 1; St.1935, p. 994.

15. Limitation of actions ⇐165

Holders of reclamation district bonds not barred by statute of limitations are entitled to have funds in district bond redemption fund on deposit with county treasurer applied to payment of such bonds. Pol.Code, § 3480; Code Civ.Proc. § 337, subd. 1.

In Bank.

Appeal from Superior Court, Yuba County; James O. Moncur, Judge.

Mandamus proceeding by James Irvine and others against William C. Bossen, as county treasurer of Yuba County, and others to compel respondent treasurer to pay petitioners the amount of certain reclamation district bonds and accrued interest thereon from the district's bond redemption fund, in which E. Julien intervened. From a judgment denying petitioner's prayer for a writ of mandamus, but providing for issuance of a writ of mandate directing payment of district bonds to the extent of moneys available in the fund in the order of maturity of the bonds, petitioners appeal.

Reversed.

Prior opinion, 143 P.2d 721.

W. Coburn Cook, of Turlock, for appellants.

A. L. Cowell, of Stockton, amicus curiæ, on behalf of appellants.

Huston & Huston, of Woodland, and Rich & Weis and Joseph L. Heenan, all of Marysville, for respondents.

Gilbert Moody, of Turlock, for intervener and respondent.

CARTER, Justice.

This is a mandamus proceeding instituted in the Superior Court of Yuba County to compel the county treasurer of that county to pay to petitioners certain bonds and accrued interest thereon out of funds available in the bond fund of Reclamation District No. 784 on deposit with said treasurer.

Reclamation District No. 784 was organized in 1907 under sections 3446 to 3493 of the Political Code. On January 1, 1921, the district issued bonds in the principal sum of $834,000 bearing interest at the rate

of 6 per cent per annum secured by assessments theretofore levied upon lands in the district. The court found that petitioners are the holders of two $1,000 bonds which matured on January 1, 1930, and five $1,000 bonds which matured on January 1, 1931. None of the bonds or coupons maturing in 1930 or 1931, have been paid except a portion of the coupons maturing on July 1, 1930. Intervener Julien holds one $1,000 bond which matured on January 1, 1934, and it has not been paid. He filed his petition in intervention on July 28, 1941. The district paid all of the interest coupons which matured prior to 1930. The bonds commenced maturing on January 1, 1930, in the amount of $90,000 and matured on January 1st of each year thereafter to and including 1938; on January 1, 1939, the balance of $24,000 matured. There are unpaid bonds of said district aggregating $212,000 in principal. As to 71 of those 212 bonds including petitioner's bonds, actions have been commenced thereon and judgments recovered determining that the statute of limitation had not run thereon. As to the balance of 141 bonds, including intervener's bond, no action has been commenced thereon and they have not been presented for payment or registration, nor has demand for their payment been made. Of the 141 bonds, 25 matured on January 1, 1930, and 22 on January 1, 1931. Of the bonds falling due on January 1 of 1930 and 1931, only the seven bonds held by petitioners have been reduced to judgment. Petitioners' bonds have been presented to the treasurer for payment and registration. The trial court found that the district is solvent and the treasurer has on hand in the bond fund $9,466.70 for the payment of bonds; that all the calls for assessment required by the statute have been made but there has never been sufficient funds on hand to pay all outstanding bonds; that all the steps required to be taken by the district's officials to provide for the payment of the bonds have not been taken; and that petitioners' bonds are not barred by the statute of limitation.

As conclusions of law the court found that the bondholders had no means of enforcing their bonds by legal action; that the district has not provided funds for the payment of its bonds and has not fulfilled all of the requirements of sections 3446 to 3493 of the Political Code, and has not given notice of the availability of funds to pay its bonds; that the statute of limitation has not run against bonds upon which no action has been brought; "That petitioners' prayer for writ of mandamus should be denied, but on application of petitioners or intervener a writ of mandate may be issued requiring and directing the payment of all bondholders the outstanding bond obligations of one maturity to be paid in full if funds are sufficient therefor before the payment of bond obligations of a later maturity, or if funds are not sufficient then the bondholders in that maturity shall be paid pro rata.

"That the bondholders of Reclamation District No. 784 are entitled to payment from funds on hand in the bond fund of said district to the extent of moneys available in the order stated in the preceding paragraph."

It is petitioners' and appellants' theory that because, except as to their bonds, no action was commenced on the bonds maturing in 1930 and 1931, and no presentation or registration or demand for the payment thereof was made, the right of all such bondholders is barred by the statute of limitation, and hence, the funds available should be used to pay their bonds alone. The intervener asserts that the statute did not commence to run on his bond until there was money available in the bond fund to pay him.

[1, 2] It has been repeatedly stated as a general proposition that where an obligation of a governmental agency is payable out of a particular fund or in a particuar way, the statute of limitation does not commence to run until the particular fund has been provided or the method pursued to provide such fund. Sawyer v. Colgan, 102 Cal. 283, 36 P. 580, 834; Hewel v. Hogin, 3 Cal.App. 248, 84 P. 1002; Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194; Freehill v. Chamberlain, 65 Cal. 603, 4 P. 646; Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766; 37 C.J. 849; 34 Am.Jur., Limitation of Actions, § 141; 43 Am.Jur., Public Securities and Obligations, § 348; 56 A.L.R. 830; 1 Bonds & Bond Securities, Jones, § 510; see McGrath v. County of Butte, 30 Cal.App.2d 734, 87 P.2d 381; Ritter v. Franklin, 50 Cal.App.2d 844, 123 P.2d 866; and Moody v. Provident Irr. Dist., 12 Cal.2d 389, 85 P.2d 128. On the other hand it has been stated that in respect to obligations payable out of the general tax fund as distinguished from a particular source or fund, the statute commences to run from the time of

maturity. See Farwell v. San Jacinto, etc., Irr. Dist., 49 Cal.App. 167, 192 P. 1034; People ex rel. Webb v. Honey Lake Valley Irr. Dist., 77 Cal.App. 367, 246 P. 819; San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 79 P. 374; Barnes v. Glide, 117 Cal. 1, 48 P. 804, 59 Am.St.Rep. 153; Schoenhoeft v. Board of Com'rs of Kearny County, 76 Kan. 883, 92 P. 1097, 14 Ann.Cas. 100, 102, 16 L.R.A.,N.S., 803; Smythe v. Inhabitants of New Providence Tp., D.C., 253 F. 824; Central Trust Co. v. Board of Com'rs, 111 Kan. 104, 205 P. 1031; Little v. Emmett Irr. Dist., 45 Idaho 485, 263 P. 40, 56 A.L.R. 822; Miller v. Independent School Dist. No. 16, 171 Okl. 136, 42 P.2d 125.

[3, 4] The reasoning in the cases making the distinction is not particularly helpful. Those announcing the special fund theory appear to be based on various theories. First there is the view that no cause of action accrues on the obligation until a fund for its payment has been provided because it is not payable until such fund is accumulated. That is tantamount to saying that the time of payment is fixed by the time that the fund is to be provided, an obligation being imposed on the government agency to establish the fund. There is a difference between that theory and the view that the obligation is not payable at all unless a fund is provided. Such an obligation would be of little value if the government agency was not required to provide the fund. The statutory power to incur the obligation should carry with it the implicit duty to pay the obligation, and by taxation, as that is the chief source of the government's income. If the statute and instrument representing the obligation clearly indicate that it is not payable until the fund has been provided, it would follow that that was the time fixed for its payment. But where the statute or instrument merely states that the obligation is payable out of a particular fund or source of income or is based upon an established assessment or tax levy, there is not enough from which it may be implied that the obligation is not payable or that a cause of action does not accrue thereon until the fund has been provided, especially, where the instrument on its face states a certain date of maturity. In Sawyer v. Colgan, supra, the obligations were state Indian war bonds, and upon the wording of the statute it was concluded that the bonds were not payable until the state had provided funds not otherwise appropriated. No provision was made for raising money to pay the bonds by the act authorizing their issue. They were payable from money in the treasury not otherwise appropriated, but no method of taxation was fixed for supplying the treasury with funds not appropriated to some other purpose. Also the action was for a writ of mandate to compel the state controller to issue a warrant on the state treasury. Of course if there were no funds in the treasury to pay the bonds the court would not compel the issuance of a warrant, and during the time that condition existed, the statute of limitation would not run on that relief. Moreover, the court held in that case that the bondholder could not sue the state in the absence of a statute expressly authorizing it. The availability of a right of action on the bonds is hereafter discussed. Likewise, in Freehill v. Chamberlain, supra, the proceeding was for mandamus to compel the treasurer to pay the bonds and during the time that had elapsed prior thereto no funds were available in the fund. The court held the statute would not run as to that action because such action would be unavailing. Clearly under such circumstances it would be. The court does state that [65 Cal. 603, 4 P. 647]: "The contrary view would place it in the power of a municipality, in many cases, to avoid all payment of its debts, because, if by concert of action each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury." But there are available as will presently appear, other remedies. In the instant case the statute as it read at the time the bonds were issued (Pol.Code, § 3480) provided for the issuance of bonds in an amount equal to an assessment levied upon the lands in the reclamation district. All moneys collected from assessments and from the sale of lands for delinquent assessments and penalties are paid into the bond redemption fund. The lien for unpaid assessments upon which bonds have been issued continues until the bonds are paid and if any are unpaid after enforcement of the assessment a supplemental assessment shall be levied. Provision is made for calls for installments of the assessments on maturity of principal and interest. The bond recites that the principal and interest are payable upon a stated date; the bond is issued pursuant to section 3480 of the

Political Code and is "based upon and secured by" the assessment levied. We find nothing in those provisions which makes the time of payment contingent upon there being money in the bond fund or that no action accrues until such fund is provided. On the contrary the maturity date is expressly fixed. Even if it be assumed that after the original assessment and any supplemental assessments have been fully enforced there are still insufficient funds to pay the debt and no other sources are available, yet it does not follow that the statute of limitation should not have run if a right of action has accrued whereby the bondholders' rights could be protected. In Bradley Co. v. Ridgeway, supra, the action was by a landowner to quiet title against an assessment and the court merely stated the rule generally with regard to special funds. The decision is rested primarily on estoppel and equity that the landowner may not quiet title against the lien of a street improvement on the ground that the statute limitation had run on the bonds. See Ritter v. Franklin, supra. In McGrath v. County of Butte, supra, the court was concerned with whether limitation on a statutory liability applied to a mandamus proceeding to compel the levy of a tax. In Ritter v. Franklin, supra, the court refused to apply the rule.

[5-7] Another consideration upon which the special fund theory seems to be based is, that where the bonds are payable from such a fund, the holder has no remedy until a fund has been provided or that the remedy is of no substantial value. In some of the cases the point is made that the government cannot be sued. It is a fundamental principle in determining when the statute of limitation commences to run, that it runs from the time a cause of action accrues and it invariably accrues when there is a remedy available. (16 Cal.Jur. 488–490.) Hence, the pertinent inquiry is, the nature of the remedies available to the bondholder. A bondholder may by mandamus proceedings compel the proper officials of the governmental agency to levy and collect the tax or assessment and to do the other things required by the statute under which the bonds were issued to obtain the funds necessary to pay the bonds. See Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Meyer v. Porter, 65 Cal. 67, 2 P. 884; Pennington v. Baehr, 48 Cal. 565; People v. Honey Lake Valley Irr. Dist., supra; San Francisco Savings Union v. Reclamation Dist., supra; Barnes v. Glide, supra; Nevada National Bank v. Board of Supervisors, 5 Cal.App. 638, 91 P. 122; Hewel v. Hogan, supra. Of course, such an action would not lie to compel the disbursing officer to pay the bondholder from the bond fund if there was no money in the fund. It might be available to compel pro rata payment if there were some funds but insufficient in amount. However, if the reason the fund was depleted was that the steps required by statute to feed it had not been performed, performance could be compelled.

[8-11] Assuming that in the instant case all of the things required to be done under the statute for the raising of funds has been done and there are insufficient funds available, still there is another remedy available. A cause of action on the matured bonds has accrued. In Meyer v. City and County of San Francisco, 150 Cal. 131, 135, 88 P. 722, 723, 10 L.R.A.,N.S., 110, in discussing the remedies available to the holders of bonds secured by special improvement assessments, this court said:

"But, although no action could be maintained to recover a general judgment against the city for the money due on the bonds, and the complaint is insufficient to authorize a writ of *mandamus*, conceding that a *mandamus* suit to enforce payment of the bonds would lie against the city in any case, we think that the plaintiff may, nevertheless, maintain an action against the city on the bonds, not to enforce payment thereof, but to establish and perpetuate them as a claim upon the funds to be raised under the act, and to prevent the bar of the statute of limitations. At the time the action was begun but one day remained of the period of limitation. By the expiration of that period the plaintiff would have been barred forever of all right to enforce payment of the bonds, which the demurrer admits to be valid and unpaid. The delay was not the fault of the plaintiff. Circumstances might exist under which it would not be the fault of the defendant, or its officers, and in which plaintiff could not force payment by *mandamus*, as, for instance, if the officers, although exercising reasonable diligence, had been unable to collect the tax until after the period of limitation had run. In such a case the plaintiff would be practically without remedy if he could not maintain an action to prevent the running of the statute against him. Justice requires that he shall have some means of preventing his

claim from becoming outlawed. No better or more appropriate remedy can be suggested than that of an action of the character above indicated.

"In this conclusion we are supported by the example of the federal courts in a somewhat analogous case. Those courts have no original jurisdiction to issue writs of *mandamus*. The writ can only issue after judgment and in aid of its enforcement and execution. * * * With respect to bonds which constitute an obligation against a portion only of the county or city, and which do not constitute a general obligation against such corporation, those courts found themselves in somewhat of a dilemma. The bonds in question there, as here, purported to be issued by the city or county, respectively, but it was held that they did not constitute a general obligation against the obligor sufficient to authorize a general judgment thereon. In those courts, if no judgment could be obtained, there could be no *mandamus*, and a bondholder would be without remedy therein to enforce his obligation. In this situation it was said 'the holder of these bonds cannot have any remedy in the federal courts unless he is entitled to recover a judgment thereon and to enforce such judgment, if necessary, by *mandamus*. * * * It seems to us that the provision that the bonds shall be issued in the name of the county implies a liability on the part of the county to be sued, so far as is necessary to give effect to the rights of the holders of the bonds. * * * This is to be effected by the nature of the judgment we render, which is not a personal judgment against the county, but only a judgment judicially establishing the plaintiff's debt.' Jordan v. Cass Co., 13 Fed.Cas.No.7,517, p. 1088, 3 Dill. 185. This case was followed by Cass Co. v. Johnston, 95 U.S. 360, 24 L.Ed. 416; Davenport v. Dodge Co., 105 U.S. 237, 26 L.Ed. 1018; and Mather v. San Francisco, 9 Cir., 115 F. 37, 52 C.C.A. 631. The latter was an action upon some of the Dupont street bonds, of which the bonds in suit in this case at bar form a part. Upon similar reasoning we can say that the provision that the bonds here involved should be issued in the name of the city and county implies that the city and county can be sued, when necessary to preserve the plaintiff's rights and prevent the bar of the statute of limitations, and that in such action a judgment can be given establishing the debt for that purpose." See, also, People v. Honey Lake Valley Irr. Dist., 77 Cal.App. 367, 246 P. 819; Farwell v. San Jacinto, etc., Irr. Dist., 49 Cal.App. 167, 192 P. 1034; Curtis v. Rialto Irrigation District, 44 Cal.App. 738, 739, 187 P. 117; Moody v. Provident Irr. Dist., supra; and Carpenter v. Glenn-Colusa Irr. Dist., 14 Cal.2d 338, 94 P.2d 345. It is true that the judgment cannot be enforced by execution against the property of the district. El Camino Irr. Dist. v. El Camino Land Corporation, 12 Cal.2d 378, 85 P.2d 123; Clough v. Compton-Delevan Irr. Dist., 12 Cal.2d 385, 85 P.2d 126; Moody v. Provident Irr. Dist., supra. But it does not follow that the bondholder should not be required to obtain such a judgment. It is not a wholly idle gesture. It will prevent the running of the statute of limitation. Bondholders should not be permitted to stand idly by after their bonds mature. Their claim should be brought to the attention of the district and any questions of their right to recover settled. The district will be advised of the amount of bonds which must be met, there always being the possibility that collection of some may never be pressed. The district is authorized to make a supplemental assessment if the original proves insufficient (Pol. Code, § 3480; see Irvine v. Reclamation Dist. No. 108, 24 Cal.2d 468, 150 P.2d 428), and the existence of the necessity of such an assessment should not be indefinitely postponed by the failure of the statute of limitation to run. The statement in Clough v. Compton-Delevan Irr. Dist., supra, that judgment on the bonds would be futile apparently did not consider the statute of limitation. In Moody v. Provident Irr. Dist., supra, this court recognized that a judgment could be obtained, but concluded that obtaining the judgment would be idle inasmuch as the statute which provided for registration of the bonds with the treasurer, an endorsement thereon by him of failure to pay for lack of funds, and the giving of notice that funds were available when that event occurred (Stats.1897, p. 254, § 52, as amended), was considered when accepted by the bondholder, as a new agreement tolling the statute of limitation. The same effect was given to such a statute in County of Lincoln v. Luning, supra. In Carpenter v. Glenn-Colusa Irr. Dist., supra, the court recognized that an action to obtain a judgment was proper to toll the statute if it were not for the registration provision in the irrigation district law making a new agreement which tolled the stat-

ute. The court said in commenting on the Moody case at page 340, of 14 Cal.2d, at page 345 of 94 P.2d: "It was therein pointed out that under section 52 of the California Irrigation District Act * * *, registration of unpaid bonds or coupons amounts to a *new agreement,* in which the interest rate rises from 6 per cent to 7 per cent, and the statute of limitations is tolled, until such time as money becomes available to pay the obligations. It followed, *therefore,* that *no additional right would be gained by the entering of a money judgment,* which would be an idle and unnecessary act. Accordingly it was held that an action to recover such a judgment was improper." (Italics added.) A statute was enacted in 1935 (Stats.1935, p. 994), which provided that when any bond or interest coupon payable from funds in the custody of the county treasurer is presented to him for payment and is not paid for want of funds, he must endorse thereon "Not paid for want of funds" with the date of presentation and a serial number indicating the order of presentation and stamp his name thereon. Bonds or interest coupons so endorsed are entitled to preference as to payment out of the first money received by the treasurer properly applicable to the payment thereof in order of presentation. When money is received in the treasury applicable to the payment of such bonds or interest coupons, it is set aside for that purpose and notice thereof is given to the bondholder by registered mail. If there is no presentation for payment within thirty days after the mailing of the notice, the fund so set aside is applied to the payment of the unpaid registered bonds or coupons next in order. That act was amended in 1937 to include bonds payable from funds in the custody of the treasurer of a city or city and county as well as of a county. (Stats.1937, p. 407.) Assuming that statute applies to the bonds here involved and constitutes an offer on the part of the Legislature to the bondholders that if they register their bonds the statute of limitation shall be tolled, and an acceptance of the offer is manifested by presentation for registration (see Moody v. Providence Irr. Dist., supra), it is doubtful that the Legislature intended that such offer should be open to holders of bonds or interest coupons upon which the four-year statute of limitation had run (Code Civ.Proc. § 337 (1), after the maturity date thereof before the registration statute was passed. At least the holder whose bond was four years overdue when the act was passed should present his bond for registration within a reasonable time after the act became effective. In the instant case none of the bonds above-mentioned have been presented for registration. The act does not specify any time in which the bondholder must present his bond for registration, but certainly the Legislature did not intend that the presentation could be delayed indefinitely after maturity. If such were the case no benefit would accrue from the presentation and registration with regard to the statute of limitation, because it would not run in any event if the registration statute were construed to be a self-operating stay on the running of the statute of limitation. The registration statute contemplates that bonds should be presented and registered thereunder to obtain the benefits. Obviously, the presentation to be effective should be made within four years after the maturity of the obligation of the bond or interest coupon.

[12] Finally, the particular fund theory is sometimes based upon an analogy to a trust fund; that is, that the bond redemption fund is held in trust by the custodian thereof; that the officials of the public agency are trustees and are bound to perform their duties as trustees to comply with the statute in feeding the fund; that the statute of limitation does not commence to run until there has been a repudiation of the trust; and that a mere breach of the trust is not a repudiation. While the situation has some of the aspects of a trust relationship, it is fundamentally a contractual relation in which the maturity date is fixed for the payment of the bonds, and even though all of the statutory steps have been taken, a judgment may, as we have seen, be obtained on the obligation.

[13, 14] Summarizing what we have said, it is clear that mandamus is available if the officials do not perform their statutory duty, and such an action must be commenced at least within four years after maturity of the bonds, and possibly before, if the failure to perform occurs before that time, and under such circumstances an action may be commenced within four years after maturity of the obligation of the bond, and a judgment recovered thereon. It must necessarily follow that in any event the statute of limitation will have run

against the obligation unless an action be commenced within four years after maturity of the bonds, or the bonds are registered as provided for in the statute of 1935 (Stats.1935, p. 994).

[15] In the instant case the bonds accruing in 1930 and 1931, except those held by petitioners are barred by the statute, hence, petitioners are entitled to have the funds on hand applied to the payment of their bonds. Likewise, the intervener's bond maturing in 1934 is barred.

For the foregoing reasons the judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concurred.



PARK & TILFORD IMPORT CORPORATION v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 848, A. F. of L., et al.*

L. A. 18653.

Supreme Court of California.

Dec. 30, 1944.

Rehearing Granted Jan. 29, 1945.

1. Torts ⇐10

A closed shop agreement with an employer who is not subject to the National Labor Relations Act is as proper an object of concerted action as the attainment of higher wages, shorter hours, or better working conditions, whether or not the labor union represents a majority of the employees that it seeks to bring within the closed shop agreement. National Labor Relations Act §§ 1, 7, 8(3), 9(a), 13, 29 U.S.C.A. §§ 151, 157, 158(3), 159(a), 163.

2. Torts ⇐10

The National Labor Relations Act recognizes rights of peaceful picketing and boycotting of an employer by a labor union, whether or not its members are employed by him, and such rights may be exercised to secure a closed shop. National Labor Relations Act §§ 1, 7, 8(3), 9(a), 13, 29 U.S.C.A. §§ 151, 157, 158(3), 159(a), 163.

3. Master and servant ⇐15(4)
Torts ⇐10

The National Labor Relations Act does not require that a union represent a majority during the period of its activities for a closed shop, but only that it represent a majority when the agreement is made, and the union may resort to concerted activities to win over the employees with the object of gaining a majority and at the same time engage in concerted activities against employer until he signs closed shop agreement. National Labor Relations Act §§ 1, 7, 8(3), 9(a), 13, 29 U.S.C.A. §§ 151, 157, 158(3), 159(a), 163.

4. Torts ⇐10

Picketing and boycotting for a closed shop, if peacefully carried on, are lawful not only under the National Labor Relations Act, but under the Clayton and Norris-LaGuardia Acts. National Labor Relations Act §§ 7, 8(3), 9(c), 13, 29 U.S.C.A. §§ 157, 158(3), 159(c), 163; Clayton Act § 20, 29 U.S.C.A. § 52; Norris-LaGuardia Act § 2, 29 U.S.C.A. § 102.

5. Torts ⇐10

The Clayton Act makes picketing and boycotting lawful even when performed by others than employees of the particular employer, if they are unenjoinable in federal court under the Norris-LaGuardia Act. Norris-LaGuardia Act § 2, 29 U.S.C.A. § 102; Clayton Act § 20, 29 U.S.C.A. § 52.

6. Commerce ⇐8(1)

Under the Norris-LaGuardia Act, peaceful picketing and boycotting for a closed shop by an outside union are not enjoinable in a federal court, and, being made lawful by federal law, they are immune from injunctions of state courts as well as federal courts. Norris-LaGuardia Act § 2, 29 U.S.C.A. § 102; Clayton Act § 20, 29 U.S.C.A. § 52.

7. Master and servant ⇐15(1)

A state court has no power to enjoin labor activities on the ground that they might induce the employer against whom they are directed to commit an unfair labor practice, for only the National Labor Relations Board can determine what constitutes an unfair labor practice and take steps to

* Subsequent opinion 165 P.2d 891.

prevent it. Norris-LaGuardia Act § 2, 29 U.S.C.A. § 102; Clayton Act, § 20, 29 U.S.C.A. § 52; National Labor Relations Act §§ 8(3), 9(a), 10(a, c), 29 U.S.C.A. §§ 158(3), 159(a), 160(a, c).

8. Master and servant ⇐15(1)

Since the National Labor Relations Board decides what is necessary to effectuate the policies of the National Labor Relations Act, and may even order an employer to bargain collectively and make a closed shop agreement with a union that has lost its majority after the employer has refused to deal with it, a court has no jurisdiction to conclude that, because a union represents a minority, the employer would commit an unfair labor practice by entering into a closed shop agreement with it. Norris-LaGuardia Act § 2, 29 U.S.C.A. § 102; Clayton Act § 20, 29 U.S.C.A. § 52; National Labor Relations Act §§ 8(3), 9(a), 10(a, c), 29 U.S.C.A. §§ 158(3), 159(a), 160(a, c).

9. Master and servant ⇐15(1)

A court does not have jurisdiction to determine whether a union represents a majority in a unit appropriate for the purposes of collective bargaining, for it is within the exclusive province of the National Labor Relations Board to determine the bargaining unit that has the required majority. National Labor Relations Act §§ 7, 8(3), 9(c), 29 U.S.C.A. §§ 157, 158(3), 159(c).

10. Torts ⇐10

The terms "unfair" and "unfair to organized labor" carry no odious connotation that an employer is guilty of fraud or dishonorable conduct, but merely connote that an employer is conducting his business in a manner unfavorably regarded by the union. National Labor Relations Act §§ 8(3), 9(a), 13, 29 U.S.C.A. §§ 158(3), 159(a), 163.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfair to Organized Labor".

11. Injunction ⇐98(3)

Where labor unions, not representing majority of employees, called a strike of employer's teamsters, established a picket line, and placed employer's name on an "unfair list", because of employer's refusal to sign closed shop agreement with the unions, use of the terms "unfair" and "unfair to organized labor" with reference to employer could not be enjoined. Norris-LaGuardia Act § 2, 29 U.S.C.A. § 102; Clayton Act § 20, 29 U.S.C.A. § 52; National Labor Relations Act §§ 8(3), 9(a), 13, 29 U.S.C.A. §§ 158(3), 159(a), 163.

EDMONDS, SHENK, and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Park & Tilford Import Corporation against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 848, A. F. of L., and others, to enjoin defendants from listing plaintiff as unfair to organized labor and from picketing and boycotting plaintiff and its business. From a judgment for plaintiff, defendants appeal.

Reversed.

Prior opinion 139 P.2d 963.

V. P. Lucas and David Sokol, both of Los Angeles, for appellants.

Clarence E. Todd, of San Francisco, amicus curiae, on behalf of appellants.

O'Melveny & Myers, Pierce Works, Homer I. Mitchell, and W. B. Carman, Jr., all of Los Angeles, for respondent.

TRAYNOR, Justice.

Plaintiff, a New York corporation engaged in the manufacture, importation and sale of alcoholic beverages, maintains its local and western division offices in Los Angeles. All of its merchandise in California is brought into the state. Four per cent of the goods from its local warehouse is sold and shipped to other states and the rest is sold to customers in California. Plaintiff is admittedly engaged in interstate commerce within the meaning of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 32, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352; Lyons v. Eagle-Picher Lead Co., 10 Cir., 90 F.2d 321. Its California employees include a division manager, secretary, bookkeeper, warehouse superintendent, fifteen salesmen, four office clerks and two teamster-warehousemen.

In January, 1941, plaintiff's salesmen formed a union named the Park & Tilford Salesmen's Association. In the same year,

one of the teamsters joined defendant Local 848, the other defendant, Local 595. In January, 1942, representatives of Local 595, with plaintiff's permission, interviewed the office clerks and asked them to join the union. They refused. Toward the end of February, 1942, representatives of Local 595 requested plaintiff to sign a closed shop contract covering the clerks. When plaintiff refused, the union threatened to call the teamsters out on strike, establish a picket line, and boycott plaintiff unless it signed the contract. Plaintiff again refused and in March, 1942, Local 848 was asked by Local 595 to organize the salesmen. With plaintiff's permission Local 848 interviewed the salesmen, but they refused to join. Local 848 then submitted a closed shop contract to plaintiff, which it refused to sign upon the ground that to do so would be an unfair labor practice under the National Labor Relations Act, since the union did not represent the salesmen. On March 20, 1942, the Park & Tilford Salesmen's Association admitted the office clerks and changed its name to Park & Tilford Mutual Association. Additional requests by the unions failed to induce plaintiff to sign the contracts, and the unions called the teamsters out on strike and began to picket plaintiff's place of business. A boycott was instituted June 14, 1942. The Los Angeles Food and Drug Council published plaintiff's name and business in its "Unfair List" and defendant notified many of plaintiff's customers verbally and by circular letter that plaintiff was "unfair" and requested them not to purchase plaintiff's products.

On September 1, 1942, plaintiff filed a petition with the National Labor Relations Board for the certification of a bargaining agent for its employees, and on September 2, 1942, brought an action in the superior court for an injunction. On September 3, 1942, Local 595 filed charges with the National Labor Relations Board that plaintiff was guilty of an unfair labor practice, namely, the domination of the Park & Tilford Mutual Association. The Regional Director refused to issue a complaint that plaintiff was guilty of an unfair labor practice, and his action was sustained by the board on an appeal by Local 595. Plaintiff's petition before the National Labor Relations Board was dismissed on the ground that neither defendant labor unions nor the Park & Tilford Mutual Association presented any request for recognition. (47 N.L.R.B., No. 55.) In the superior court action, the court found that plaintiff suffered irreparable damage and will continue to do so unless the picketing and boycotting cease; that all activities of defendants have been peaceful; that no violence or threats of violence have occurred; and that no false or fraudulent statements were published by the unions other than the statement that plaintiff was "unfair to organized labor" and the publication of plaintiff's name and business on the "Unfair List" of the Food and Drug Council. Defendants appeal from the judgment enjoining them from picketing and boycotting plaintiff and from denominating or listing plaintiff as "unfair" or "unfair to organized labor" during the pendency of proceedings before the National Labor Relations Board, and thereafter until modification or vacation of the injunction.

[1] It is settled that the acts complained of would not have been unlawful had they been directed against an employer who was not subject to the National Labor Relations Act. A closed shop agreement with such an employer is as proper an object of concerted action as the attainment of higher wages, shorter hours, or better working conditions, whether or not the labor union represents a majority of the employees that it seeks to bring within the closed shop agreement. McKay v. Retail, etc., Union No. 1067, 16 Cal.2d 311, 319, 106 P.2d 373; Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 382, 106 P.2d 403; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414; Sontag Chain Stores Co. v. Superior Court, 18 Cal.2d 92, 113 P.2d 689; see Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 682, 123 P.2d 20; Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 155, 143 P.2d 20, 150 A.L.R. 916; Lisse v. Local Union, 2 Cal.2d 312, 41 P.2d 314; In re Lyons, 27 Cal.App.2d 293, 81 P.2d 190; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Southern California Iron & Steel Co. v. Amalgamated Assn., 186 Cal. 604, 200 P. 1; Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200; Allen-Bradley Local v. Wisconsin etc. Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed.

1154; Stillwell Theatre v. Kaplan, 259 N. Y. 405, 409, 182 N.E. 63, 84 A.L.R. 6; Rest., Torts, § 788.

Plaintiff contends, however, that it could not yield to defendants' demand for a closed shop agreement without committing an unfair labor practice under the National Labor Relations Act, and that defendants' concerted action for such an agreement was therefore unlawful and should be enjoined.

The relevant provisions of the National Labor Relations Act, sections 8(3) and 9 (a), 29 U.S.C.A. §§ 158(3), 159(a), read as follows: "It shall be an unfair labor practice for an employer * * * By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made. * * * Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

[2, 3] The National Labor Relations Act is based on the policy of encouraging collective bargaining and protecting the exercise of the workers' rights of association, organization and designation of representatives of their own choosing for negotiating terms and conditions of employment. N.L.R.A. § 1, 29 U.S.C.A. § 151. Congress has safeguarded labor's economic weapons by expressly providing that nothing in the act "shall be construed so as to interfere with or impede or diminish in any way the right to strike" N.L.R.A. § 13, 29 U.S.C.A. § 163, and that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." N.L.R.A. § 7, 29 U.S.C.A. § 157. The act recognizes, among other rights, peaceful picketing and boycotting of an employer by a labor union, whether or not its members are employed by him. National Labor Relations Board v. Peter Cailler Kohler Swiss Chocolates Co., 2 Cir., 130 F.2d 503, 506; Montgomery Ward Employees Ass'n v. Retail Clerks, etc., Ass'n, D.C., 38 F.Supp. 321. Such rights may be exercised to secure a closed shop, for the act specifically designates the closed shop as one of the objectives of collective bargaining. N.L.R.A. § 8(3), 29 U.S.C.A. § 158(3). The act does not require that a union represent a majority during the period of its activities for a closed shop, but only that it represent a majority when the agreement is made. The National Labor Relations Board may exercise its power under section 9(c) of the National Labor Relations Act to take a secret ballot of the employees to determine which group has the required majority, and meanwhile any group may seek to win over a majority of the employees. It may resort to concerted activities to win over the employees with the object of gaining a majority (see Montgomery Ward Employees Ass'n v. Retail Clerks, etc., Ass'n, supra; National Labor Relations Board v. Dahlstrom, etc., Co., 2 Cir., 112 F.2d 756, 758; National Labor Relations Board v. Karp, etc., Co., 2 Cir., 134 F.2d 954) and at the same time engage in concerted activities against the employer until he signs a closed shop agreement. If a union could not picket or boycott an employer until it had the majority necessary for a closed shop agreement, it would be deprived of one of the most effective means of obtaining that majority. Meanwhile, the employer may apply to the board to hold an election and to certify the bargaining agent designated by the majority of the employees. Section 203.1 of the Rules and Regulations implementing the National Labor Relations Act, 29 U.S.C.A. Appendix. The day after plaintiff filed its petition with the board in this case, it brought this action for an injunction to put an end to the very activities of the union by which it hoped to gain a majority of the employees. Since neither

the defendant unions nor the Park and Tilford Mutual Association requested recognition, the board denied plaintiff's application to institute certification proceedings.

[4, 5] Picketing and boycotting for a closed shop, if peacefully carried on, are lawful not only under the National Labor Relations Act, but under the Clayton and Norris-LaGuardia Acts. Section 20 of the Clayton Act, 29 U.S.C.A. § 52, prescribes not only that peaceful picketing and boycotting shall be immune from injunctions of federal courts, but that such activities shall not be "considered or held to be violations of any law of the United States." The section was construed in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196, to protect labor activities only of employees of the employer against whom they are directed. After enactment of the Norris-LaGuardia Act, 29 U.S.C.A. § 102, however, limiting the enjoining power of the federal courts in labor disputes irrespective of whether the members of a union engaged in labor activities are employees of the employer affected by their activities, the United States Supreme Court read into section 20 of the Clayton Act the public policy declared by Congress in the Norris-LaGuardia Act. Whatever the scope of that section before the Norris LaGuardia Act, it now makes picketing and boycotting lawful even when performed by others than employees of the particular employer, if they are unenjoinable in a federal court under the Norris-LaGuardia Act. United States v. Hutcheson, 312 U. S. 219, 61 S.Ct. 463, 85 L.Ed. 788. In reaching the conclusion that these activities are lawful, and not simply unenjoinable, the court stated in the Hutcheson case: "The Norris-La Guardia Act removed the fetters upon tradeunion activities, which according to judicial construction of § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation. * * * If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be 'considered or held to be violations of any law of the United States.' So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or the unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of § 20 that differentiates between trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer." 312 U.S. 219, 231, 232, 61 S.Ct. 463, 466, 85 L.Ed. 788.

[6] The result of the Hutcheson case is a complete "identification of legislatively declared unenjoinability with complete legality." 146 A.L.R. 1252. By declaring lawful, and therefore beyond interference by state courts, union activities that are unenjoinable in the federal courts under the Norris-LaGuardia Act, the Hutcheson case obviates the inconsistencies that would arise if state courts, in labor disputes involving a business engaged in interstate commerce, could enjoin conduct as being in violation of the federal law, even though the conduct is not enjoinable in a federal court. See 2 Teller, Labor Disputes and Collective Bargaining, § 416. Under the Norris-LaGuardia Act peaceful picketing and boycotting for a closed shop by an outside union are not enjoinable in a federal court, Lauf v. E. G. Shinner & Co., 303 U.S. 323, 329, 58 S.Ct. 578, 82 L.Ed. 872, and are therefore lawful, United States v. Hutcheson, supra. Since these acts are made lawful by federal law, they are immune from injunctions of state courts as well as federal courts.

[7-9] Even if the activities in question were not made lawful by the federal statutes discussed above, a state court would have no power to enjoin labor activities on the ground that they might induce the employer against whom they are directed to commit an unfair labor practice, for only the National Labor Relations Board can

determine what constitutes an unfair labor practice under the act and take steps to prevent it. Section 10(a) of the National Labor Relations Act, 29 U.S.C.A. § 160(a) provides: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." This provision, together with section 10(c) of the National Labor Relations Act giving the board power to take testimony and make findings of fact, "commits to the Board the exclusive power to decide whether unfair labor practices have been committed." National Licorice Co. v. National Labor Board, 309 U.S. 350, 365, 60 S.Ct. 569, 578, 84 L.Ed. 799. Since the board decides what is "necessary to effectuate the policies of the Act" (Franks Bros. Co. v. National Labor Relations Board, 321 U.S. 702, 704, 64 S.Ct. 817, 88 L.Ed. 1020) and may even order an employer to bargain collectively and make a closed shop agreement with a union that has lost its majority after the employer has refused to deal with it (44 National Labor Relations Board, 898, 917, Frank Bros. Co. v. Labor Board, supra), it is not within the jurisdiction of a court to conclude that because a union represents a minority, the employer would commit an unfair labor practice by entering into a closed shop agreement with it. See, also, Seventh Annual Report of The National Labor Relations Board, 1942, p. 47, note 9; Eighth Annual Report of the National Labor Relations Board, 1943, p. 34. A court does not even have jurisdiction to determine whether a union represents a majority in a unit appropriate for the purposes of collective bargaining at the time of the making of the agreement, let alone at any previous time, for it is within the exclusive province of the board to determine the bargaining unit that has the required majority. As the court stated in Fur Workers Union, Local 72 v. Fur Workers Union, 70 App.D.C. 122, 105 F.2d 1, 12; affirmed 308 U.S. 522, 60 S.Ct. 292, 84 L.Ed. 443; "Neither the National Labor Relations Act nor the Norris-LaGuardia Act confers upon the Federal courts power to determine what is the appropriate and lawfully selected collective bargaining unit for employees. * * * it seems clear that by the National Labor Relations Act Congress intended to confer exclusive initial jurisdiction upon the Board to determine the appropriate and lawfully selected bargaining unit for employees, and intended to give to the Board alone appropriate machinery, to wit, elections machinery, for making such determination. * * * we should not, unless, upon consideration of the Act and its language and purpose, we find it mandatory to do so, put such a construction thereon as would result in the anomalous existence of concurrent initial jurisdiction in both the courts and the Board. In the absence of a principle that, as between administrative tribunals and courts, the jurisdiction first attaching shall prevail—and we know of no such principle—the consequence of such double jurisdiction would be most serious." See, also, Lund v. Woodenware Workers Union, D.C., 19 F.Supp. 607; Blankenship v. Kurfman, 7 Cir., 96 F.2d 450; Reilly v. Millis, D.C., 52 F.Supp. 172; Weyerhaeuser Timber Co. v. Everett District Council, 11 Wash.2d 503, 119 P.2d 643, distinguishing Bloedel Donovan Lumber Mills v. International Woodworkers, 4 Wash.2d 62, 102 P.2d 270; Green v. Obergfell, 73 App.D.C. 298, 121 F.2d 46, 138 A.L.R. 258; Sharp & Dohme v. Storage Warehouse, etc., Union, D.C., 24 F.Supp. 701; Montgomery Ward Employees Ass'n v. Retail Clerks International, etc., Ass'n, D.C., 38 F.Supp. 321; Stone Logging, etc., Co. v. International Woodworkers, 171 Or. 13, 135 P.2d 759; 41 Mich.L. Rev. 1143; 15 Tex.L.Rev. 344.

[10, 11] Plaintiff, relying on Magill Bros. v. Building Service, etc., Union, 20 Cal.2d 506, 127 P.2d 542, contends that references to it as "unfair" and "unfair to organized labor" were untruthful and that the use of these terms and the placing of its name on the "Unfair List" of defendants' trade paper should be enjoined. In the Magill case the signs carried by the pickets stated: "This house on strike. A. F. L." There was in fact no strike; the statements were held to be false; and defendants were enjoined from making them. In the present case there has been no falsification of facts. It has been repeatedly held that the terms "unfair" and "unfair to organized labor" carry no odious connotation that an employer is guilty of fraud or dishonorable conduct, but merely connote that an employer is conducting his business in a manner unfavorably regarded by the

union. J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 592, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 395, 106 P.2d 414; Emde v. San Joaquin County, etc., Council, supra, 23 P.2d at pages 143, 155, 156, 143 P.2d 20, 150 A.L.R. 916; Cafeteria Employees Union v. Angelos, 320 U. S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58; Steffes v. Motion Picture Machine Operators Union, 136 Minn. 200, 202, 161 N.W. 524; Labor Review Publishing Co. v. Galliher, 153 Ala. 364, 373, 374, 45 So. 188, 15 Ann.Cas. 674; John R. Thompson Co. v. Delicatessen & C. W. Union, Local 410, 126 N.J.Eq. 119, 123, 8 A.2d 130; Cinderella Theater Co. v. Sign Writers' Union, D.C., 6 F.Supp. 164, 172; Watters v. Retail Clerks Union No. 479, 120 Ga. 424, 427, 47 S.E. 911; Campbell v. Motion Picture Mach. Operators' Union, 151 Minn. 220, 226, 186 N.W. 781, 27 A.L.R. 631; see 1 Teller, op.cit. § 126, pp. 389, 392, § 152, pp. 472-473; see 43 Words and Phrases, Perm. Ed., 1940, p. 195. In Cafeteria Employees' Union, etc. v. Angelos, supra, the Supreme Court of the United States reversed the judgments of the New York Court of Appeals, which had approved an injunction restraining peaceful picketing in which the term "unfair" had been used, declaring: "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' * * * is not to falsify facts."

The judgment is reversed.

GIBSON, C. J., and CARTER, and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

As I read the record, the evidence clearly shows that at the time the controversy which occasioned this litigation arose, Park & Tilford was engaged in interstate commerce within the meaning of the National Labor Relations Act, commonly known as the Wagner Act, 49 Stat. 449, 29 U.S.C.A. § 151 et seq., and was an employer subject to its provisions. I agree with the reasoning of Judge Henry M. Willis, who enjoined the appellant labor organizations from picketing, that because of the federal statute, the unions' activities were for an unlawful purpose and that the listing and publication of the employer's name and business on the unfair list was neither truthful nor honest.

Concerning the first ground of his decision Judge Willis said:

"By express terms of the act it is declared to be an unfair labor practice for an employer, subject to the Act, to interfere with, restrain or coerce employees in the exercise of their rights of self-organization or of collective bargaining through representatives of their own choosing. Also it is declared to be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment so as to encourage or discourage membership in any labor organization, provided this does not preclude the employer from making an agreement with a labor organization requiring membership in such organization as a condition of employment, if such labor organization is the representative of a majority of the employees in the appropriate collective bargaining unit covered by such agreement.

"Under the proofs herein this court is constrained to find that the defendants, acting in concert of purpose and activities, established and have maintained a peaceful picket line at plaintiff's place of business, and have instituted and carried on a secondary boycott of plaintiff's business relations and dealings with its customers for the purpose of coercing plaintiff to persuade its employees, both clerks and salesmen, to join the defendant unions, respectively as to units, as a condition of retaining employment. This persuasion, if successful in its purpose, would render plaintiff guilty of an unfair labor practice and a direct violation of the National Labor Relations Act. Incidental to and as a basis of such persuasion, defendant unions, each for itself, demanded of plaintiff that it execute with the respective union a closed-shop contract, by the terms of which plaintiff would be required to influence its employees to join the respective union as a condition of continuing employment. As the defendant unions did not represent a majority of either the clerks or the salesmen, employees of plaintiff, neither of them was authorized to bargain for or to execute such an agreement on behalf of such employees in their respective units, and it would have constituted an unfair labor practice on the part of plaintiff to have acceded to such demand and to have executed such contract. Such contract would

not only be void and unenforceable but its execution by plaintiff would have been tantamount to the unfair labor practice first mentioned above. The obligation imposed by the Wagner Act to treat only with the true representatives is exclusive and hence imposes the negative duty to treat with no other. National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 44, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.

"The purpose of the picketing and boycotting is thus definitely shown to be the coercing of plaintiff into commission of unfair labor practices, which, if committed under such coercion, would subject plaintiff to prosecution before the Labor Board on charges. When viewed from any angle, this purpose of defendants constituted illegal coercion. Picketing or boycotting for such purpose are but the weapons of such illegal coercion, and may be enjoined. Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 682, 123 P.2d 20. And a secondary boycott must be exercised in pursuit of a lawful end. C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 395, 106 P.2d 414, supra.

"A strike, boycott or other form of economic pressure activities, however, peaceable and innocent on their face, may nevertheless be without legal justification and unlawful if the purpose behind and motivating such action is unlawful. Dorchy v. Kansas, 272 U.S. 306, 47 S.Ct. 86, 71 L. Ed. 248; Senn v. Tile Layers Protective Union, 301 U.S. 468, 478, 57 S.Ct. 857, 81 L.Ed. 1229; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 395, 399, 106 P.2d 414; McKay v. Retail Automobile Salesmen's Local, 16 Cal.2d 311, 331, 106 P.2d 373; R. H. White Co. v. Murphy et al., 310 Mass. 510, 38 N.E.2d 685.

"Collective labor activity, represented by picketing and boycotting, is permissible only when conducted according to the requirements imposed by law, and if in violation of such requirements, picketing and boycotting are subject under ordinary circumstances to the restraint of a court of equity. Magill Bros. v. Building Service, etc., Union, 20 Cal.2d 506, 127 P.2d 542. The federal law, embodied in the Wagner Act forbids an employer, whose business subjects him to the provisions of such act, from interfering with or coercing his employees in their rights of self-organization and collective bargaining, and to negotiate or enter into contracts with a labor organization which does not represent a majority of his employees in the appropriate bargaining unit. By necessary implication all others are forbidden to compel him so to do. To picket or boycott such employer for the purpose of coercing him into signing such a contract or to interfere with his employees' right of joining or not joining a union, is directly contrary to the spirit and purpose of the Wagner Act, and constitutes illegal coercion, and is subject to restraint by a state court of equity. Hudson Recreation Co. v. Bowling etc. Union Local 209 (Penn.), 3 C.C.H. Labor Cases, Par. 60300; R. H. White Co. v. Murphy et al., 310 Mass. 510, 38 N.E.2d 685."

The conclusions of Judge Willis upon the issue as to the boycott instituted by the union organizations, to me, are also unanswerable under the rule of decision which has been laid down in this state. "The use of the word 'unfair,' as employed by labor organizations generally," he declared, "carries a technical meaning commonly understood by the courts, the parties and by all persons to whom labor organizations send notices that a certain employer had been declared unfair. Such meaning ordinarily conveys the idea that the employer has refused to comply with conditions upon which union men would consent to remain in his employ, or other employers under contract with, or sympathetic to organized labor, would consent to purchase or handle material or merchandise supplied by him. J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 592, 98 P. 1027, 21 L.R.A. N.S. 550, 16 Ann.Cas. 1165.

"As commonly used by labor organizations the term 'unfair' or 'unfair to organized labor' does not mean and is not understood to mean that the employer, so charged, has been guilty of any fraud, breach of faith or dishonorable conduct, but that he has refused to comply with reasonable, honest and lawful conditions imposed or demanded by a labor organization. It is a prime requisite to support and give truth to such a charge that in some recognized lawful respect the employer has refused to comply with proper and lawful demands of a labor union. Thus if the demand made or condition imposed by the labor union upon an employer is opposed to reason, public policy or the law, and cannot be assented to without violating public

policy or law, it cannot be truthfully and honestly said that the employer is unfair to organized labor, or unfair at all. Instead, to declare that an employer is unfair under such circumstances is clearly deceptive and fraudulent.

"In this case the plaintiff is shown by the evidence to have been fair to the defendant unions at all times. It furnished them every requested opportunity to 'organize' the clerks and salesmen, and placed no obstacles in their way to secure their applications for membership in, or their authorization to defendant unions to act as their bargaining agent. Failing in these efforts to organize the employees of plaintiff, not through any fault or opposition of plaintiff, but solely because the employees in question refused to join defendant unions, preferring to self-organize in their own union, and failing to persuade plaintiff to commit acts in violation of the Wagner Act for the purpose of influencing or coercing its employees to join such defendant unions, the defendants, acting in concert, called the strike of the two teamsters, established a picket line and published plaintiff's name on the Council 'unfair list,' and mailed to many customers of plaintiff a circular letter stating that plaintiff had been placed on the 'official "unfair" list of the Los Angeles Food and Drug Council to which body our unions belong,' and requesting such customers to cease patronizing plaintiff until the unions' dispute with plaintiff was settled.

"Under the facts and circumstances of this case it must be found that the publication of plaintiff's name and business as 'unfair' was untrue, deceptive and dishonest. It is manifest, and was equally manifest to the defendants, that plaintiff had not been, and is not unfair to organized labor in general or to these local unions in particular in any respect. No truthful or honest charge of 'unfair' or 'unfair to organized labor' can be predicated on refusal of an employer to accede to unlawful demands of a union. The picketing and secondary boycott which has occurred were founded exclusively on this refusal to commit unfair labor practices by plaintiff, and in combination with the publication of this charge of 'unfair,' and are inseparably entangled with such publication."

For these reasons, in my opinion, the judgment should be affirmed.

SHENK and CURTIS, JJ., concurred.

25 Cal.2d 664

KULAWITZ v. PACIFIC WOODENWARE & PAPER CO.

S. F. 16882.

Supreme Court of California.

Dec. 30, 1944.

Rehearing Denied Jan. 25, 1945.

1. Landlord and tenant ⇐34(3)

Tenant in default in payment of rent was not entitled to rescind lease without curing his default by tendering amount due to the time of alleged breach by landlord.

2. Landlord and tenant ⇐199½

Landlord's breach of restrictive covenant would not entitle tenant to escape payment of that portion of rental which had accrued to date of landlord's alleged breach and which tenant was bound to pay.

3. Landlord and tenant ⇐34(3)

Where tenant was in default in payment of rent, tenant's notice of rescission because of landlord's breach of restrictive covenant was ineffectual where not accompanied by tender of rent due to date of landlord's breach. Civ.Code, § 1691.

4. Landlord and tenant ⇐103(3)

A covenant not to let other premises in landlord's property or permit their use for certain purposes during the existence of the lease with the cotenant is binding and a breach thereof entitles the tenant to terminate the lease.

5. Contracts ⇐278(1)
Landlord and tenant ⇐47

Condition broken by the covenantor excuses performance by the covenantee, and such rule ordinarily applies without the express intention of the parties in cases of agreed exchange, but does not apply to leases unless by the intention of the parties, expressed or necessarily implied, performance by one was conditioned upon performance by the other.

6. Landlord and tenant ⇐48(1), 49(2)

Breach or failure to perform by party to a lease is not a defense unless the covenant broken was a condition precedent to performance by the party defending. Civ. Code, § 1439.

7. Landlord and tenant ⇐48, 172(1)

Landlord's performance of covenant not to rent any space in same building for conduct of furniture store was essential to

beneficial enjoyment of the property by the tenant for the purposes intended and was a condition precedent to tenant's performance and breach thereof amounted to a constructive eviction of tenant.

8. Landlord and tenant ⇐190(1)

Any interference by the landlord by which the tenant is deprived of the beneficial enjoyment of the premises amounts to a constructive eviction if the tenant so elects and surrenders possession, and the tenant will not be liable for rentals for the portion of the term following his eviction.

9. Landlord and tenant ⇐112(1)

Tenant's default in payment of rent does not waive the landlord's performance of restrictive covenant unless the lease expressly or by necessary implication provides that performance thereof depends upon the payment of rent.

10. Landlord and tenant ⇐48, 108(1), 112(1), 182

Default in payment of rent gave landlord only the right to the rent or the right to terminate the lease, and where the lease was not terminated tenant was entitled to landlord's observance of covenant not to rent any space in same building for conduct of furniture store, in view of fact that lease did not expressly or by necessary implication provide that performance of such restrictive covenant depended upon payment of rent.

11. Landlord and tenant ⇐48, 109(1)

Where lease provided that premises were to be used for conduct of general furniture business and that there should be no sale of property by auction on the premises except upon retiring from business, tenant's retirement sale would not release landlord from covenant not to rent any space in the same building for conduct of furniture store or constitute a surrender or an offer to surrender the leasehold.

12. Landlord and tenant ⇐194(1)

Upon surrender of possession by tenant before expiration of term landlord could consider the lease still existing and sue for unpaid rent as it became due for the unexpired portion of the term, or could treat the lease as terminated and retake possession for landlord's own account, or could retake possession for the tenant's account and relet the premises, holding the tenant for the difference between the lease rentals and what landlord was able, in good faith, to secure by reletting.

13. Landlord and tenant ⇐190(1), 194(1)

Where, upon tenant's surrender of possession before expiration of term, landlord elected to treat the lease as still in existence and sued for unpaid rent as it became due and successfully resisted tenant's claim of rescission, landlord was not entitled to recover rent beyond the time that landlord breached lease by renting space in same building for conduct of furniture store. Civ.Code, § 1511, subdiv. 3.

14. Landlord and tenant ⇐48, 190(1)

Where landlord breaches restrictive covenant of lease, tenant may rescind and become absolved from further payment of rent, or tenant may continue under the lease and sue for loss of profits, or tenant may treat the violation as putting an end to the lease for the purpose of performance and sue for damages.

15. Election of remedies ⇐11

Where landlord breached restrictive covenant of lease and tenant sued to rescind but was not successful because of default in payment of rent, such failure did not preclude tenant from obtaining any other relief that might be open to him.

16. Landlord and tenant ⇐94(6), 103(3)

Where landlord directly breached restrictive covenant of lease, he was not entitled to notice and reasonable opportunity to comply with terms of the covenant, but tenant was entitled to treat the lease as ended.

17. Landlord and tenant ⇐48

A breach of a covenant not to permit a similar sales business to be conducted occurs if but one of several classes of articles is permitted to be sold by the competitor.

18. Landlord and tenant ⇐103(3)

Where linoleum and kindred products constituted a big item in the furniture business and such products were sold at tenant's furniture store and competition in that respect would result in serious losses to tenant, landlord's breach of covenant not to rent any space in same building for conduct of furniture store was not a trivial matter but entitled tenant to treat the lease as ended.

19. Landlord and tenant ⇐103(3)

Evidence showed that tenant's election to treat lease as ended on account of landlord's breach of restrictive covenant in

lease was not a pretext and that lease was terminated because of the breach of such covenant.

20. Landlord and tenant ⇐103(3)

If landlord chose to ignore restrictive covenant in lease, landlord did so at the risk of tenant's exercising his right to terminate lease and surrender possession of the premises.

SCHAUER and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by S. Kulawitz against the Pacific Woodenware & Paper Company to rescind a lease wherein the defendant filed a cross-complaint to recover unpaid rentals. From a judgment denying plaintiff any relief on the complaint and for defendant on cross-complaint but limiting recovery of unpaid rentals due at time of breach of lease by defendant, the defendant appeals.

Judgment affirmed.

Prior opinion 142 P.2d 50.

Fitzgerald, Abbott & Beardsley and Chas. A. Beardsley, all of Oakland, for appellant.

George P. Marshall and Alfred Nelson, both of Oakland, for respondent.

SHENK, Justice.

This is an appeal by the defendant from a judgment in its favor on a cross-complaint in an action in which the plaintiff sought the rescission of a lease.

The defendant leased store premises in a building owned by it in Oakland, to the plaintiff for a term of four years from July 1, 1938, at a minimum monthly rental of $350. The lease provided that the premises were to be used for the conduct of a general furniture business exclusively, and the lessee agreed not to allow any sale of property by auction on the premises except upon retiring from business. The defendant as lessor covenanted that during the term of the lease it would not let or permit occupation of any other space or storeroom in the same building "for the purpose of conducting therein a furniture store." The lease also provided that should the lessee abandon or vacate the premises during the term of the lease the lessor might at his option without notice to the lessee relet the premises, and the lessee should satisfy any deficiency between the amount realized from the reletting and the amount of the rents reserved.

The lessee took possession and conducted a general furniture business until January, 1941, when, because of illness, he became unable to give his personal attention to the business. He held an auction sale and retired from the conduct of the furniture business on the leased premises. He turned over the keys to the defendant's renting agent with instructions to find a tenant and if necessary at a rental of as much as $100 per month less than that provided in the lease. A tenant was not found. The plaintiff did not pay the rent for February, March or April, but prior to April 18, 1941, commenced to clean and restock the store in preparation for a reopening for business. While making these preparations he observed a sign on an adjoining store in the same building that it would open on May 1st for the sale of carpets, rugs and linoleum. On April 2d the defendant had let the adjoining store to one Smith on a month to month basis commencing May 1, 1941, for the specified purpose of conducting therein the "sale of linoleum and kindred products." On April 21st the plaintiff gave the lessor a telephonic notice of the claimed breach of the restrictive covenant in the lease, and on April 24th he served written notice that competition in the same building in the important items of "carpets, rugs and linoleum" would constitute a difference between a net profit and a definite loss in his conduct of the furniture business in the same building; that the breach of the covenant went to the essence of the lease agreement; that he would no longer be bound by the provisions of the lease; and that since the telephonic communication of April 21st, he had removed his stock of furniture from and had given up the possession of the premises. On April 29th the lessor replied by letter stating that it denied any breach of the restrictive covenant; that the lessee had "retired" from the furniture business; that the claimed breach was a mere pretext, and that it would continue to hold the lessee to the performance of the lease provisions. The Smith tenancy for the sale of linoleum and kindred products continued and was in existence at the time of trial.

In October, 1941, the plaintiff filed his complaint for rescission. Various amended and supplemental cross-complaints were filed by the defendant by which it sought recovery of unpaid rentals for the full un-

expired term. They will be referred to as the cross-complaint. By his answer to the cross-complaint the plaintiff admitted that rental was due to May 1, 1941, offered to pay the same, and alleged defensive matter to prevent the recovery of rentals for the remainder of the term by reason of his eviction from the leased premises by the defendant.

The trial court found the facts as above stated, and denied to the plaintiff any relief on his complaint. As to the issues raised by the cross-complaint and the plaintiff's answer thereto, the court concluded that the defendant had violated the restrictive covenant in a substantial respect, that the lease had terminated as of May 1, 1941, and that the defendant was entitled to recover only the unpaid rentals due to that date. The defendant had judgment accordingly.

On the appeal the defendant contends that the plaintiff was not entitled to a declaration that the lease had terminated and be relieved of his obligation to pay rentals for the full term when he was himself in default in the payment of prior rental under the lease; that the plaintiff's "retirement" from the conduct of the furniture business on the leased premises in January, 1941, rendered the lessor's restrictive covenant inoperative; that before the defendant could be placed in default of the restrictive covenant it was entitled to reasonable notice to afford an opportunity to remove the source of the objection; and that the evidence does not support the finding of a substantial breach of the restrictive covenant.

[1-3] The plaintiff, being in default under the lease, was not entitled to rescind without curing his default by tendering the amount due to the time of the claimed breach by the lessor. Breach of the restrictive covenant would not entitle the plaintiff to escape his obligation to pay that portion of the rentals which had accrued to the date of the alleged breach and which he was bound to pay. His notice was not accompanied by payment of that portion of the obligation which was incontrovertibly due. He therefore had not effected rescission of the lease and the trial court correctly concluded that he was not entitled to prevail on his complaint. Civ.Code, § 1691; Crouch v. Wilson, 183 Cal. 576, 584, 191 P. 916; Couts v. Cornell, 147 Cal. 560, 82 P. 194, 109 Am.St.Rep. 168. The question of the correctness of the trial court's findings and conclusions is therefore resolved by a consideration of the issues raised by the defendant's cross-complaint and the plaintiff's answer thereto.

[4-6] A covenant not to let other premises in the lessor's property or permit their use for certain purposes during the existence of the lease with the covenantee is binding and a breach thereof entitles the lessee to terminate the lease. Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal. 2d 411, 132 P.2d 457; University Club v. Deakin, 265 Ill. 257, 106 N.E. 790, L.R.A. 1915C 804; Hiatt Inv. Co. v. Buehler, 225 Mo.App. 151, 16 S.W.2d 219. The result in such cases is based on the rule that the condition broken by the covenantor excuses performance by the covenantee. That rule applies ordinarily without the express intention of the parties, in cases of agreed exchange, such as Cameron v. Burnham, 146 Cal. 580, 80 P. 929, and Rathbun v. Security Mfg. Co., 82 Cal.App. 793, 256 P. 296. See Rest., Contracts, §§ 266, 397; Cal. Ann., pp. 143, 226. For historical or other reasons it was not made applicable to leases, unless by the intention of the parties, expressed or necessarily implied, performance by one was conditioned upon performance by the other. (See Rest., Contracts, § 290; Cal.Ann., pp. 155-156.) Therefore breach or failure to perform by a party to a lease is not a defense unless the covenant broken was a condition precedent to performance by the party defending. Alderson v. Houston, 154 Cal. 1, 96 P. 884; Civ.Code, § 1439; 6 Cal.Jur. 489.

[7, 8] In this case performance of the restrictive covenant by the lessor was essential to the beneficial enjoyment of the property by the lessee for the purposes intended. It was therefore a condition precedent to the lessee's performance, and breach thereof may be said to amount to a constructive eviction of the lessee and was found to be such by the trial court. Any interference by the landlord by which the tenant is deprived of the beneficial enjoyment of the premises amounts to a constructive eviction if the tenant so elects and surrenders possession, and the tenant will not be liable for rentals for the portion of the term following his eviction. Veysey v. Moriyama, 184 Cal. 802, 805, 195 P. 662, 20 A.L.R. 1363; Agar v. Winslow, 123 Cal. 587, 56 P. 422, 69 Am.St.Rep. 84; McAlester v. Landers, 70 Cal. 79, 11 P. 505; Giraud v. Milovich, 29 Cal.App.2d 543, 547, 85 P.2d 182.

[9, 10] Default by the lessee in the payment of rentals does not waive the lessor's performance of the restrictive covenant unless the lease provides expressly or by necessary implication that performance thereof depends upon the payment of rentals. No such provision or intention appears from the agreement here involved. Under this lease the result flowing from the nonpayment of the rent gave to the lessor only the right to the rent or at his option to a termination of the lease. If he did not exercise the option the lease continued in existence. So long as the lease continued in existence the lessor was bound not to interfere with the beneficial enjoyment of the premises by the lessee for the purposes intended. Therefore upon the lessee's default in the payment of rent the lessor could at its option have terminated the lease; but as it elected to consider the lease in force it was bound to an observance of its covenant. Standard Livestock Co. v. Pentz, 204 Cal. 618, 269 P. 645, 62 A.L.R. 1239.

[11] The lessee's "retirement" sale in January, 1941, did not release the lessor from that covenant. The lease term was an estate in lands vested in the lessee. His "retirement" sale did not constitute a surrender nor an offer to surrender the leasehold. In fact the conduct of the parties indisputably showed their intention to consider the lease as continuing. The lessee sought to sublet the premises through the lessor's agent and to discharge his obligation for any deficiency in rentals. The lessor at all times unmistakably indicated its intention to treat the lease as in existence until the expiration of the stipulated term. There is no evidence of abandonment by the lessee by virtue of the "retirement" sale nor of acceptance of any such abandonment by the lessor. The lessee's title continued and he had a right to resume possession at any time until the expiration of the term, and the lessor had no right to interfere with his dominion and control. Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am.St. Rep. 145. The foregoing considerations render inapplicable cases such as M. M. Ullman & Co. v. Levy, 172 La. 79, 133 So. 369, where, on the lessor's sale of the goodwill of a business, his agreement not to engage in the same business in the vicinity for a specified number of years was held ineffective after the termination of the lease period and the tenant's retirement from business prior to the expiration of the agreed term of restraint.

[12, 13] The evidence in the present case is that the lessee surrendered possession of the premises when he gave to the lessor the notice dated April 24, 1941. Upon surrender of possession by the lessee before the expiration of the lease term, the lessor had three remedies: (1) To consider the lease as still in existence and sue for the unpaid rent as it became due for the unexpired portion of the term; (2) to treat the lease as terminated and retake possession for its own account; or (3) to retake possession for the lessee's account and relet the premises, holding the lessee for the difference between the lease rentals and what it was able in good faith to procure by reletting. Treff v. Gulko, 214 Cal. 591, 598, 7 P.2d 697; Siller v. Dunn, 103 Cal.App. 154, 158, 284 P. 232. The defendant followed the first course. It filed a cross-complaint by which it sought to recover rentals unpaid to the expiration of the lease term. It successfully resisted the plaintiff's claim of rescission inasmuch as the defendant's breach did not excuse the plaintiff's liability for rentals due prior thereto (Civ.Code, § 1511, subd. 3), and the plaintiff had failed to discharge his liability. But the defendant's breach placed it in a position of being unable to resist successfully defensive matter interposed to its own action. It could not compel a performance which depended upon performance of its own broken covenant. When, upon the constructive eviction by the lessor, the lessee exercised his right to terminate the lease and surrender possession of the premises, the result was a constructive reentry by the landlord. All issues between the parties were thus set at rest with the exception of the single issue of the liability of the lessee for unpaid rentals to the date of reentry. State Guaranty Corp. v. Richardson, 9 Cal.App.2d 287, 289, 49 P.2d 606, citing Welcome v. Hess, supra.

[14, 15] But, complains the defendant, the plaintiff has in effect received the relief sought by his complaint. This as a legal proposition is not so. In such a case the lessee has a choice of several remedies: he may rescind and become absolved from further payment of rentals; he may continue under the lease and sue for loss of profits; or he may treat the violation as putting an end to the lease for the purposes of performance and sue for damages. Med-

ico-Dental Bldg. Co. v. Horton & Converse, supra, 21 Cal.2d at page 434, 132 P.2d 457; Hiatt Inv. Co. v. Buehler, supra, 16 S.W.2d at page 226. Here the plaintiff ineffectually sought the first named remedy. The fact that he failed to establish his right to rescission did not preclude him from any other relief that might be open to him. The rule that a party is not to be denied relief because he has mistaken his remedy is applicable in such a case. Agar v. Winslow, supra, 123 Cal. at page 591, 56 P.2d 422, 69 Am.St.Rep. 84. The plaintiff may not be denied a lawful defense against an unjust claim for rentals because he misconceived his right to rescission. Here the court has merely given effect to the plaintiff's treatment of the lessor's violation of the restrictive covenant as putting an end to the lease for purposes of performance.

[16] The defendant relies on Medico-Dental Bldg. Co. v. Horton & Converse, supra, and Strong v. Morrison, 87 Cal.App. 169, 261 P. 1051, as support for its contention that in any event the plaintiff was not entitled to terminate the lease without affording the defendant reasonable opportunity to remove the source of the objection. Neither of the cases relied on is controlling in favor of the defendant on the facts presented by this record. The defendant had notice from the plaintiff of the latter's intended action on account of the former's breach. That notice was given a sufficiently reasonable time in advance of the date of the commencement of the Smith tenancy to afford the plaintiff an opportunity to cancel that tenancy if it chose to do so, and thus place itself in a position to hold the plaintiff to his rental obligations. It did not follow that course, but preferred to deny the commission by it of any breach and to continue in force and collect the rentals under the month to month tenancy to Smith for purposes in violation of its lease with the plaintiff, and at the same time hold the plaintiff bound to his lease. This it could not do. In neither of the cases relied upon did the landlord enter into a rental agreement with the prospective tenant which expressly provided for the competing use. In those cases the violation was not direct, but indirect by reason of the conduct of the competing tenant. The landlord in each of those cases was entitled to reasonable notice and time sufficient to enable it to acquire knowledge of the facts, to ascertain whether the condition could be corrected, and if possible to prevent a continued breach. In cases of direct breach, such as the present, the contention that notice and reasonable opportunity to comply with the terms of the covenant are necessary to put the lessor in default, has been rejected. Hiatt Inv. Co. v. Buehler, supra, 16 S.W.2d at page 227, and cases cited. Moreover, the finality of the defendant's reply to the plaintiff's notice indicated that further opportunity would have availed nothing.

[17, 18] In its answer to the plaintiff's complaint the defendant affirmatively admitted that its covenant not to let any space in the same building for use as a furniture store was a material and essential part of the agreement and of the inducement and consideration therefore, without which the plaintiff would not have entered into the lease. Its contention, however, that the breach of the covenant was in an immaterial respect and that the plaintiff was not entitled to abandon the lease for such a trivial cause is not supported by the record. A breach of a covenant not to permit a similar sales business to be conducted occurs if but one of several classes of articles is permitted to be sold by the competitor. Medico-Dental Bldg. Co. v. Horton & Converse, supra; Pappadatos v. Market Street Building Corp., 130 Cal.App. 62, 19 P.2d 517; Parker v. Levin, 285 Mass. 125, 188 N.E. 502, 90 A.L.R. 1446, and note pp. 1449 et seq. The trial court found on sufficient evidence that linoleum and kindred products constituted a big item in the furniture business; that such products were sold at the plaintiff's furniture store, and that competition in that respect would result in serious losses to him.

[19, 20] This court said in Medico-Dental Bldg. Co. v. Horton & Converse, supra, 21 Cal.2d at page 428, 132 P.2d 457, that in measuring the breach of such a covenant in a case where the objectionable competition is in connection with a business different from that of the lessee who is entitled to protection from the lessor, technical subterfuges would be disregarded and the substance of the situation would determine the issue. Even considering the businesses here involved to be of such different character, the defendant's claim of pretext is not supported, in view of the trial court's findings on sufficient evidence that the sale of linoleum and kindred products constituted an important item in the furniture business and that the plaintiff was preparing to reopen his furniture store on the leased premises

at the time of the defendant's breach. Here, as in the Horton & Converse case, the covenant was of such character that its contemplated breach would defeat the entire object of the lease, render further occupancy a matter of continued financial loss, and therefore in effect destroy the consideration for the lease. The sufficiency of the evidence in these respects, the surrender of the premises by the plaintiff following his notice to the defendant, the latter's immediate denial of the breach in response thereto and its refusal to take any action thereon except to hold the plaintiff to his lease and at the same time collect the rents from Smith, were justification under the law for the trial court's conclusion that the lease had been terminated. As was said in University Club v. Deakin, supra, 106 N.E. at page 792, if the lessor chose to ignore the provision of the contract it did so at the risk of the lessee's exercising his right to terminate the lease and surrender possession of the premises.

Other contentions of the parties need not be discussed.

The judgment is affirmed.

GIBSON, C. J., and CURTIS and EDMONDS, JJ., concurred.

CARTER, Justice (concurring).

I concur in the judgment of affirmance, however, I believe that our decision should properly be based upon the doctrine of surrender or surrender by operation of law as that term is used in the law of landlord and tenant. A surrender is the yielding up of an estate for years to the landlord. Triest & Co. v. Goldstone, 173 Cal. 240, 159 P. 715; Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am.St.Rep. 145. It may arise by express agreement between the landlord and tenant or by operation of law. Steel v. Thompson, 59 Cal.App. 191, 210 P. 430; Rauer's Law, etc., Co. v. Third St. Imp. Co., 21 Cal.App. 183, 131 P. 77. The latter is not, strictly speaking, a surrender wholly by operation of law, inasmuch as it is based upon the conduct of the parties indicating a surrender, and from which the court draws the legal conclusion that the surrender has taken place. Even in a so-called surrender by operation of law the issue is largely one of fact for the trier of fact. Triest & Co. v. Goldstone, supra; Steel v. Thompson, supra; Strei v. Brooks, 95 Cal.App. 589, 273 P. 145; Rognier v. Harnett, 45 Cal.App.2d 570, 114 P.2d 654. In the ordinary case two things must occur to establish a completed surrender: (1) The abandonment of the leased premises by the tenant; and (2) an acceptance of the abandonment by the landlord. See Welcome v. Hess, supra; Voss v. Levi, 33 Cal. App. 671, 166 P. 359; Bonetti v. Treat, 91 Cal. 223, 27 P. 612, 14 L.R.A. 151; In re Bell, 85 Cal. 119, 24 P. 633; Anheuser-Busch Brewing Ass'n v. American P. Co., 59 Cal.App. 718, 211 P. 817; 260 Seaman Ave. Corporation v. Armstrong, 130 Cal. App. 612, 20 P.2d 715; Salvation Army v. Daily Telegram, 125 Cal.App. 743, 14 P. 2d 123; Neuhaus v. Norgard, 140 Cal.App. 735, 35 P.2d 1039. The effect of a completed surrender is to terminate the tenancy, to release the tenant from the payment of future rent and to accomplish a mutual rescission of the lease, but he is liable for rent accruing before the surrender is complete. See Gaskill v. Trainer, 3 Cal. 334; McDermott v. Burke, 16 Cal. 580; Baker v. Eilers Music Co., 26 Cal.App. 371, 146 P. 1056; Donnellan v. Wood, Curtis & Co., 4 Cal.App. 192, 87 P. 235; Costello v. Martin Brothers, 74 Cal.App. 782, 241 P. 588; Guiras v. Harry H. Culver & Co., 109 Cal. App. 743, 293 P. 705; Moskovitz v. LeFrancois, 121 Cal.App. 310, 8 P.2d 1049.

In the instant case the court found upon sufficient evidence that the tenant abandoned the premises. It is immaterial whether the abandonment occurred in January when he sold his business at auction, vacated the property and ceased to pay rent, or in April when he heard that the landlord was leasing property in the same building to one Smith to engage in a similar business. Both occurred before May 1, 1941, when the landlord gave possession of the adjoining premises to Smith. Hence, the first requirement of a surrender, abandonment by the tenant, unquestionably occurred. Up to May 1st the landlord had assumed the position of following the first course leading to the various remedies stated to be available to him in Phillips-Hollman, Inc. v. Peerless Stages, Inc., 210 Cal. 253, 258, 291 P. 178, 180:

"The rule is well settled that *where a lease has been repudiated by a tenant, and the premises abandoned,* and there are no covenants in the lease to the contrary, the landlord has a choice of but two remedies:

"1. He may *rest upon his contract* and sue for each installment of rent as it falls due. If this alternative be selected, obvi-

ously the action must be limited to accrued installments, and no recovery can be had for future installments, because, the lease being still in existence, no obligation to pay the rent arises until each installment falls due.

"2. He may take possession of the premises, relet the same, and recover from the tenant any damages suffered thereby. Such damages will be the difference between the amount secured on the reletting and the amount provided for in the original lease." (Italics added.)

The question thus arises as to whether the second requisite of a surrender, that is, acceptance of the abandonment by the landlord, has been established. In that connection the principle that that question is one of fact should not be ignored. Here the trial court found that there was such an acceptance. The chief act by the landlord which has been considered as an acceptance by him is a reentry and assumption of complete possession by him. Other conduct has been given a like effect. It is said in 15 California Jurisprudence 793:

"Under the rule just stated, a surrender by operation of law arises where a new lease is accepted by a tenant, where a lease is given to a third person, where a landlord resumes possession with the acquiescence of the tenant, or *where the landlord does any act amounting to an eviction.* Where a lessee is unable to gain possession because of the refusal of third persons, also claiming as lessees, to deliver it, and the landlord then authorizes the lessee to prosecute ejectment in the landlord's name to secure possession, an abandonment of the lease by mutual consent will be inferred, and it cannot be availed of by the third person as a defense. * * * While a tenant of premises for a term cannot divest himself of his right to possession or terminate his liability for the stipulated rent therefor by a mere abandonment of the premises without the consent of the lessor, a resumption of possession of the premises by a landlord with the acquiescence of a tenant amounts to a surrender of a leasehold by operation of law. A mere statement by the lessor to the lessee that he may move out if he desires, does not become of binding effect in terminating the leasehold until a surrender and acceptance of possession have actually been made. Nor are the mere delivery of the keys of the premises to the lessor and their retention sufficient to effect a surrender by operation of law, unless that appears to be the intention of both parties. An acquiescence in the surrender or abandonment of the premises is perhaps best evidenced by the lessor's taking possession of the property and assuming over it again all the authority of an owner in possession." (Italics added.)

But those are not the only acts which may constitute an acceptance. The general test is as stated in 32 American Jurisprudence, Landlord & Tenant, section 901:

"A surrender of demised premises occurs only through the consent or agreement of the parties evidenced either by an express agreement or by an unequivocal act *inconsistent with the terms of the lease and with the relation of landlord and tenant, or by acts so inconsistent with the terms of the lease as to imply in law an agreement to surrender,* and hence, an acceptance by the landlord is requisite." (Italics added.)

And, as expressed in the quotation from California Jurisprudence, any act amounting to an eviction is sufficient. The landlord's covenant in the instant case, not to permit any space in the same building to be used for a furniture store, if it has been violated by the lessor, if that covenant goes to the heart of the lease, if its violation is inconsistent with the terms of the lease and the relation of landlord and tenant, or if it amounts to an eviction, then the breach of it would show an acceptance of the abandonment and a completed surrender. That is true because, if the landlord chooses, as he does here, to rely upon the lease and recover the rent, he must not do anything to interfere with the tenant's rights thereunder. It would not be doubted that if the landlord demolished the building on the premises there would be an acceptance of the abandonment. The remodeling of a building and making extensive repairs thereon has been considered an acceptance by the landlord of the tenant's abandonment. 32 Am.Jur., Landlord & Tenant, § 907. The violation of the covenant here in question is an act which constitutes an acceptance; at least it is sufficient from which the trial court could have implied an acceptance and surrender. That is true because this court has held that such a covenant goes to the essence of the lease, that the covenant to pay rent is dependent upon the continued observance of it. In Medico-Dental Bldg. Co. v. Horton & Converse, 21 Cal.2d 411, 418, 132 P.2d 457, 462, this court in dealing with such a covenant stated:

"It is plaintiff's position that a lease is a conveyance as distinguished from a contract, so that any covenant on the part of the lessor is independent of the lessee's obligation to pay rent and each party has his remedy for breach of covenant in an action for damages. While it is true that a lease is primarily a conveyance in that it transfers an estate to the lessee, it also presents the aspect of a contract. Pollock on Contracts, Third Am. Ed., p. 531. * * * Thus, the parties recognized in plain terms the essential interdependence of their obligations.

"It is an established rule that those covenants which run to the *entire consideration of a contract are mutual and dependent.* * * * *Undoubtedly the restrictive covenant in defendant's lease was of such a nature.* * * * The correlation of these facts with the express provisions of the lease above noted compels the conclusion that the restrictive covenant *was not incidental or subordinate to the main object of the lease, but went to the whole of the consideration, and that as such it must be deemed a dependent covenant.* * * * But where, as here, the covenant of the lessor is of such character that *its breach will defeat the entire object of the lessee in entering into the lease, such as rendering his further occupancy of the premises a source of continuing financial loss* incapable of satisfactory measurement in damages, it must be held that the covenant goes to the root of the consideration for the lease upon the lessee's part." (Italics added.)

There can, therefore, be no escape from the proposition that the entire purpose of the lease has failed because of the landlord's breach of the covenant and it is as much an acceptance of the tenant's abandonment, and hence a surrender, as a demolition of a portion of the premises. Moreover, since any act which would constitute an eviction of the tenant by the landlord will constitute an acceptance of the tenant's abandonment. Triest & Co. v. Goldstone, supra; Welcome v. Hess, supra, if the breach of the covenant in question is an eviction, we have an acceptance. That it is an eviction follows from the rule that: "If, for example, the landlord, after vacating premises to the plaintiff, rents adjoining premises or a part of the same premises to other tenants for the conduct of a business or for other purposes naturally destructive of the plaintiff's business or his beneficial enjoyment of his premises, the latter may claim a constructive eviction." 32 Am.Jur., Landlord & Tenant, § 263. Inasmuch as the tenant's rights are as above outlined there is no question about his being entitled to a declaration that the lease is cancelled. Assuming that is an equitable remedy he cannot be deprived thereof because he was in default since the act of the landlord completed a surrender upon which he could lawfully rely.

The clause in the lease that upon default in the payment of rent "the lessor may, at his option and without notice to lessee, relet the same for such rent and upon such terms as he may see fit," and lessee agrees to pay any deficiency, does not affect the foregoing conclusions for many reasons. It is not a situation where the lessor having the power to relet has any superior power embraced therein including the power to rent premises in the same building to be used for a furniture business. To so reason would give to that clause a right on the part of the lessor to breach the covenant against renting to a competing business. Obviously, that is not the purpose of that clause. It is merely a method of mitigating the damages which may be followed by the lessor if he chooses. *Here he has not chosen to follow it. He has not and does not purport to exercise that right. On the contrary he maintains that his conduct did not constitute a breach of the competitive business covenant.* How can it be said that he is pursuing that right when *the facts are all to the contrary?* The lessor by availing himself of the right under that clause is not the only one to benefit. The lessee also may well benefit because the recovery against him would be reduced from the full agreed rental to the difference between the agreed rental and that obtained on a reletting.

Suppose the lessor instead of breaching the competing business covenant had gone into possession himself or demolished, remodeled, or sold the premises. Certainly the lessee could successfully assert an acceptance of his abandonment. The lessor could not escape the effect of such conduct on the pretext that he was *relctting* the premises, because obviously he was not. His acts speak louder than his assertions. Likewise, in the instant case the lessor's breach of the covenant against competition is wholly irreconcilable with a reletting on behalf of the tenant. If there is a reletting it should be under the same conditions, that is, with no competing business in the same

building, as under the lease. Another way of stating the matter might be to say that the lessor by breaching the covenant against a competing business or assuming possession of the premises or remodeling them, *exceeded his authority under the re-letting clause of the lease resulting in a surrender.* In Siller v. Dunn, 103 Cal.App. 154, 284 P. 232, the lease contained a re-letting clause. The lessee abandoned the premises. The court states at page 155 of 103 Cal.App., at page 233 of 284 P.:

"Notwithstanding this provision in the lease [the right of the lessor to relet], it is the contention on the part of the defendants [lessees] that the testimony of the plaintiff [lessor] established beyond question that by his own acts he had accepted a surrender of the lease, had repossessed himself of the premises in his own right and for his own uses and purposes, and had by operation of law released the defendants from further liability for the payment of rent. The lease in question provided a certain stipulated rental and also specified the purposes for which the premises were to be used, to wit, as a furniture and furnishing goods store, and that no other or different use of the said premises be made by the lessee without the written consent of the lessor first had and obtained. * * * On or about the 8th day of August, 1927, the Dunn-Brett Furniture Company delivered to the plaintiff the key to the premises described in the lease, and at the time of the delivery of the key the plaintiff handed to the president of the corporation a notice to the effect that he would still hold the corporation liable for rent until the premises were released. It is further shown by the testimony that, prior to the surrender of the premises by the furniture company and the delivery of the key to the premises to the plaintiff, the plaintiff had for about three months made some effort to find another tenant for the premises; the plaintiff having been informed by the officers of the furniture company that the business of the company was in failing circumstances, and that the company would not be able long to continue in business. There does not appear to be any testimony in the transcript to the effect that the plaintiff made any effort to obtain a tenant for the premises after the surrender thereof by the furniture company on the 8th day of August, 1927, or during any of the time for which judgment is asked in this case on account of rentals alleged to be due, nor does the testimony show that the efforts were by the plaintiff to relet the premises, or upon what terms they were offered, but from matters hereinafter referred to we do not deem this material. The testimony shows that, at or about the time the furniture company gave up the key to the premises, the plaintiff put into execution an idea or thought that he had entertained in relation to converting the premises into an hotel. His language was: 'To throw it into an hotel so we could rent it.' It further appears from the transcript that on or about the 17th day of August, 1927, the plaintiff began the remodeling of the six-story building herein referred to so as to make it available for hotel purposes, and that this remodeling was finished on or about the 15th day of February, 1928; the period of time for which the plaintiff claims rent being from the date when the defendant surrendered the premises up to the 15th day of February, 1928, when the same were ready for occupancy for hotel purposes. It further appears from the transcript that the cost of remodeling the premises was somewhere between $50,000 and $60,000; that the work of remodeling required approximately six months. The plaintiff's testimony is to the effect that during the time of remodeling the premises it would have been impossible for any tenant to have taken possession thereof. * * * It does not appear to be questioned that the remodeling of the building does not come within the terms of repairs mentioned in the lease, nor does it appear to be questioned that the character of the remodeling of the building precluded the possibility of its being used as a furniture and furnishing store. Upon the testimony of the plaintiff showing that the remodeling of the building was not in the nature of repairs, was such as to preclude the further use of the premises for the purposes mentioned in the lease, and *that the plaintiff intended to and did take possession of the premises for the purposes of converting them to a different use from that mentioned in the lease, and was doing so not for the benefit of the lessee, but for and on his own account, a nonsuit was granted.* * * * We think the testimony is conclusive that the *plaintiff took possession of the premises solely as owner in his own right and not in furtherance of any of the covenants of the lease,* and that it was in execution of a plan to convert the premises into an hotel and change its uses entirely from that limited in the lease.

"The law seems to be pretty well settled that, upon the surrender of leased premises by a lessee before the expiration of the term provided for in the lease, the owner of the premises has three remedies: First, he may do nothing and sue the lessee as each installment of rent becomes due, or for the whole thereof when it becomes due; second, he may treat the lease as terminated and retake possession of the premises and use the same for his own purposes as the exclusive owner thereof; or, third, he may retake possession of the premises for the tenant's account and hold the tenant in damages for the difference between the rentals provided for in the lease and what, in good faith, he was able to procure from a reletting. Only one question is involved upon this appeal, and that is, notwithstanding the clause in the lease which we have quoted, the plaintiff abandoned the lease and by his actions is now estopped to maintain this action.

"In the case of Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am.St.Rep. 145, it was held (quoting from the syllabus) that: 'Where tenants leased a building for a term of years as a store, and abandoned the premises after one year's occupation thereof, sending the keys to the landlord, the acts of the landlord in taking possession of the premises, and reletting them for a period longer than the remainder of the term, without notifying the original lessees that he should so do on their account, and without notifying them that he should continue to hold them liable for the rent, show an acceptance by the landlord of the surrender, and he is estopped from denying it.' The opinion in that case shows what the landlord may do, as we have hereinbefore stated. It also shows that during the unexpired portion of the term of the lease *the lessee has a right to resume possession of the premises unless the landlord has done something which is equivalent to the acceptance of a surrender of the lease.* * * In Bernard v. Renard, 175 Cal. 230, 165 P. 694, 3 A.L.R. 1076, it is held (quoting from the syllabus in 3 A.L.R. 1076): 'Acceptance of a surrender of a lease will be effective if, after the lessee's refusal to take possession or be bound by the lease, the lessor assumes absolute control of the property and attempts to let it without any notice to the lessee that he is not acting in his own right.' In Voss v. Levi, 33 Cal. App. 671, 166 P. 359, 361, the court, in its opinion, used the following language: 'Such acceptance of surrender was evidenced only at the time the plaintiff, on the 19th day of January, 1915, took possession of the premises and proceeded to have them remodeled. That an acceptance of surrender was then completely had we have no doubt.' In Rehkopf v. Wirz, 31 Cal.App. 695, 161 P. 285, 286, in considering the question of the acceptance of a surrender of a lease, it is said, referring to the right of the lessor to relet the premises and hold the tenant liable: 'But a lessor who chooses to follow that course must in some manner give the lessee information that he is accepting such possession for the benefit of the tenant, and not in his own right and for his own benefit. If the lessor takes possession of property delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant'—citing a number of authorities. And further: 'An unqualified taking of possession by the lessor and reletting of the premises by him as owner to new tenants is inconsistent with the continuing forces of the original lease. * * * If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant.' There can be no difference in principle between the acts referred to in this case, which amounts to a release of the tenant, and the circumstances shown by the evidence upon the record in this case. *The remodeling of the premises by the owner cannot be held to be anything other than a taking of possession of the premises exclusively by the landlord or owner for his own uses and purposes as such owner.* As we have stated, the testimony in this case shows that the premises were rendered wholly untenantable during the period for which rent is claimed, and also that the premises have been rendered wholly unusable for the purposes mentioned in the lease to the Furniture Company.

"In the case of Meeker v. Spalsbury et al., 66 N.J.L. 60, 48 A. 1026, 1027, the court, in considering a lease having in it a provision relative to repairs similar to the one under consideration, and where it was claimed that a surrender had been accepted by operation of law, used the following language: 'He (referring to the landlord) was to have the right to enter and make such repairs as should be necessary for the preservation of the premises. When the plaintiff *did more than that,* he conclusively evidenced his intention to hold possession on his own account, thereby accepting the tenants' abandonment as a surrender.' The case of Meeker v. Spalsbury, supra, is

referred to and approved in the case of Fink v. Browe Co., N.J.Ch., 99 A. 926. To the same effect in principle is the case of In re Schomacker Piano Forte Mfg. Co., D.C., 163 F. 413. In 15 California Jurisprudence, 797, § 214, the rule is stated that making material alterations in the leased premises amounts to an acceptance of the abandonment of the premises by the lessee. We do not deem it necessary to cite or quote from other authorities, as the foregoing show the rule well settled that when the landlord remodels premises so as to make them unavailable for the purposes for which they were leased, and also renders them untenantable during the period of remodeling, that rent for such period cannot be collected, for the reason that acceptance of the surrender of the lease will be inferred as a matter of law, and the landlord estopped from asserting the contrary. The respondents do not question the contention of the appellant that a clause in a lease, such as we have set forth herein, will be upheld where the parties have acted consistently therewith, but only contend that the plaintiff's evidence conclusively establishes that his acts were not consistent therewith, and that by his taking unqualifiedly possession of the premises, and as he says, practically dismantling five of the floors thereof and remodeling the building so as to fit it for an entirely different use and purpose, establishes beyond controversy in law an acceptance of the abandonment of the lease." (Italics added.)

Likewise, in the instant case the lessor has done more than relet the premises (he has not done that at all) he has committed an act which is unequivocally opposed to the continuance of the lease. See, also, State Guaranty Corporation v. Richardson, 9 Cal.App.2d 287, 49 P.2d 606; In re Goldburg's Estate, 148 Misc. 607, 266 N.Y.S. 106; Bonsignore v. Koondel, 134 Misc. 344, 235 N.Y.S. 453; First Stamford Nat. Bank & Trust Co. v. Pierce, 161 Misc. 756, 293 N.Y.S. 75.

For the foregoing reasons the judgment should be affirmed.

SCHAUER, Justice (dissenting).

I dissent. The majority opinion, in my view, transgresses fundamental rules of both law and equity. It sets a precedent which certainly is potentially inimical to the interests of every owner of income property in California of a class similar to that here involved and, by reason of the character of the rules which are breached, may well affect other types of income property. Briefly, the majority opinion grants equitable relief—full release from the executory obligation to pay rent, evidenced by a written lease—to a defaulting tenant who had abandoned the leased premises, had failed to pay the rent, and had unconditionally renounced his obligations under the lease while the lessor was in no way in default.

The grounds upon which the majority place their conclusion are: (1) that the lessor breached a restrictive covenant to protect the lessee against competition in the same building by renting an adjoining store in that building for a somewhat similar business *after the lessee had retired from his business, had ceased paying rent, and had abandoned the premises,* and (2) that by so renting the adjoining store the lessor either constructively evicted the tenant or accepted his abandonment of the lease and released him from his obligations thereunder.

The majority opinion in words concedes that "The plaintiff, being in default under the lease, was not entitled to rescind without curing his default by tendering the amount due to the time of the claimed breach by the lessor. * * * He therefore had not effected rescission of the lease and the trial court correctly concluded that he was not entitled to prevail on his complaint." But having made such concession it proceeds to completely disregard the effect of it. The majority say that "The question of the correctness of the trial court's findings and conclusions [for the plaintiff] is therefore resolved by a consideration of the issues raised by the defendant's cross-complaint and the plaintiff's answer thereto." This seems to me to be but a quibble in that the controlling issues "raised by the defendant's cross-complaint and the plaintiff's answer thereto" are precisely the same as those raised by the complaint and answer. In fact the plaintiff's answer to the cross-complaint *incorporates therein all the allegations of his complaint and the relief granted him by the judgment is, as far as it goes, precisely the relief sought in his complaint.* To hold that "the trial court correctly concluded that he was not entitled to prevail on his complaint" but that he was entitled to prevail on his answer to the cross-complaint begs the question. As previously stated the only relief awarded him by the judgment is that sought in the complaint.

As to the suggestion that the lessor constructively evicted the tenant after the tenant had previously abandoned the premises and unconditionally renounced his obligations under the lease, it seems to me that the very statement of the proposition sufficiently exposes its infirmity. How can a tenant be evicted from that which he has already abandoned? And the contention that defendant accepted the tenant's abandonment of the premises and released him from his obligations under the lease by renting an adjoining store for a somewhat similar business *after the tenant had ceased doing business and had abandoned the premises and renounced his obligations,* seems likewise devoid of merit in law and justice, as hereinafter discussed more fully.

In order that there may be no misapprehension or uncertainty as to the precise facts involved it seems necessary to relate them with particularity. This is a suit in equity by a lessee to rescind or terminate a written lease of a portion of a store building. The demised premises had been used to house a furniture store. The so-called rescission is sought upon the ground that the defendant lessor breached a restrictive covenant not to "permit any space * * * in the same building * * * to be used or occupied for the purpose of conducting therein a furniture store without the consent in writing of the Lessee first had and obtained." Defendant answered and cross-complained for delinquent rent and attorney's fees and plaintiff, by way of answer (amended) to the cross-complaint and as an equitable defense thereto, incorporated in such answer all the allegations of his complaint and in addition alleged "that on or about the first day of February, 1941, plaintiff abandoned the lease alleged in the complaint * * * and thereupon abandoned the premises described in said lease and that on the first day of May, 1941 cross complainant accepted said abandonment of said lease and of said premises; and by said acceptance of said abandonment all liability of plaintiff under said lease ceased except as heretofore admitted by plaintiff." The admissions referred to (not wholly consistent as to dates with the allegations above quoted) contain an express concession by the plaintiff that he had not paid the rent accruing February 1, 1941, or subsequent thereto and also that he *owed* the rent accruing up to *April 18, 1941.* In such answer to the cross-complaint plaintiff further alleged that he "offers to pay the same," referring to the admittedly due rent, but denied that he owed, and admitted that he *refused to pay, any rent for any period of time subsequent to April 18, 1941;* and alleged also "that on or about the first day of May, 1941 defendant and cross complainant evicted plaintiff from the premises * * * and thereby terminated all liability of plaintiff to cross complainant except as hereinbefore admitted."

The trial court made findings of fact, which will be more particularly noted hereinafter, and gave judgment substantially as prayed in plaintiff's complaint and affirmative answer to cross-complaint, decreeing that "the lease referred to in plaintiff's complaint between plaintiff and defendant was terminated on the first day of May, 1941," and awarding defendant only the rent accruing "for the months of February, March and April of 1941, together with legal interest," $300 attorney's fees and costs. Defendant appeals, specifying that its appeal is taken from those portions of the judgment decreeing the termination of the lease, denying recovery of rent accruing on and subsequent to May 1, 1941, and limiting recovery of attorney's fees to the sum of $300. It is my conclusion, for the reasons hereinafter set forth, that the appeal is well taken.

The majority rely, for affirmance of the judgment, primarily upon an asserted breach of the restrictive covenant above quoted. Such covenants (to protect a lessee against competition) are valid and a substantial and material breach thereof, persisted in by the lessor after reasonable notice and demand for discontinuance, will justify the lessee in "rescinding" (terminating) the lease and will relieve him from further obligation thereunder. (Medico-Dental Bldg. Co. v. Horton & Converse (1942), 21 Cal.2d 411, 132 P.2d 457.) This rule is based upon the proposition that covenants "not to lease" and "to pay rent" are mutually dependent (Ibid., 21 Cal.2d at pages 418, 419, 132 P.2d at page 462). If these covenants are truly mutually dependent it is obvious that a party in default on his own obligation has no right to demand performance of the correlative obligation. By the same token that a lessor who has first breached substantially a restrictive covenant may not require a lessee (who elects to vacate the premises) to pay rent, so likewise is it true that a lessee who first defaults and refuses to pay rent may not require performance of the restrictive cov-

enant. The principle underlying this proposition is applied to matters of law (see Civ.Code, §§ 1439 and 1440, hereinafter quoted and discussed) and it has even more basic and universal application where equitable relief is sought. Equity will not "aid him who is guilty of breach of contract connected with the transaction concerning which he asks for a decree in his favor." (DeGarmo v. Goldman (1942), 19 Cal.2d 755, 764, 123 P.2d 1, 6; Harrison v. Woodward (1909), 11 Cal.App. 15, 24, 103 P. 933.) The admissions and averments of the plaintiff in his pleadings, the findings of the trial court, and the evidence all unite to bring this case within the operation of the rule stated.

The record discloses that the lease between plaintiff and defendant was executed on June 20, 1938. By it defendant demised to plaintiff for a term of four years a storeroom in a building in Oakland to be used as a furniture store. The lessee covenanted to pay "the total rent or sum of $15000.00 plus 5% of the gross sales price of all merchandise sold in said premises and also on sales originating in said premises but consummated elsewhere, in excess of $90,000.00 annually." Provision was made for the payment of the rent in installments; the lessee agreed "*not * * * to allow any sale of property by auction, except upon retiring from business,* on said premises, * * * that in the event said Lessor shall bring action at law against said Lessee to enforce the payment of any rent due or to enforce any of the terms or conditions hereof * * * then said Lessee agrees to pay to said Lessor attorney fees adjudged reasonable by the court * * and * * * should the Lessee abandon *or vacate* said premises during the term of this lease, the Lessor may, at his option and without notice to Lessee, relet the same for such rent and upon such terms as he may see fit and * * * Lessee agrees to satisfy and pay any deficiency and to pay the expense of such releting and collecting." (Italics added.) The only covenant upon the part of the defendant lessor which is material here is the previously mentioned one whereby it agreed that it would "not during the term of this lease * * * permit any space or store room in the same building * * * to be used or occupied for the purpose of conducting therein a furniture store without the consent in writing of the Lessee first had and obtained."

The trial court found the facts as to execution of the lease and entry into possession by plaintiff; "that in the month of January, 1941 plaintiff did retire from said furniture business on said premises and plaintiff did in and during said month of January, 1941 hold a public auction in said premises at which auction plaintiff sold and disposed of all plaintiff's furniture and personal property connected with the plaintiff's said furniture business on said premises and thereafter plaintiff discontinued his said furniture business on said premises; that plaintiff failed to pay the rent of said premises provided in said lease to be paid February first 1941 and plaintiff has paid none of the rent provided in said lease to be paid each month during the life of said lease following said first day of *of* February, 1941; that after holding said auction and on the first day of February, 1941 plaintiff abandoned said leasehold and the premises described in said lease."

The court further found that the restrictive covenant was "a material and essential part of said lease. * * * That plaintiff did not at any time, in writing or otherwise, consent that any space * * * be used or occupied by any other tenant * * for the purpose of conducting therein a furniture store; that on the 1st day of May, 1941 defendant rented a store in said building to William Smith for the purpose of selling linoleum and kindred products therein; * * * that on the said first day of May, 1941 said Smith entered the store * * * and commenced the sale of linoleum and kindred products therein and has continuously thereafter, to and including the trial of this action, persisted in the advertising and sale to the general public of linoleum and kindred products from said store * * *; that by said renting to said Smith said defendant on the first day of May, 1941 accepted the abandonment by plaintiff of the premises leased to plaintiff under the terms of said lease and evicted plaintiff therefrom; that during the latter part of March, 1941 and the early part of April, 1941 plaintiff did undertake to commence the reestablishment of his furniture business in the premises described in said lease *but plaintiff did on the 18th day of April, 1941 abandon said premises* leased to plaintiff upon receiving information that Smith was to use said adjoining store in said building for the same of linoleum and kindred products. * * * *that it is true that by conducting an auction in January of 1941 plaintiff did give notice to the de-*

fendant that plaintiff was retiring from business and discontinuing the conduct of a furniture store in the leased premises, but prior to the granting to said William Smith of any right to possession of said store * * * and during the latter part of March, 1941, plaintiff was engaged in re-establishing the furniture business of plaintiff in the premises * * *; that said lease was terminated May 1, 1941 and it is true that defendant violated the covenant of quiet enjoyment and evicted plaintiff on said first day of May 1941 and did on said first day of May, 1941 accept the abandonment by plaintiff of the premises." (Italics added.)

This suit was commenced on October 18, 1941, at which time plaintiff was in arrears on the rent, if his obligation under the lease was not terminated, in the sum of $3,150. In any event he admitted that he owed, and that there was due and payable to defendant, the rent which accrued on February 1st, March 1st, and on April 1st, for the period up to April 18, 1941. As to rent for any period of time subsequent to April 18th, plaintiff alleged in his amended answer to the cross-complaint that "no rent and no installment of rent mentioned in said lease is payable or unpaid or owing * * * for any period of time following April 18, 1941." Paragraph III of the defendant's cross-complaint pleads the rent reserved under the lease and specifically alleges that plaintiff "refused to pay said rent or any part thereof accruing on February 1, 1941, or at any time thereafter." Plaintiff's answer to this allegation is as follows: "Answering paragraph III of said cross-complaint, plaintiff admits the allegations therein contained save and except that plaintiffs *refusal to pay rent* dates from April 18, 1941 and not February 1, 1941, as alleged therein." (Italics added.) It thus becomes apparent that plaintiff unconditionally refused to pay any rent for any period of time subsequent to April 18, 1941. Under these circumstances he was not entitled to the aid of equity to relieve him from the obligation which he had unequivocally renounced unless a right to renounce it had already matured on April 18, 1941. In this connection it will also be remembered that the trial court found that "plaintiff did on the 18th day of April, 1941 abandon said premises leased to plaintiff upon receiving information that Smith was to use said adjoining store in said building for the same of linoleum and kindred products."

The tenancy of Smith, which was negotiated during the early part of the month of April, was to commence on May 1, and was on a month to month basis. It could have been terminated by the defendant at any time on not more than one month's notice to Smith. At the time plaintiff learned of the plan to rent the store to Smith he (plaintiff) was not actually conducting a furniture business. He had retired from that business. There is no finding, and no evidence in the record which would support a finding, that plaintiff notified defendant that he was contemplating or preparing re-establishment of the furniture business. He did not at any time demand that defendant desist from the plan to rent the adjoining store to Smith. He abandoned the premises on April 18th, according to the finding of the trial court, and *thereafter* gave notice of unequivocal renouncement of his obligations under the lease. His notice reads, "lessee hereby gives notice that he will no longer be bound to the provisions of the lease on his part to be performed; that since telephonic notification to you of the foregoing, given April 21, 1941, lessee has moved his stock of furniture from, and has given up possession of, the said premises."

It indisputably appears from the foregoing recital that plaintiff lessee undertook to absolutely and finally terminate the lease without previous notice to the lessor, without curing his own prior and continuing default, without an offer to pay the overdue rent and in the face of his unconditional refusal to pay rent. He was not actually engaged in the furniture business in April, 1941. He had retired from that business in the preceding January. He was not then in a position where he could complain of competition in a similar business. (See Medico-Dental Bldg. Co. v. Horton & Converse (1942), supra, 21 Cal.2d 411, 428, 132 P.2d 457.) The defendant lessor had notice that plaintiff had retired from the furniture business; it apparently was not given notice at any time prior to the trial of the suit (at least not prior to plaintiff's abandonment of the premises and unconditional renouncement of his obligations under the lease) that plaintiff had ever formed an intention to reestablish a furniture business in the leased premises. The amended answer to the cross-complaint upon which the suit went to trial contains plaintiff's sworn declaration, twice repeated, "that this cross defendant did on or about *the first day of*

February 1941 abandon the lease alleged in the complaint * * * and referred to in cross complainant's said Cross Complaint and thereupon abandoned the premises described in said lease and that on the first day of May, 1941 cross complainant accepted said abandonment." (Italics added.) The plaintiff's pleadings contain no suggestion that he ever contemplated, or notified defendant that he contemplated, reestablishing a furniture business in the leased premises.

The discontinuance of plaintiff's business was a matter of concern to defendant. The lease called for a stated cash consideration to be paid defendant lessor "plus 5% of the gross sales price of all merchandise sold in said premises * * * in excess of $90,000.00 annually." Such lease also authorized the lessor, in the event that lessee "should * * * abandon *or vacate* said premises during the term of this lease," to relet the premises *without notice to lessee.* Certainly under such circumstances the lessor had a right to rent the adjoining storeroom to Smith on a month to month basis for the conduct of any lawful business.

The finding that plaintiff did "undertake to commence" the reestablishment of a furniture business in the premises in the absence of a finding that defendant had notice or knowledge of such intention or undertaking is immaterial and is insufficient upon which to predicate the equitable relief releasing him from his obligation to pay the contracted rent. He did not perform the obligations upon his part to be performed and he did not offer to perform them. On the contrary he unconditionally renounced his obligations while he was in default. Under no heretofore known principle should equity aid him under such circumstances.

There is no evidence whatsoever in the record to support the finding that defendant on May 1, 1941, evicted plaintiff from the premises. Whether plaintiff be deemed to have abandoned the lease and premises on February 1, 1941, as alleged in his pleadings and found by the court, or on April 18th, as also inconsistently found by the court, is immaterial. In either event he had abandoned the premises prior to May 1st, and hence could not then have been evicted by defendant. (Cf. Universal Milk Co. v. Wood (1928), 205 Cal. 751, 756, 272 P. 745.) Obviously, the renting of the adjoining store to Smith under the circumstances shown did not constitute an eviction of plaintiff from the premises demised to him or a release of plaintiff from the obligations of the lease. The court also found that defendant on May 1st, did "accept the abandonment by plaintiff of the premises described in said lease." The mere circumstance that defendant rented the adjoining storeroom to Smith for "the sale of linoleum and kindred products," while it may show cognizance of the fact that plaintiff had retired from the furniture business, does not show an acceptance of plaintiff's abandonment of the premises in the sense of releasing him from the obligations of the lease. The substance of the evidence precludes a finding or conclusion of law that defendant released plaintiff from such obligations.

It may well be that if plaintiff had paid or offered to pay the delinquent and accruing rent, had given notice to defendant that he, plaintiff, intended to reestablish his business in the leased premises as of some definite date, and demanded that defendant prior to such date terminate the renting to Smith (see Strong v. Morrison (1927), 87 Cal.App. 169, 171, 261 P. 1051), plaintiff would have been entitled to declare a breach of the lease by defendant and secure its cancellation or termination in equity if defendant failed to accede to such demand. But plaintiff had taken none of those steps at the time he gave notice to defendant of rescission and forfeiture or at the time he sued for equitable relief, and no valid reason appears why defendant should be obliged in the meantime to forego the rental received from Smith, on pain of forfeiture of the lease of his defaulting tenant—the plaintiff.

Plaintiff has urged that equitable principles are inapplicable because, he asserts, "The judgment awards no relief in equity. * * * No decree or judgment of rescission was given." Although by its judgment the trial court did not declare the lease rescinded ab initio it did decree the same forfeited or terminated as to executory provisions including the obligation to pay all rent accruing subsequent to April 30, 1941. This is an equitable decree (it has been termed "rescission"; see Medico-Dental Bldg. Co. v. Horton & Converse (1942), supra, 21 Cal.2d 411, 432, 132 P.2d 457) and it should stand or fall by the same principles which govern rescission, insofar as the basic right to invoke equity is concerned.

By both legal and equitable principles plaintiff was bound to perform the obligations on his part to be performed before

he could claim relief against defendant. As stated in Johnson v. Moss (1873), 45 Cal. 515, 518, "The plaintiff then was the first to violate the agreement, and if * * he suffered damage, we do not see how he can be heard to complain of it. He should have performed his part of the agreement before insisting upon performance by the defendant." Section 1439 of the Civil Code provides that "Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able and offer to fulfill all conditions concurrent so imposed upon him on the like fulfillment by the other party, except as provided by the next section [hereinafter quoted]." Obviously, plaintiff did not "offer to fulfill all conditions concurrent * * * imposed upon him." On the contrary he was, by his own sworn admissions and averments, in default on such conditions at all times concerned up to and including the time of trial. (Cf. Universal Milk Co. v. Wood (1928) supra, 205 Cal. 751, 272 P. 745.) According to such sworn admissions and averments he abandoned the premises and the lease on February 1, 1941, and failed to pay any rent thereafter. He again abandoned, or reaffirmed abandonment of, the premises on April 18, 1941, and six days later notified the defendant in writing that he would "no longer be bound to the provisions of the lease on his part to be performed." This notice was unconditional. It contained no offer to pay delinquent rent or accruing rent. It set forth no demand that defendant discontinue the plan to rent the adjoining storeroom to Smith commencing the following May 1st. It contained no notice that plaintiff intended to reestablish a furniture business in the leased premises or elsewhere. Obviously, defendant was not in default for any breach of the restrictive covenant at the time of plaintiff's abandonment of the premises and unconditional renouncement of his obligations whether the abandonment be regarded as having taken place on February 1st, or April 18th.

The restrictive covenant in question was an agreement to protect plaintiff against *competition* in the same building in the same line of business. Since plaintiff had retired from business not later than in the preceding January and since it is true, as the trial court found, "that by conducting an auction in January of 1941 plaintiff did give notice to the defendant that plaintiff was retiring from business and discontinuing the conduct of a furniture store in the leased premises," it is apparent that plaintiff could not place himself in a position where he could rightfully complain of the month to month tenancy of Smith without first offering to pay both the delinquent and the accruing rent and giving defendant reasonable notice that he intended to reestablish and resume conduct of a furniture store at some definite date. After plaintiff had retired from business and ceased paying rent the covenant to protect plaintiff against competition in the furniture business in the same building became immaterial and would so remain until and unless plaintiff offered to cure his default, and resume the payment of rent, and notified the defendant that he intended to reestablish a furniture business in the premises. Plaintiff, by giving notice that he would not perform the conditions on his part to be performed (at a time when defendant was not in default) brought himself and defendant within the purview of section 1440 of the Civil Code, which provides that "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." (See, also, Twomey v. People's Ice Co. (1884), 66 Cal. 233, 5 P. 158; Dunn v. Daly (1889), 78 Cal. 640, 644, 21 P. 377; Wood, Curtis & Co. v. Seurich (1907), 5 Cal.App. 252, 253–255, 90 P. 51; Ross v. Tabor (1921), 53 Cal. App. 605, 612, 200 P. 971; Rathbun v. Security Mfg. Co. (1927), 82 Cal.App. 793, 796, 256 P. 296; State Athletic Com'n v. Massachusetts Bonding, etc., Co. (1941), 46 Cal.App.2d 839, 842, 117 P.2d 80; 6 Cal. Jur. 488, 489, § 288.) Furthermore, it is to be remembered that the relief sought by plaintiff both in his complaint and in his answer to the cross-complaint is equitable and that "It is elementary that a party to an agreement may not rescind it while himself in default in respect to a material part thereof." (Gavina v. Smith (1944), 154 P.2d 681; North American Dredging Co. v. Outer Harbor, etc., Co. (1918), 178 Cal. 406, 413, 173 P. 756; see, also, State of California v. McCauley (1860), 15 Cal. 429, 454, 457, 458; Fairchild, etc., Co. v. Southern Ref. Co. (1910), 158 Cal. 264, 273, 110 P. 951; California Sugar, etc., Agency v. Penoyar (1914), 167 Cal. 274, 280, 139 P.

671.) And under the circumstances of this case, no actual damage whatsoever having been incurred by plaintiff, equity should not deny to defendant a reasonable opportunity, after proper demand, to rectify the asserted breach. (See 10 Cal.Jur. 492, § 34; 12 Cal. Jur. 633-634, § 3.)

It has also been suggested, on behalf of plaintiff, that a letter written to his attorney by defendant's attorneys on April 29, 1941, constituted an actual, a constructive, or an anticipatory breach of the restrictive covenant. But this letter was not written until *after* plaintiff had defaulted, had abandoned the premises, and had unconditionally renounced his obligations. It could not operate retroactively to give plaintiff as of April 18 a right of action or of affirmative defense or of equitable disavowal of obligations which he did not then possess. Furthermore, such letter does not purport to declare, nor does it warrant the inference, that the defendant would have declined to respect its obligations to protect the plaintiff against competition in the building if the plaintiff had cured his default, retracted his renouncement of obligations, and notified defendant that he intended to reestablish a furniture business in the leased premises. Relative to the Smith tenancy the letter merely states *as factual matters* that "We are advised that the new tenancy that has been created affecting one of the stores in the same building does not *in fact* authorize the new tenant to conduct therein a furniture store or to conduct any business therein except the business of selling linoleum. In this connection we are also advised that even while your client *was* in business in the leased premises *he did not handle linoleum.* We are advised further that your client *wholly discontinued business at the leased premises before the new tenancy was created.* * * *" Italics added.) Such statements relate wholly to a factual situation, which, if erroneously stated, could have been corrected. They do not dispute the legal obligation of the lessor to protect the lessee against competition in the building during any period while lessee might be conducting a furniture business in the leased premises. Such letter also negatives any conclusion that the defendant intended to release the plaintiff from his promises; it states specifically that "The lessor insists that the lessee is still bound by the terms of the lease and that the lessee is obligated to continue to pay the rent provided for the lease." Under the conditions existing on April 29, when the letter was written, it cannot be held that any statement in that letter constituted or evidenced a breach of the restrictive covenant, either actual anticipatory, or constructive.

Defendant contends, further, that inasmuch as the trial court limited defendant to only three months' rental—in the sum of $1,050—the award of $300 as attorney's fees was granted for the recovery of that amount, and that should additional rent be found to be due then an increased award of attorney's fees should follow. Plaintiff asserts that inasmuch as the defendant lessor neither brought nor instituted this action, but merely cross-complained in the suit filed by plaintiff, he should have been awarded no attorney's fees. However, as stated in Pacific Finance Corp. v. Superior Court (1933), 219 Cal. 179, 182, 25 P.2d 983, 90 A.L.R. 384 (see also Millar v. Millar (1921), 51 Cal.App. 718, 722, [197 P. 811]), "cross-actions * * * are still distinct and independent causes of action, so that when properly interposed and stated the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant." It therefore appears that plaintiff's action in filing its cross-complaint entitled it to attorney's fees upon the recovery of rentals from plaintiff lessee, within the hereinabove quoted provision of the lease.

In my opinion the portions of the judgment appealed from, including the portion limiting recovery of attorney's fees to the sum of $300, should be reversed.

TRAYNOR, J., concurred.

Rehearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

25 Cal.2d 605

LEET v. UNION PAC. R. CO. (two cases).
L. A. 18953, 18954.

Supreme Court of California.

Dec. 30, 1944.

Rehearing Denied Jan. 25, 1945.

1. Commerce ⇐81
Master and servant ⇐253
War ⇐10(2)

The state court having jurisdiction of action under Federal Employers' Liability Act may not refuse to exercise it on ground of doctrine of forum nonconveniens, burden on interstate commerce, or war conditions. Federal Employers' Liability Act §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

2. Courts ⇐28

The rule of "forum nonconveniens" is an equitable one embracing the discretionary power of a court to decline to exercise jurisdiction which it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere.

See Words and Phrases, Permanent Edition, for all other definitions of "Forum Nonconveniens".

3. Courts ⇐489(9½)

The right to have action under Federal Employers' Liability Act tried in one of the mentioned federal district courts is absolute, and cannot be defeated by doctrine of forum nonconveniens or other equitable grounds, or anything except congressional action. Federal Employers' Liability Act, §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

4. Courts ⇐107

The United States Supreme Court's denial of certiorari to review decisions of state supreme court, though it might not be an approval of the state court's decisions, is persuasive.

5. Commerce ⇐81

Permitting action under Federal Employers' Liability Act to be tried in California, when witnesses would have to be transported from Oregon, would not constitute an unreasonable burden upon interstate commerce. Federal Employers' Liability Act §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

6. War ⇐10(2)

A state court may not ignore venue provisions of Federal Employers' Liability Act under war powers, in absence of action by the President or Congress. Federal Employers' Liability Act §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

7. Continuance ⇐22
War ⇐10(2)

A motion for a continuance of action under Federal Employers' Liability Act for an indefinite time, on same grounds as motions to abate the action because it should have been prosecuted in Oregon to avoid burden of transporting witnesses to California, especially under war conditions, did not call for exercise of discretion by trial court. Federal Employers' Liability Act §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

8. Continuance ⇐50

If court may not refuse to exercise its jurisdiction, it may not accomplish the same result by an indefinite continuance.

9. Master and servant ⇐291(9)

In action under Employers' Liability Act for death of train crew members, plaintiff was entitled to instruction on doctrine of res ipsa loquitur though plaintiff proved specific acts of negligence in improper maintenance of road bed, unless inference of negligence from res ipsa loquitur doctrine would be dispelled as matter of law under rules applicable in cases generally. Federal Employers' Liability Act §§ 1 et seq., 6, 45 U.S.C.A. §§ 51 et seq., 56.

10. Negligence ⇐121(2)

If plaintiff alleges negligence specifically and generally he may rely upon doctrine of res ipsa loquitur and the general inference of negligence flowing therefrom without limitation to the particular acts of negligence alleged.

11. Negligence ⇐121(2)

The main theory underlying doctrine of res ipsa loquitur is that under the circumstances there is a probability of negligence.

12. Negligence ⇐121(2)

Application of the doctrine of res ipsa loquitur should not be denied merely because plaintiff proved specific acts of negligence.

13. Negligence ⇐136(6)

Where res ipsa loquitur doctrine is applicable, test for determining when the inference is wholly dispelled as a matter of law is the same as in the case of any other inference, and instances in which inferences are dispelled are rare.

EDMONDS, CURTIS, and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Separate actions under the Employer's Liability Act, 45 U.S.C.A. § 51 et seq., by Charlotte E. Leet, as administratrix of the estate of Alfred Martin Thatcher, deceased, and as administratrix of the estate of Harold Patrick Utterback, deceased, against the Union Pacific Railroad Company. From a judgment for plaintiff in each case, defendant appeals.

Affirmed.

Prior opinion, 144 P.2d 64.

E. E. Bennett, Edward C. Renwick, and Malcolm Davis, all of Los Angeles, for appellant.

Hildebrand, Bills & McLeod, of Oakland, Martin & Downey, of Los Angeles, and Louis H. Brownstone, of San Francisco, for respondent.

CARTER, Justice.

In these two actions plaintiff, as administratrix of the estates of Thatcher and Utterback, recovered judgments in the trial court for damages under the Federal Employers' Liability Act as the result of the wrongful deaths of decedents. 45 U.S.C.A. § 51 et seq.

Decedents were killed in Portland, Oregon, while in the employ of defendant railroad company. They and their heirs were residents of Oregon. The heirs nominated plaintiff to be administratrix and she was appointed by the superior court sitting in probate in Los Angeles County. Defendant is a Utah corporation and admits that it was and is doing business in California. After the commencement of the actions in the Superior Court in Los Angeles County, California, by plaintiff, defendant obtained decrees in an Oregon trial court restraining decedents' heirs from prosecuting the actions in California. Defendant made motions in the California court to abate the actions and also pleaded the Oregon injunction decrees in their answer. Defendant also made motions to continue the trial of the actions "indefinitely." Those motions were based upon the same grounds urged in the Oregon court in the injunction proceedings and the facts with reference thereto are undisputed. They are, that the deaths occurred in Oregon; that decedents and their heirs were residents of Oregon; that for defendant to present its defense it would have to transport twenty witnesses from Oregon to California; that it operates a railroad in both Oregon and California; that plaintiff resides in California; that defendant is engaged, by the direction of the government of the United States, in transporting troops and war materials in Oregon and other areas and for that purpose requires the services of many employees including the witnesses above mentioned; that such transportation will be seriously impeded if it is required to transport those witnesses to California for the trial of the actions, and because of its inability to transport them it must rely upon their depositions; that it is engaged in interstate commerce, and was so engaged at the time of the deaths. Defendant charges that counsel for plaintiff handles many actions under the Federal Employers' Liability Act and consistently prosecutes them in California courts although the accidents occur in other states and with the motive of making the defense of such actions costly and difficult for defendant; that interstate commerce and the war effort will be seriously impaired and burdened by having the actions tried in California and that defendant cannot properly defend the actions here.

The court denied defendant's motions without opinion and it must be assumed the denial was on the merits. The Supreme Court of Oregon reversed the decrees of the Oregon trial court enjoining the prosecution of the actions in California. Union Pac. R. Co. v. Utterback (Union Pac. R. Co. v. Thatcher), Or., 146 P.2d 76; Id 146 P.2d 769. Defendant's petition for a writ of certiorari to the Supreme Court of the United States from the Oregon decision was denied.

The main issue presented on this appeal of defendant from the judgments for plaintiff is that the foregoing circumstances required the superior court of California to

abate the actions, grant the continuance and refuse to entertain jurisdiction of them. The solution of that problem depends upon the effect of the provision in the Federal Employers' Liability Act. It reads: "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States." 45 U.S.C.A. § 56.

It is conceded that under the foregoing section the California court has *jurisdiction* of the subject matter of and parties to the actions. It is admitted that the defendant railroad company is doing business in California and hence is amenable to the process of the California court, and by the terms of section 56 a competent court of three states may have concurrent jurisdiction of actions under the Federal Employers' Liability Act, namely, the residence of the defendant, where the action arose, or where the defendant is doing business. It should also be noticed that the superior court of California is an existing court with jurisdiction under the state law to adjudicate actions under the Federal Employers' Liability Act. Hence, the sole question is, what circumstances, if any, will justify the state court in refusing to exercise the jurisdiction it admittedly has over an action under the Federal Employers' Liability Act.

[1] Whatever may have been the rule on the subject from time to time it is now settled that the state court having jurisdiction may not refuse to exercise it. The doctrine of forum nonconveniens, claim of a burden on interstate commerce, or war conditions constitute no justification for a refusal to exercise jurisdiction.

[2, 3] The rule of forum nonconveniens is an equitable one embracing the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action before it may be more appropriately and justly tried elsewhere. If the plaintiff by reason of section 56 has an absolute right to have the action tried in the named courts, there is no room for the doctrine. It has been repeatedly held that the right to have an action brought under the act tried in one of the mentioned *federal district courts* is absolute. Connelly v. Central R. Co. of New Jersey, D.C., 238 F. 932; see Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, 136 A.L.R. 1222; Miles v. Illinois Central R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, 146 A.L.R. 1104; Trapp v. Baltimore & O. R. Co., D.C., 283 F. 655. And that right cannot be defeated by the doctrine of forum nonconveniens, convenience, or other equitable grounds such as vexatious suits or anything else except congressional action; the court has a duty to exercise its jurisdiction. Schendel v. McGee, 8 Cir., 300 F. 273; Southern R. Co. v. Painter, 8 Cir., 117 F.2d 100; Southern R. Co. v. Cochran, 6 Cir., 56 F.2d 1019; Chesapeake & Ohio R. Co. v. Vigor, 6 Cir., 90 F.2d 7, certiorari denied 302 U.S. 705, 58 S.Ct. 25, 82 L.Ed. 545; Rader v. Baltimore & Ohio R. Co., 7 Cir., 108 F.2d 980; Miles v. Illinois Central R. Co., supra; Baltimore & Ohio R. Co. v. Kepner, supra; Union Pac. R. Co. v. Utterback, supra. While some of the foregoing authorities involved an injunction issued against the parties by one court against the prosecution of the action in a court having jurisdiction, as distinguished from a motion in the forum to refuse jurisdiction, the principle is the same. The injunction will not be granted on the equitable grounds of convenience or vexation because the plaintiff's right is absolute and the court cannot deny jurisdiction. If it is absolute then the forum has no right to refuse jurisdiction. In Chesapeake & Ohio R. Co. v. Vigor, supra, the deceased was injured in Ohio and defendant railroad company was a resident of that state and the plaintiff administrator was appointed there. The action was brought in the federal district court in Indiana where defendant was doing business, and an action for injunctive relief was brought in the federal district court in Ohio. The federal Circuit Court of Appeals in affirming the denial of an injunction by the District Court stated at page 8 of 90 F.2d: "The plaintiff (the railroad company in the injunction action), it is true, may suffer some inconvenience or be put to extra expense in producing witnesses to testify in court in the Indiana case, but *it is to be presumed that Congress*

considered such probable inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time. We held in Southern Railway Company v. Cochran, 6 Cir., 56 F.2d 1019, that the filing of a suit in such a jurisdiction, even though it was inconvenient to the defendant, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction. This ruling is consonant with established authority, and it is controlling in the case at bar." (Italics added.) In Baltimore & Ohio R. Co. v. Kepner, supra, the court affirmed a judgment denying an injunction by a state court wherein it was sought to restrain plaintiff from prosecuting an action under the Federal Employers' Liability Act in a federal district court in a district where defendant did business but in which neither plaintiff nor defendant resided and where the accident did not occur, on the grounds of the convenience of witnesses and the inequities resulting. The court said at page 52 of 314 U.S., at page 9 of 62 S.Ct., 86 L.Ed. 28, 136 A.L.R. 1222:

"We read the opinion of the Supreme Court of Ohio to express the view that if it were not for Section 6 of the Employers' Liability Act the requested injunction would be granted on the undisputed facts of the petition. Section 6 (45 U.S.C.A. § 56) establishes venue for an action in the federal courts. As such venue is a *privilege created by federal statute* and claimed by respondent the Supreme Court of Ohio felt constrained by the Supremacy Clause to treat Section 6 as decisive of the issue. It is clear that the allowance or denial of this federal privilege is a matter of federal law, not a matter of state law under Erie R. Co. v. Tompkins, 304 U.S. 64, 72, 58 S.Ct. 817, 819, 82 L.Ed. 1188 [1191], 114 A.L.R. 1487. Its correct decision depends upon a construction of a federal act. Consequently the *action of a state court must be in accord with the federal statute and the federal rule as to its application rather than state statute, rule or policy.*

"Petitioner presses upon us the argument that the action of Congress gave an injured railway employee the privilege of extended venue, subject to the usual powers of the state to enjoin what in the judgment of the state courts would be considered an improper use of that privilege. This results, says petitioner, because the Act does not in terms exclude this state power. As courts of equity admittedly possessed this power before the enactment of Section 6, the argument continues, it is not to be lightly inferred that the venue privilege was in disregard of this policy. But the federal courts have felt they *could not interfere with suits in far federal districts where the inequity alleged was based only on inconvenience. There is no occasion to distinguish between the power and the propriety of its exercise in this instance since the limits of the two are here co-extensive.* The privilege was granted because the general venue provisions worked injustices to employees. *It is obvious that no state statute could vary the venue and we think equally true that no state court may interfere with the privilege, for the benefit of the carrier or the national transportation system, on the ground of inequity based on cost, inconvenience or harassment.* When the section was enacted it filled the entire field of venue in federal courts. A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910, for the benefit of employees." (Italics added.)

In Miles v. Illinois Central R. Co., supra, a state court in Tennessee enjoined a resident widow from prosecuting an action for her husband's death occurring in Tennessee, in a Missouri state court where the railroad did business but had no residence. The injunction was based upon the inconvenience of witnesses, oppressiveness and inequity as to the railroad. The court reversed the injunction judgment stating at page 702 of 315 U.S., at page 830 of 62 S. Ct., 86 L.Ed. 1129, 146 A.L.R. 1104:

"The real point of controversy here is whether that portion of section 6 (45 U.S. C.A. § 56) of the F.E.L.A., which *holds litigation in the state court where it is instituted,* prevents the court of another state from enjoining citizens, within its jurisdiction, from continued prosecution of the suit on grounds of inequity. Here, as in the Kepner's case, there is no question but that the Missouri court has venue of the proceeding. Here, too, we need to look no farther into Tennessee law than the opinion of the state's highest court in this

record to conclude that *under state law a court of equity may enjoin a resident citizen from attempting to enforce his rights, oppressively and inequitably,* and that the expense and inconvenience hereinbefore set out resulted in oppressiveness and inconvenience in the eye of the state court.

"In the legislative history of section 6, the provision that removal may not be had from a 'State court of competent jurisdiction' was added to the House bill on the floor of the Senate and later accepted by the House, in order to assure a hearing to the employee in a state court. Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. The venue of state court suits was left to the practice of the forum. *The opportunity to present causes of action arising under the F.E.L.A. in the state courts came, however, not from the state law but from the federal.* By virtue of the Constitution, *the courts of the several states must remain open to such litigants on the same basis* that they are open to litigants with causes of action springing from a different source. This is so because the Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U. S. 1, 56-69, 32 S.Ct. 169, 177, 178, 56 L.Ed. 327, 38 L.R.A.,N.S., 44. *The Missouri court here involved must permit this litigation.* To deny citizens from other states, suitors under F.E.L.A., access to its courts would, if it permitted access to its own citizens, violate the Privileges and Immunities Clause. Constitution, Art. IV, § 2; McKnett v. St. Louis & S. F. R. Co., 292 U.S. 230, 233, 54 S.Ct. 690, 691, 78 L.Ed. 1227. Since the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts *spring from federal law,* the right to sue in state courts of proper venue where their jurisdiction is adequate *is of the same quality as the right to sue in federal courts. It is no more subject to interference by state action than was the federal venue in the Kepner case.*

"* * * As Congress has permitted both the state and federal suits, its determination that the carriers must bear the incidental burden is a determination that the state courts may not treat the normal expense and inconvenience of trial in permitted places, such as the one selected here, as inequitable and unconscionable." (Italics added.)

The Miles case is completely decisive that the doctrine of forum nonconveniens is no justification for a state court to refuse jurisdiction of an action under the Federal Employers' Liability Act. Likewise, it is conclusive that the state court *must* take jurisdiction. It has no choice in the matter and no rule or policy on its part alters the situation. It has long been the law that where there is a competent state court, it must entertain an action under the F.E.L.A. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, 38 L.R.A.,N.S., 44; see Miller v. Municipal Court, 22 Cal.2d 818, 142 P.2d 297. This court in holding that an administrator must be appointed in California to prosecute an action in California under the Federal Employers' Liability Act even though neither defendant nor the deceased resided here and there was no estate of the decedent in California other than the cause of action arising from the fact that the railroad did business here, said in Re Estate of Waits, 23 Cal.2d 676, 679, 146 P.2d 5, 7: "The Federal Employers' Liability Act authorizes suit by the aggrieved party in any state where the carrier does business. 45 U.S.C.A., § 56; Miles v. Illinois Central R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129 [146 A.L.R. 1104]. Since a suit requires the appointment of a personal representative (American R. Co. v. Birch, 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879), who is ordinarily allowed to sue only in the state of his appointment (see Code Civ.Proc., § 1913), *refusal to appoint an administrator in a state where suit is authorized by the act would nullify the very right the act grants.*" (Italics added.) It should be noted that the court refers to the *right* granted. Certainly it would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action.

[4] The latest expression of the Supreme Court of the United States appears from its denial of certiorari from the decisions of the Oregon Supreme Court in the injunction proceedings heretofore sus-

tained. Union Pac. R. Co. v. Thatcher, 65 S.Ct. 36; and Union Pac. R. Co. v. Utterback, 65 S.Ct. 36. While that may not be an approval of the Oregon decisions, it is persuasive and we agree with what is there said. "As we understand the doctrine of Baltimore & Ohio R. Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, 136 A.L.R. 1222, and Miles et al. v. Illinois Cent. R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129 [146 A.L.R. 1104], a state court cannot validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employers' Liability Act where the act conferred venue on the ground that the prosecution in the court of the sister state is inequitable, vexatious and harassing to the carrier." Union Pac. R. Co. v. Utterback, Or., 146 P.2d 76, 79. This court, although not dealing with the conditions here involved, has recently stated the general proposition: "* * * that a state court, otherwise competent to exercise jurisdiction over the subject-matter, the parties, and the amount in controversy, must assume jurisdiction of an action created by federal law enacted pursuant to a legitimate federal function, regardless of whether or not that action be considered either as penal or as furthering the governmental interest." Miller v. Municipal Court, 22 Cal.2d 818, 851, 142 P.2d 297, 316.

[5] It is fallacious to assume that there may be an unreasonable burden upon interstate commerce to permit the action to be tried in California when witnesses will have to be transported to California from Oregon. The query at once suggests itself, Who is burdening interstate commerce? Certainly not the California court because it is merely following the mandate of the Federal Employers' Liability Act which confers jurisdiction upon it. Hence, the only burden would be that imposed by Congress in adopting the act. The courts have squarely repudiated the proposition. Miles v. Illinois Central R. Co., supra; Baltimore & Ohio R. Co. v. Kepner, supra; Chesapeake & Ohio R. Co. v. Vigor, supra; Southern Pac. Co. v. Baum, 39 N.M. 22, 38 P.2d 1106; Hoffman v. Missouri ex rel. Foraker, 274 U.S. 21, 71 S.Ct. 905, 47 L. Ed. 485. The Supreme Court of the United States said in the Kepner case, 314 U.S. at page 54, 62 S.Ct. at page 10, 86 L.Ed. 28, 136 A.L.R. 1222: "This court held in Hoffman v. Missouri ex rel. Foraker, 274 U.S. 21, 47 S.Ct. 485, 71 L.Ed. 905, that the burden on interstate commerce would be disregarded where the carrier had lines in the distant state. The importance of unhampered commerce is at least as great as that of a carrier's freedom from harassing incidents of litigation. Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York."

In the Miles case, 315 U.S. at page 701, 62 S.Ct. at page 829, 86 L.Ed. 1129, 146 A.L.R. 1104, that court said: "As in the Kepner case, there is in this case no occasion to go into the question of the availability as support for an injunction of a charge of interference with interstate commerce by reason of the burden of expense and inconvenience. The trial court found a burden on the commerce of the Illinois Central but made no finding as to any burden on interstate commerce. Moreover, the Court of Appeals stated that the Illinois Central 'expressly abandoned the contention' 'that the prosecution of the suit in St. Louis was a burden on interstate commerce.' No contention is made here that there is any such burden or that the Illinois Central is not doing substantial business in Missouri, as found by the trial court. It operates daily passenger trains with its own crews into St. Louis over the St. Louis Terminal Company tracks, maintains passenger and freight offices and had total receipts in St. Louis of a million and a half the year the suit was filed. Under the rule announced in Denver & Rio Grande W. R. Co. v. Terte, 284 U.S. 284, 287, 52 S.Ct. 152, 153, 76 L.Ed. 295, the Illinois Central is properly suable in Missouri. In the Kepner case, 314 U.S. 44, 51, 62 S.Ct. 6, 9, 86 L.Ed. [28, 136 A.L.R. 1222], we pointed out, with a discussion of the applicable cases, that *the carrier must submit to inconvenience and expense, if there is jurisdiction, 'although thereby interstate commerce is incidentally burdened.'* There is no occasion to repeat the comments here. The specific declaration is section 6 (45 U.S.C.A. § 56) that the United States courts should have concurrent jurisdiction with those of the several states and the prohibition against removal point clearly to the conclusion that *Congress has exercised its authority over interstate commerce to the extent of permitting suits in state*

courts, despite the incidental burden, where process may be obtained on a defendant, not merely soliciting business but actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction." (Italics added.)

[6] Turning to war conditions as a possible basis for a refusal by the California court to exercise jurisdiction reliance is placed upon the Interstate Commerce Act, 49 U.S.C.A. § 6(8), which authorizes the President to demand traffic preference for transport of troops and war material. It is conceded that no presidential order has been made on the subject of venue of actions against railroads. How then may a state court brush aside the venue provisions of the Federal Employers' Liability Act under war powers? Assuming the President or Congress may, this court may not. We have seen that those provisions grant an absolute right. Only Congress, or possibly the President under war powers, may restrict that right. If such power exists at all it would authorize a court to refuse to entertain jurisdiction of any action where the witnesses would be absent from vital war production while attending court. In other words, the courts would be closed to litigants. As before stated, the United States Supreme Court has denied certiorari from the decision of the Oregon Supreme Court in the injunction proceedings. The Supreme Court of Oregon stated (146 P.2d 76, at page 80):

"We think, therefore, that the President through the Secretary of War would be warranted in making an order restricting the venue of suits against carriers under general control, either complete or supervisory, while such carriers were engaged in transporting troops, munitions or military supplies, if and when, in the judgment of the President, the practice reflected in plaintiffs' complaints was prejudicial to the just interests of the government in the prosecution of the war. Alabama & V. R. Co. v. Journey, 257 U.S. 111, 42 S.Ct. 6, 66 L.Ed. 154.

"We cannot, however, bring ourselves to believe that, even to promote the prosecution of the war effort, in the absence of any such order a state court of one state may enjoin the continuance of litigation pending in the court of another state where venue is expressly given to the latter by an Act of Congress. * * *

"We cannot subscribe to the principle that upon the sole ground of military expediency while a war is in progress the civil courts should be held to have the right and to be charged with its attendant duty to intrude their judgment with respect to the necessity or advisability of suspending the operation of the provisions of an Act of Congress. We think that in time of war such a course would be an encroachment upon the prerogative of the Commander in Chief of the military forces."

From the foregoing it is clear that the California court had jurisdiction to proceed with the trials of the above entitled causes and was required to exercise such jurisdiction.

Defendants cite various earlier cases on the subject and claim the statements in the Miles and Kepner cases are dicta but suffice it to say we believe those recent statements by the United States Supreme Court are decisive. It also speaks of there being no requirement that a state furnish a court for the trial of actions under the Federal Employers' Liability Act. With that issue we are not concerned inasmuch as the superior court is already established and is competent to entertain such litigation.

[7, 8] The motions for a continuance were, as has been stated, based upon the same grounds as the motions to abate and were for an "indefinite time." Under those circumstances there was no question of the exercise of discretion by the court. If the court may not refuse to exercise its jurisdiction it may not accomplish the same result by an indefinite continuance.

[9] Defendant claims that the court erred in instructing the jury on the doctrine of res ipsa loquitur. Plaintiff alleged that defendant negligently maintained its tracks and right-of-way thereby causing a train travelling thereon to become derailed and resulting in a collision with the train upon which decedents were riding as members of the crew. Defendant's contention rests upon the claim that plaintiff proved specific acts of negligence, that is, an improperly maintained roadbed causing a rail to break followed by derailment. Hence, it is asserted that plaintiff may not avail herself of the benefit of the doctrine. Defendant does not deny that the case would be a proper one for the application of the doctrine except for

the proof of particular causes above mentioned. Assuming that plaintiff's evidence was aimed at showing the specific acts of negligence on defendant's part, plaintiff was still entitled to an instruction on the doctrine. There has been considerable confusion and conflict in this state as well as elsewhere on the subject of whether proof by plaintiff of specific acts of defendant's negligence will deprive him of the benefit of the doctrine or whether allegations in his complaint of specific acts of negligence will so deprive him, assuming that the doctrine is otherwise applicable, that is, the accident is of a character that would not ordinarily happen except for the negligence of defendant.

Turning first to the pleading question it has been stated that if negligence has been specifically but not generally pleaded by plaintiff he may not avail himself of the doctrine. Matthews v. Southern Pac. Co., 15 Cal.App.2d 36, 59 P.2d 220; Porter v. Rasmussen, 127 Cal.App. 405, 15 P.2d 888; Hall v. San Joaquin L. & P. Corp., 5 Cal.App.2d 755, 43 P.2d 856; Wills v. Price, 26 Cal.App.2d 338, 79 P.2d 406; Smith v. McClary, 28 Cal.App.2d 468, 82 P.2d 712; Davidson v. American Liquid Gas Corp., 32 Cal.App.2d 382, 89 P.2d 1103; Marovich v. Central California T. Co., 191 Cal. 295, 216 P. 595; Harker v. Southern Cal. Edison Co., 83 Cal.App. 204, 256 P. 848; Connor v. Atchison, etc., R. Co., 189 Cal. 1, 207 P. 378, 22 A.L.R. 1462; Horney v. Dillingham, 81 Cal.App. 443, 253 P. 970; Ingledue v. Davidson, 102 Cal.App. 703, 283 P. 840; Jianou v. Pickwick Stages System, 111 Cal.App. 754, 296 P. 108; Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 300 P. 487; Damgaard v. Oakland High School Dist., 212 Cal. 316, 298 P. 983; Klenzendorf v. Shasta U. H. School Dist., 4 Cal.App.2d 164, 40 P.2d 878; Angerman Co. v. Edgemon, 76 Utah 394, 290 P. 169, 79 A.L.R. 48. But that if he pleads it both generally and specially he may rely upon the doctrine. McCole v. Merchants Express Corp., 19 Cal.App.2d 149, 64 P.2d 1130; Ellis v. Jewett, 18 Cal.App.2d 629, 64 P.2d 432; Mudrick v. Market Street R. Co., 11 Cal.2d 724, 81 P.2d 950, 118 A.L.R. 533; McComas v. Al. G. Barnes Shows Co., 215 Cal. 685, 12 P.2d 630; Hackley v. Southern Pacific Co., 6 Cal.App.2d 611, 45 P.2d 447; Burke v. Dillingham, 84 Cal.App. 736, 258 P. 627; Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 300 P. 487; Roberts v. Sierra R. Co., 14 Cal.App. 180, 111 P. 519, 527; Bourguignon v. Peninsular R. Co., 40 Cal.App. 689, 181 P. 669; Seney v. Pickwick Stages, 82 Cal.App. 226, 255 P. 279; Vertson v. City of Los Angeles, 116 Cal.App. 114, 2 P.2d 411; Gish v. Los Angeles R. Corp., 13 Cal.2d 570, 90 P.2d 792; Angerman Co. v. Edgemon, 76 Utah 394, 290 P. 169, 79 A.L.R. 48. On the other hand it has been held that the principle may be invoked even though plaintiff specifically pleads the acts of negligence and does not allege negligence generally. See Lippert v. Pacific Sugar Corp., 33 Cal.App. 198, 164 P. 810; Soto v. Spring Valley Water Co., 39 Cal.App. 187, 178 P. 305; Chauvin v. Krupin, 4 Cal.App.2d 322, 40 P.2d 904; Angerman Co. v. Edgemon, 76 Utah 394, 290 P. 169, 79 A.L.R. 48.

[10] Between those two views it has been suggested that where negligence is pleaded both generally and specifically, plaintiff may rely upon the doctrine but only in aid of an inference of negligence in respect to the particular acts pleaded and none other. Gish v. Los Angeles R. Corp., supra; Wills v. Price, 26 Cal.App.2d 338, 79 P.2d 406; Phillips v. Southern California E. Co., Ltd., 23 Cal.App.2d 222, 72 P.2d 769; Harker v. Southern California Edison Co., 83 Cal.App. 204, 256 P. 848; Atkinson v. United Railroads of S. F., 71 Cal.App. 82, 234 P. 863; Angerman Co. v. Edgemon, 76 Utah 394, 290 P. 169, 79 A.L.R. 48. However, by the very nature of the rule permitting the application of the doctrine where there is a general allegation of negligence together with specific allegations, the reasoning must be that defendant is advised by the pleading that he must meet an inference of negligence (res ipsa loquitur) whatever may be the particular acts or omissions charged; that is, he has notice that he must be prepared to meet an inference of negligence which may embrace misconduct in addition to the specific instances alleged. The essence of the matter is fairness in pleading to give the defendant such notice by the complaint that he may prepare his case. The rule that plaintiff cannot rely upon the doctrine where he pleads only specific acts of negligence has been predicated upon the principle that he may not prove a case outside the scope of his pleading and to permit him to have an inference of negligence which embraces acts or omissions not set forth in the complaint would violate that principle. See Porter v. Rasmussen, 127 Cal.App. 405, 15 P.2d 888; Harker v. Southern Cal. Edison Co., 83 Cal.App. 204, 256

P. 848; Roberts v. Sierra R. Co., 14 Cal. App. 180, 111 P. 519, 527; Marovich v. Central California T. Co., 191 Cal. 295, 216 P. 595; Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370; Healy v. Market Street R. Co., 41 Cal.App.2d 733, 107 P.2d 488. In the Marovich case, 191 Cal. at page 306, 216 P. at page 600, the theory is succinctly stated: "* * * where the plaintiff in his complaint makes no general allegation of negligence, or no allegation of general negligence, instructions applying the doctrine of *res ipsa loquitur* should not be given. *This must be so, for the reason that in such case the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged in his complaint.*" (Italics added.) It must be concluded therefore that if plaintiff alleges negligence specifically and generally he may rely upon the doctrine and the general inference of negligence flowing therefrom without limitation to the particular acts of negligence alleged inasmuch as by the general allegation of negligence defendant is notified that he must meet such a broad inference.

[11] It is true that in some cases where the complaint contained only specific allegations of negligence the court held that the doctrine of res ipsa loquitur was not applicable because it could not be said, that in view of such allegations, defendant was in a better position than plaintiff to explain what occurred. See Porter v. Rasmussen, 127 Cal.App. 405, 15 P.2d 888; Jianou v. Pickwick Stages System, 111 Cal.App. 754, 296 P. 108; Smith v. McClary, 28 Cal.App.2d 468, 82 P.2d 712; Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 300 P. 487; Connor v. Atchison, etc., R. Co., 189 Cal. 1, 207 P. 378, 26 A.L.R. 1462. While that theory may be one of the reasons for applying the doctrine, and a factor in determining whether or not it should be available, it is a general test for characterizing, in the first instance, various situations as justifying or not the invocation of the doctrine, and the main theory underlying the doctrine is, that because of the circumstances, there is a probability of negligence (see Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436; Honea v. City Dairy, Inc., 22 Cal.2d 614, 140 P.2d 369), and the inference that flows therefrom is evidence in the case.

In regard to the situation where plaintiff wishes to rely upon the doctrine, assuming the case is otherwise a proper one for its application, but he nevertheless goes forward and endeavors to show specific particulars in which the defendant was negligent, there is also a diversity of opinion. It has been stated that if he proves *all* of the facts as to how the accident occurred, and the specific acts of negligence, he may not rely on the doctrine. Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 22 P.2d 554; Manuel v. Pacific Gas & Electric Co., 134 Cal.App. 512, 25 P.2d 509; Keller v. Pacific Tel. & Tel. Co., 2 Cal.App.2d 513, 38 P.2d 182; Davidson v. American Liquid Gas Corp., 32 Cal.App.2d 382, 89 P.2d 1103; Gorden v. Goldberg, 3 Cal.App.2d 659, 40 P.2d 276; Jorgensen v. East Bay Transit Co., 46 Cal.App.2d 189, 115 P.2d 556; Connor v. Atchison etc., R. Co., 189 Cal. 1, 207 P. 378, 26 A.L.R. 1462; Matthews v. Southern Pac. Co., 15 Cal. App.2d 36, 59 P.2d 220; Hall v. San Joaquin L. & P. Corp., 5 Cal.App.2d 755, 43 P.2d 856; Partin's Adm'r v. Black Mountain Corp., 248 Ky. 32, 58 S.W.2d 234, 93 A.L.R. 609. Yet it has also been held, that the introduction of evidence as to how the accident happened, and the cause thereof, does not necessarily prevent the application of the doctrine. See Brunig v. Pacific Gas & Elec. Co., 140 Cal.App. 254, 35 P.2d 226; Chauvin v. Krupin, 4 Cal. App.2d 322, 40 P.2d 904; Kilgore v. Brown, 90 Cal.App. 555, 266 P. 297; Strock v. Pickwick Stages System, 107 Cal.App. 298, 290 P. 482; Lippert v. Pacific Sugar Corp., 33 Cal.App. 198, 164 P. 810; Soto v. Spring Valley Water Co., 39 Cal.App. 187, 178 P. 305; Partin's Adm'r v. Black Mountain Corp., 248 Ky. 32, 58 S.W.2d 234, 93 A.L.R. 609.

[12, 13] For example it is said in Kilgore v. Brown, supra, 90 Cal.App. 559, 266 P. 299:

"Appellant relies on Connor v. Atchison, etc., R. Co., 189 Cal. 1, 207 P. 378, 26 A.L.R. 1462. We do not read this case as authority for the position taken. The learned justice (Mr. Justice Wilbur) who wrote the opinion in that case states that a complete explanation of the cause of the accident was pleaded, and that: 'The general rule is that where the plaintiff in his complaint gives the explanation of the cause of the accident, that is to say, where the plaintiff, instead of relying upon a general allegation of negligence, sets out specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply' (citing authorities). Later in the same opinion the Jus-

tice says: 'In this case if the plaintiff had alleged negligence in general terms (and plaintiff did so in the instant case), and had merely proved the happening of the accident a prima facie case would have been established under the doctrine of res ipsa loquitur. But where the plaintiff went further and showed that the accident was caused by a cloudburst, the question of whether or not the defendant was negligent in failing to inspect the track was to be determined by the jury without reference to the prima facie case resulting from the mere happening of the accident. * * * However, where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the res ipsa loquitur doctrine.' We do not think this language can be taken as authority for the proposition that, if the plaintiff, after a general allegation of negligence, explains the details of the case on the witness stand so far as she knows them, and hits upon the cause of the accident, that this deprives the plaintiff of the res ipsa loquitur instruction to the jury. The fact that some testimony is offered which tends to show specific acts of negligence does not preclude the plaintiff from relying on the presumption." If, because of the circumstances of the case and the probabilities, an inference of negligence is raised, the doctrine should be applied, it is difficult to see why its application should be denied merely because plaintiff proves specific acts of negligence. There is no reason why such proof should wholly dispel the inference any more than it would in any other case. The plaintiff is penalized for going forward and making as specific a case of negligence as possible. If he endeavors to make such a case he runs the risk of losing the benefits of the doctrine to which the circumstances entitle him. Rather than place him in such a position he should be encouraged to prove as much as possible. The end result is not injurious to the defendant. He is not injured by the fact that the inference of negligence arose. The circumstances established a foundation therefore based upon probability. Indeed, he is in a better position as he has specific evidence to meet before the trier of fact that may be helpful to him. The case goes to the trier of fact with the general inference of negligence, plus other evidence of specific acts of negligence, to be weighed against defendant's showing. There is no reason for applying a different test for determining when the inference is wholly dispelled as a matter of law in a case where res ipsa loquitur is applicable, than is used in the case of any other inference. The instances in which an inference is dispelled are rare. See Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868. Whatever the test may be, there is no occasion for a different one when considering the inference arising from the application of the doctrine of res ipsa loquitur. Hence, we conclude that evidence of specific acts of negligence does not deprive plaintiff of the benefit of the doctrine, unless the case is one where the inference would be dispelled as a matter of law under the same rules that apply in cases generally.

For the foregoing reasons the judgments are affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

I cannot agree with the assumption made by Mr. Justice Carter that the motions of the railroad company to continue the trial of the two actions were denied upon the merits. The carrier contends that the adverse rulings were made solely because of the trial judge's conclusion that the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., required the court to accept jurisdiction and proceed with the trials regardless of any prejudice suffered by the employer as the result of its inability to produce witnesses without impairing the war effort. The plaintiffs do not claim that the rulings were made upon the merits, nor do they challenge the railroad company's statements to the contrary.

The motions were made upon the grounds, generally stated, that it was prejudiced by the absence of witnesses who could not then be produced without serious interference with the war effort, and that the trial of the cases on the date then set would place an undue burden upon interstate business. Facts tending to support the company's position were presented by means of three affidavits which included various data concerning the carrier's wartime activities. The plaintiffs filed no affidavits challenging these facts. They have maintained a consistent position that the facts stated by the railroad company are quite immaterial and that the court was without authority to

grant the motions unless the employer "had an absolute right to abate the California proceedings." (Resp.Brief, p. 21.)

In further explanation of what occurred in the trial court at the time the motions were made, the company states: "The motions to abate and the motions for continuance were not based primarily on the Oregon decrees, but were rather addressed to the discretion of the trial court. The trial court erroneously interpreted the Miles case and decided that it had no power to abate or continue the California proceedings no matter what equitable considerations might exist. It was that erroneous view which led the trial court to make orders which appellant contends constituted an abuse of the trial court's discretionary powers, entirely without any consideration of the validity or effect of the Oregon decrees. As has been pointed out, it was decided by the United States Supreme Court in Douglas v. New York, N. H. & H. R. Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747, and again in the Miles case (Miles v. Illinois Central R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, 146 A.L.R. 1104) that the Federal Employers' Liability Act does not require state courts to entertain jurisdiction of suits arising under it, where the litigants are non-residents, and the cause of action arose elsewhere. Therefore, contrary to the trial court's impression, it was the duty of the trial court to consider the equities of the case and to determine whether under all the circumstances the California court should assume jurisdiction."

The decisions of the Supreme Court of the United States do not compel the conclusion that a state court is powerless to refuse jurisdiction of any action brought under the Federal Employers' Liability Act, 45 U.S.C.A. § 51. On the contrary, in its most recent interpretation of that legislation, five members of the court were of the view that the venue provision (section 6) does not compel a state to open its forums to all cases arising under the statute under all circumstances. Miles v. Illinois Central R. Co., supra. And consistent with that view are a number of prior decisions. McKnett v. St. Louis & S. F. R. Co., 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227; Denver & Rio Grande W. R. Co. v. Terte, 284 U.S. 284, 52 S.Ct. 152, 76 L.Ed. 295; Douglas v. New York, New Haven & Hartford R. Co., 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747; Michigan Cent. R. Co. v. Mix, 278 U.S. 492, 40 S.Ct. 207, 73 L.Ed. 470; Hoffman v. Missouri ex rel. Foraker, 274 U.S. 21, 47 S.Ct. 485, 71 L.Ed. 905; Atchison, Topeka & Santa Fe R. Co. v. Wells, 265 U.S. 101, 44 S.Ct. 469, 68 L.Ed. 928; Davis v. Farmers' Co-operative Equity Co., 262 U. S. 312, 43 S.Ct. 556, 67 L.Ed. 996.

In the Miles case, Justices Frankfurter, Roberts, Byrnes and Chief Justice Stone were of the opinion that "Section 6 did not give the state courts compulsive jurisdiction," and Justice Jackson, in sharing that view, stated: "It is very doubtful if any requirement can be spelled out of the Federal Constitution that a state must furnish a forum for a nonresident plaintiff and a foreign corporation to fight out issues imported from another state where the cause of action arose." Under this construction of the statute, it was the duty of the trial judge in the present litigation to hear and determine, upon the merits, the railroad company's motions for a continuance, exercising a sound discretion as to whether, upon the facts presented, the trials of the two actions should be continued for either an indefinite or a stated period.

In my opinion, therefore, the judgments should be reversed with directions to the trial court to proceed accordingly.

CURTIS and SHENK, JJ., concurred.

Rehearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.

67 Cal.App.2d 660

SHAW v. GUARANTY LIQUIDATING CORPORATION.

Civ. 3146.

District Court of Appeal, Fourth District, California.

Jan. 24, 1945.

Hearing Denied March 22, 1945.

1. Landlord and tenant ⇐79(1)

The intent of assignor, as construed from language used in assignment of lease, determines whether a condition or a mere personal covenant has been imposed. Civ. Code, §§ 1442, 1492.

2. Mines and minerals ⇐74

Provision in partial assignment of oil and gas lease, that if assignee had not procured approval of the Secretary of Interior within one year after delivery of assignment then assignment should be void, constituted a "condition" and not a "covenant", and upon failure of assignee to secure such consent, all assignee's rights thereunder were forfeited. Civ.Code, §§ 1442, 1492, 3275.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition" and "Covenant".

3. Mines and minerals ⇐74

The rule respecting right to equitable relief against forfeitures had no application as to partial assignment of oil and gas lease containing provision that assignee's failure to obtain the approval of the Secretary of the Interior rendered lease void, since failure to obtain such approval automatically terminated the lease, and court was not called upon to forfeit assignee's interest. Civ.Code, §§ 1442, 1492, 3275.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Earl S. Shaw against Guaranty Liquidating Corporation to quiet title to a leasehold estate insofar as the same pertained to the portion of lands covered by a partial assignment of an oil and gas lease from plaintiff to defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

Geo. W. Fenimore, of Los Angeles, for appellant.

Leonard R. Seaman, of Los Angeles, for respondent.

GRIFFIN, Justice.

On January 23, 1937, plaintiff and his wife, by "Partial Assignment of Lease" assigned to defendant corporation a certain oil and gas lease dated July 2, 1928, between the United States of America, as lessor, and plaintiff, as lessee. In so far as said lease pertains to and affects a portion of the lands originally demised under the "Partial Assignment" defendant agreed to make application to the Secretary of the Interior for approval of said Assignment within ninety days after delivery thereof to defendant "* * * *and that if said assignee shall not have procured such approval within 1 year after delivery to him of this assignment, then and in that event said assignment shall be null and void and of no effect* * * *. The Assignee agrees that he will comply with all of the terms, conditions and covenants provided in said lease to be kept and performed by the lessee, * * *."

Defendant made timely application for the approval of the assignment on or about April 15, 1937, and in reply thereto the Secretary of the Interior notified defendant to furnish evidence of its corporate capacity to acquire the leasehold interest conveyed by the Partial Assignment and to furnish a $5,000 surety bond in favor of the United States of America, as lessor, guaranteeing faithful performance of the original lease obligations, insofar as they pertained to and affected the portion of the demised premises covered by the Partial Assignment. No action in this regard was taken by defendant. Subsequently, by letter dated November 24, 1937, the Commissioner of the General Land Office again notified defendant that it would be necessary for it to furnish the requisite $5,000 lease bond before the Secretary of the Interior would approve the Partial Assignment.

Defendant made no effort to comply with the requirements of the Secretary of the Interior until September, 1942, at which time it filed a "Petition for Supplemental Showing". The required lease bond was not filed until May 22, 1943, six days prior to the trial of this action, and over six years after the notice from the General Land Office wherein defendant was first apprised of the requirement.

Plaintiff brought this action to quiet his title to the lease hold estate created by the above-mentioned oil and gas lease, in so far as the same pertains to and affects the

portion of the lands covered by the partial assignment from plaintiff to defendant.

Plaintiff's claim of title is based upon the clause in the above italicized provision in the Partial Assignment. The questions presented are these: Does the above italicized language of the Partial Assignment create a condition subsequent which terminated the estate conveyed upon the happening of the specified event? Is defendant entitled to relief from the forfeiture therein provided?

[1] It is defendant's argument on this appeal that under the rule of strict construction the language of the assignment constitutes a *covenant* and not a *condition*, and that since time is not of the essence of the assignment and that since exact compensation can be made for any delay, a forfeiture will not be permitted, and that under equitable rules, the defendant will be relieved from such forfeiture, citing such cases as Victoria Hospital Ass'n v. All Persons, 169 Cal. 455, 147 P. 124; Joyce v. Krupp, 83 Cal.App. 391, 257 P. 124; Hopkins v. Woodward, 216 Cal. 619, 15 P.2d 499; and Secs. 1442 and 1492, Civ.Code. The authorities in this state have uniformly held that the intent of the assignor, as construed from the language used, determines whether a condition or a mere personal covenant has been imposed. Victoria Hospital Ass'n v. All Persons, supra; Firth v. Marovich, 160 Cal. 257, 116 P. 729, Ann. Cas.1912D, 1190; Firth v. Los Angeles Pacific Land Co., 28 Cal.App. 399, 152 P. 935; Rosecrans v. Pacific Electric R. Co., 21 Cal.2d 602, 134 P.2d 245.

Language similar to that used in the Partial Assignment of Lease, which is the subject of this action, has been construed by the courts as evidencing the intent of the assignor to create a condition subsequent. Carstensen v. Gottesburen, 215 Cal. 258, 9 P.2d 831; Knight v. Black, 19 Cal.App. 518, 126 P. 512; and Rosecrans v. Pacific Electric R. Co., supra.

[2] The natural construction of the language used in the partial assignment of lease above mentioned is that the defendant consents to the imposition of the condition requiring the approval of the Secretary of the Interior to the Partial Assignment within the specified time. Defendant agrees, if such approval is not procured within the specified time, then and in that event the assignment shall be null and void and of no effect.

It is difficult to conceive that the plaintiff, as assignor, intended that the Partial Assignment should continue to be valid and subsisting if the approval of the Secretary of the Interior was not obtained within one year after delivery thereof. The words "null and void" and "no force and effect" have a clear and unmistakable meaning, a meaning which leaves no doubt as to the intention of plaintiff as assignor under the Partial Assignment. At least, the trial court was fully authorized, under the cases cited, to so find from a reasonable interpretation of the entire document and intent of the parties as disclosed by the evidence.

[3] Defendant, in its answer, set forth certain facts which it claimed justified its actions in waiting for a period of nearly six years before it endeavored again to secure the approval of the Partial Assignment by the Secretary of the Interior. The trial court found such allegations to be untrue and that the evidence did not entitle it to equitable relief under section 3275 of the Civil Code. The evidence fully supports this finding. In the instant case, the general rule that equity will not ordinarily enforce a forfeiture does not apply, for in the instant case, on the happening of the specified event, namely, the failure of defendant to procure the approval of the Secretary of the Interior within the specified time, the estate conveyed by the Partial Assignment automatically terminated and the trial court's sole duty was to ascertain the happening of that event, and upon proof thereof, to affirm the termination of the estate. The court was not called upon to forfeit defendant's interest. That had already occurred. Parsons v. Smilie, 97 Cal. 647, 32 P. 702; Crowell v. City of Riverside, 26 Cal.App. 2d 566, 582, 80 P.2d 120; Phillips v. Bruce, 41 Cal.App.2d 404, 106 P.2d 922.

Section 1492 of the Civil Code provides that "where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime."

The performance required by the defendant was the procurement of the approval of the Secretary of the Interior to the Partial Assignment within one year after de-

livery thereof. Inasmuch as that approval has never been obtained it is impossible for defendant to tender a performance of that obligation. Inasmuch as plaintiff assigned the lease as to a portion only of the lands originally demised thereunder, plaintiff would, in the absence of approval of the Partial Assignment, run the risk of forfeiting the lease as to the land retained by him for breach of the covenant against assignment. Carstensen v. Gottesburen, supra; Crowell v. City of Riverside, supra.

At all times since the execution and delivery of said Partial Assignment, plaintiff has been liable to the lessor under his lease for performance of the obligations of the lessee thereunder, not only as to the land retained by him but also as to the lands covered by the Partial Assignment. This is evidenced by the fact that since the termination on December 1, 1941, of the rental relief granted by the Government under the lease, demand was made on plaintiff, not defendant, for the payment of rental due on the lands covered by the Partial Assignment.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



67 Cal.App.2d 664

PEOPLE v. SAUER.

Cr. 562.

District Court of Appeal, Fourth District, California.

Jan. 24, 1945.

Rehearing Denied Feb. 2, 1945.

Hearing Denied Feb. 19, 1945.

1. Criminal law ⇐980(1)

Defendant "appeared for judgment" within meaning of Penal Code provisions that when defendant so appears he must be informed of nature of charge against him when defendant appeared on motion to change plea from not guilty to guilty and then waived time for judgment. Pen.Code, § 1200.

See Words and Phrases, Permanent Edition, for all other definitions of "Appear for Judgment".

2. Criminal law ⇐980(1)

Where, in space of a few minutes, defendant withdrew plea of not guilty, was informed of charge against him, and entered plea of guilty, and defendant's counsel waived time for judgment, made a plea for a jail rather than a penitentiary sentence, and gave negative answer to inquiry as to whether there was any legal ground why judgment should not be pronounced, and court then pronounced judgment, there was a substantial compliance with code section providing that when a defendant appears for judgment he must be informed of nature of charge against him, and judgment was not defective for failure to again inform defendant of nature of charge against him immediately before pronouncement of judgment. Pen.Code, § 1200.

3. Criminal law ⇐274

Denial of defendant's motion to withdraw plea of guilty on ground that entry of plea was involuntary and that there was collusion between defendant's attorney and deputy district attorney by means of which defendant was misled was not an abuse of discretion, in view of absence from record of anything even tending to support such contention.

4. Criminal law ⇐980(1), 1186(4)

Where judge, to make sure of legality of change of defendant's plea from not guilty to guilty, called a recess and out of defendant's presence conferred with assistant district attorney, deputy district attorney and defendant's counsel in chambers, during which conference nothing was mentioned which had not been brought out in open court, conversation in chambers was not a prohibited "representation in aggravation or mitigation of the punishment", and even if there was a technical violation of the Statute, reversal was not required, since no miscarriage of justice resulted. Pen.Code, § 1204; Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Representation in Aggravation or Mitigation of Punishment".

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Carl G. Sauer was convicted of forgery. From an order denying defendant motions for correction of the record, to vacate and set aside judgment and to permit defend-

ant to withdraw plea of guilty, defendant appeals.

Affirmed.

See, also 155 P.2d 60.

Carl G. Sauer, in pro. per.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and James M. Thuesen, Dist. Atty., and Harold V. Thompson, Deputy Dist. Atty., both of Fresno, for respondent.

BARNARD, Presiding Justice.

In an information filed on May 18, 1942, the defendant was charged with the crime of forgery in that he signed another man's name to a check payable to himself and cashed the check. On June 3, 1942, he appeared in court with his counsel for the purpose of arraignment. He pleaded not guilty and the setting of the trial was continued to June 8, 1942.

On June 15, 1942, he came into court with his counsel and at his request he was permitted to withdraw his plea of not guilty, whereupon he entered a plea of guilty. He waived time for judgment and, after some considerable investigation of the surrounding circumstances, a judgment was entered sentencing him to imprisonment at San Quentin, where he has since been confined.

Under date of April 29, 1944, the defendant filed notice of motions to amend and correct the record, to annul, vacate and set aside the judgment, and to permit him to withdraw his plea of guilty, noticing the same for May 12, 1944, together with an application and motion for an order to produce the defendant at the time of hearing of the other motions. On May 3, 1944, an order was made directing that the defendant be produced in court on May 12, 1944, for the purpose of presenting any evidence he desired in support of his motions, and directing the sheriff to bring the defendant to court on that date. For some reason which does not appear the defendant was not produced in court on May 12, 1944, but on that day certain evidence was taken and an order was entered denying all of the motions made by the defendant. Under date of May 19, 1944, the defendant gave written notice of appeal from the order entered on May 12, 1944, and on the same day he applied for a clerk's and reporter's transcripts and asked for certain things as "additional record", including several matters which had and could have no possible bearing on the appeal taken.

On June 10, 1944, the defendant filed an objection to the transcript on appeal which had been filed, claiming that it did not contain all of the matters which he had requested, and also filed notice of a motion to be heard on July 11, 1944, for an order vacating and setting aside the order of May 12, 1944, on the ground that it was void on its face for want of jurisdiction. The hearing on these matters was continued to August 3, 1944.

On August 3, 1944, the court entered an order vacating and setting aside its order of May 12, 1944, setting the various motions of the defendant for correction of the record, to vacate and set aside the judgment and to permit him to withdraw his plea of guilty for hearing on August 17, 1944, and again directing the sheriff to produce the defendant in court at that time.

The defendant was produced in court on August 17, 1944, whereupon he was asked if he desired the services of an attorney. He stated that he did not, and the hearing proceeded. He called two witnesses, read into the record the transcript of the proceedings at the time he was originally sentenced and made a lengthy argument. The matter was submitted and an order was entered denying his motion to set aside and vacate the judgment. From this order the present appeal was taken.

Appellant's first contention is that judgment was pronounced against him on June 15, 1942, without substantial compliance with the requirements of section 1200 of the Penal Code in that he was not immediately, before judgment was pronounced, informed of the nature of the information filed against him, of his arraignment and plea of guilty; that the clerk's transcript erroneously shows that this was done; and that the court should have ordered these minutes corrected and should have set aside the judgment as entered and should have proceeded then to properly arraign him for sentence. The clerk's minutes of the proceedings on June 15, 1942, show that the appellant was properly arraigned for judgment after his plea was changed and he had entered a plea of guilty. The appellant now insists that these minutes are not correct but no evidence was introduced other than a reporter's transcript of what took place at the time the plea was changed and judgment was pronounced on June 15, 1942. That transcript shows that on that occasion the appellant came into court with his then attorney and with the assistant district at-

torney representing the People. Appellant's attorney informed the court that they would like to withdraw his plea of not guilty and enter a plea of guilty. The court asked the appellant personally whether this statement was correct and whether he desired to do this. The defendant replied that he did. The court then granted permission to do so and announced that the former plea was withdrawn. The court then informed the defendant that he then stood charged with the crime of forgery alleged to have been committed by him on or about April 25, 1942, and asked if they were ready to plead to that charge. On receiving an affirmative reply from the attorney the court asked the appellant whether he was guilty or not guilty. The appellant replied: "Guilty". Appellant's attorney then waived time for judgment, whereupon the court stated that he desired some information before he rendered judgment. The appellant's attorney then told the court the circumstances under which the check had been forged; that the appellant had previously been sentenced to San Quentin on a charge of forgery; that he had been paroled and later sent back as a parole violator; that when he got out he had gone straight for a period of about thirteen months; and that he had then had some trouble with his wife. The attorney then suggested that the appellant ought to "be given another chance by a jail sentence." The court then asked the appellant, "Can you offer any plausible reason, Mr. Sauer, why you, every time you get at liberty you commit some forgery?" The appellant replied: "Only * * * there is no excuse Your Honor, it is just I wasn't strong enough to bear under the strain." The defendant then went on to say that after he got out of San Quentin he wanted to do what was right towards his family; that he worked hard and gave them practically all he earned; that "It just came about that, it just happened"; and that he would like to prove to the court that he could make good and that the trouble was probably fear, "Afraid my past would become known here in town."

The court then announced he would have to send the appellant to San Quentin and stated that he wanted to ask him some questions. Appellant's attorney then made a considerable argument to the effect that the appellant should be given a jail sentence. After some further discussion between the court, defendant's counsel and the assistant district attorney a short recess was taken, after which the court asked the appellant the usual questions preliminary to the pronouncement of judgment. The court then asked the appellant if he had any legal cause to show why judgment should not be pronounced and his attorney replied: "No, Your Honor." Judgment was then pronounced.

[1, 2] Section 1200 of the Penal Code provides that when a defendant appears for judgment he must be informed of the nature of the charge against him and of his plea, and must be asked if he has any legal cause why judgment should not be pronounced against him. In this instance, he appeared to ask permission to change his plea, which was granted, and then waived time for judgment. The only reasonable conclusion is that when he came into court on this occasion he appeared for judgment. Before entering his plea of guilty he was informed of the nature of the charge against him, and that his former plea had been withdrawn. He then personally entered a plea of guilty. After a little interval during which his counsel made an earnest plea for a jail sentence and in which the general circumstances of the case were brought out, he was asked if he had any legal cause to show why judgment should not be pronounced. His attorney replied in the negative and the court proceeded to pronounce judgment. There is nothing in section 1200 which requires that the defendant be informed of the nature of his charge and of his plea immediately before the sentence is actually pronounced, and no possible prejudice could result from the fact that this was done here a few minutes before the judgment was pronounced and during the same proceeding and in connection with the very matter for which the appellant had come into court with his attorney. He had just been informed of the nature of the charge, and had just entered a plea of guilty. There was a substantial compliance with section 1200 and no prejudice appears. Under these circumstances, the minutes of the clerk are correct in their essence and no necessity for amending them appears. Not only does no prejudice appear but it would not be to the interest of the appellant to bring him back to court to rearraign him and again sentence him after he had already served about two years and seven months of his time.

[3] The appellant next contends that the denial of his motion to withdraw his plea of guilty and to vacate the judgment entered thereon was an abuse of discretion on the part of the trial court. He argues, in brief, that his entry of a plea of guilty of the crime charged was not voluntary and that the record shows that there was collusion between his attorney and the deputy district attorney by means of which he was misled into changing his plea from one of not guilty to one of guilty. The difficulty is that the record is devoid of anything which would even tend to support such a contention. In the transcript of the proceedings on June 15, 1942, when judgment was pronounced, which was read into evidence here, it appears that the appellant's attorney informed the court that they desired to withdraw the plea of not guilty and enter one of guilty; that the court then asked the appellant personally if this was his desire; that the appellant answered in the affirmative; and that after the appellant's counsel had stated the general facts of the case, including the fact that he had forged this check and cashed it at a certain place, the court asked the appellant whether he could offer any plausible reason for his actions. While the appellant's reply is somewhat rambling it indicates very clearly that he admitted that he had forged the check in question and that he had no excuse to offer other than his own weakness.

At the hearing which resulted in the order here appealed from the appellant read into the record the transcript of the proceedings at the time judgment was pronounced and called two witnesses. The first of these was a deputy clerk and his testimony has no possible bearing on the questions before us. The appellant then called the attorney who had represented him at the time judgment was pronounced, on June 15, 1942. He asked this attorney whether or not he had told the appellant that if his plea of guilty were changed he would be given a jail sentence. The attorney replied: "No, I never told you that." He then asked the attorney if he had told the appellant that he had seen the judge and that the appellant need not be afraid to change his plea to guilty. The attorney denied that he had had any such conversation with the appellant. The attorney, in response to a question as to whether the appellant had asked him to go into court and change his plea, replied: "Yes". The attorney then stated that at first the appellant had denied having written the check in question; that after he had seen the check and compared it with an exemplar of the appellant's handwriting he had gone to see the appellant in jail and asked him to tell him the truth; that the appellant replied: "I wrote this check * * * no use my saying any farther that I did not"; that he informed the appellant of the evidence possessed by the district attorney and told him that they had not yet alleged the prior conviction but that if he stood trial they would probably charge a prior conviction; and that under these circumstances he had advised the appellant to plead guilty. The appellant then asked the attorney if he had not told him that, regardless of the facts, the judge was going to send him to the penitentiary if he did not change his plea. The attorney replied that he did not. The attorney then testified that they went into court to change the plea because the appellant had told him there was no use standing trial because he had written this check.

The appellant did not take the stand at the hearing here in question and he introduced no further evidence. The only suggestion of any inducement offered to the appellant to get him to change his plea appears in the questions he asked his former attorney. In each and every instance the testimony of this attorney is to the contrary and that testimony not only stands uncontradicted in the record, but there is not a particle of evidence in the record to substantiate the appellant's present contention that the change of plea on his part was not voluntary or that any hope or inducement was offered to him to obtain such a changed plea. Under these circumstances, neither an abuse of discretion or error here appears. In this connection it may be observed that the appellant, in his briefs, argues many matters which are in no way concerned with the issues before the court or upon this appeal, and which are entirely unsupported by anything in the record.

[4] The last point raised is that the trial court divested itself of jurisdiction to pronounce judgment against the defendant in that during the proceedings before judgment was pronounced on June 15, 1942, the judge "removed himself from the court room and accepted representations and testimony against appellant out of court and out of the presence of appellant." It is argued that this is contrary to the

provisions of section 1204 of the Penal Code and that it was, therefore, incumbent upon the court to vacate the judgment on the ground that it is void.

This contention is based on the fact that during the proceedings on June 15, 1942, a recess was taken and a conference was held in the judge's chambers between the judge, the appellant's attorney, the assistant district attorney and a deputy district attorney. It appears from the transcript of the proceedings on that date that while the appellant's attorney was telling the court about the circumstances surrounding the case and urging that the appellant be given a jail sentence he mentioned the fact that he had talked to a deputy district attorney who was not present. A little later, the judge suggested that they get this deputy district attorney in. The assistant district attorney remarked that he could get him in about two or three minutes and a recess was taken. Some conversation then took place in the judge's chambers which does not appear in the transcript of the proceedings on that date. At the hearing, which resulted in the order here appealed from, the appellant called his former attorney and brought out the fact that such a conversation had taken place in the judge's chambers and that he himself did not go into the chambers. The record does not show whether or not he remained in hearing distance, however. On cross-examination the deputy district attorney asked the appellant's former attorney to relate what had been said in chambers on June 15, 1942. The appellant objected on the ground that it made no difference what was there said and that he relied on the mere fact that some statements were made at that time which related to him. The objection was overruled and the appellant's former attorney gave the substance of the conversation that took place in the judge's chambers on the prior occasion. According to this, and there is nothing else in the record showing what the conversation was, the discussion was with respect to whether or not the deputy district attorney who had been called in had made any promises to the effect that the appellant would be given a jail sentence and whether he had made any agreement in that connection with appellant's then attorney. The only other thing in the conversation was that the fact that the appellant had been in San Quentin and had violated his parole was mentioned, and that his attorney had argued that in spite of this fact he "thought the man should have a road camp or a county jail sentence."

It sufficiently appears that anything said in this conversation in the judge's chambers was not a "representation * * * in aggravation or mitigation of the punishment" within the meaning of section 1204. In an abundance of caution the trial judge was merely attempting to make sure that no improper agreement had been made with the appellant in order to induce him to change his plea of not guilty to one of guilty. This went entirely to the legality of the plea and not to the kind of punishment that should be given. While the appellant's attorney again asked that he be given a jail sentence this was merely an argument on his part and was not a representation of fact of any kind. While some reference was made in that conversation to the fact that the appellant had previously been imprisoned and had violated his parole, that fact had been brought out a few minutes before by his own attorney in open court. The court had no intention of fixing the time of punishment which is governed by the Indeterminate Sentence Law, no new facts were developed, and the only thing mentioned, aside from the question as to whether any agreement had been made, was the reference to his violation of parole which had just been brought out in open court, and the argument of appellant's attorney that in spite of that fact he could well be given a jail sentence. No substantial violation of section 1204 appears and, if it be assumed that there was some technical violation of that section, it cannot be held reversible under the provisions of section 4½ of article VI of the Constitution. Neither prejudice to the appellant nor any possible miscarriage of justice can be ascribed to the incident in question.

For the reasons given, the order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

67 Cal.App.2d 673

PEOPLE v. SAUER.

Cr. 560.

District Court of Appeal, Fourth District, California.

Jan. 24, 1945.

Criminal law ⇐1131(4)

Where order appealed from was subsequently vacated by trial court and the entire matter was set for rehearing which resulted in a new order, appeal was dismissed as moot.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Carl G. Sauer was convicted of forgery. From an order denying defendant motions for correction of record, to vacate judgment and to permit defendant to withdraw plea of guilty, defendant appeals.

Appeal dismissed.

Carl G. Sauer, in pro. per.

James M. Thuesen, Dist. Atty., and M. K. Gibbs, Deputy Dist. Atty., both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is the first appeal mentioned in the opinion this day filed in People v. Sauer, Cal.App., 155 P.2d 55.

This appeal was taken from the order entered on May 12, 1944, denying appellant's various motions, the appeal being based on the ground that the court had erred in summarily denying these motions without a proper hearing and without producing the appellant in court, although an order had been made that he be so produced.

The appellant also moved to vacate and set aside the order of May 12, 1944, and on August 3, 1944, the court vacated and set aside that order, and reset the entire matter for hearing on August 17, 1944. A hearing was then had resulting in a new order and a new appeal which was considered in the opinion to which we have referred.

On September 12, 1944, the respondent moved to dismiss the appeal taken from the order entered on May 12, 1944, on the ground that that order had been vacated and set aside and that all questions raised on said appeal are now moot. Because the facts were not then fully known to the court, the decision on the motion to dismiss the appeal was reserved and the matter ordered to be submitted in connection with the submission of the second appeal which was then pending. The matter was so submitted when the other appeal came on for hearing.

It now appears that the order from which this appeal was taken has been vacated and set aside, that the appellant was later given a full and complete hearing on such of his motions as he desired to present, having been produced in the trial court for that purpose, and that the entire matter has been fully covered in a new order which was entered and in a new appeal taken therefrom. No questions or issues remain which call for any consideration on this appeal.

For the reasons given, this appeal is dismissed as moot.

MARKS and GRIFFIN, JJ., concur.



67 Cal.App.2d 591

CATHCART v. REDLANDS SECURITY CO. et al.

Civ. 3280.

District Court of Appeal, Fourth District, California.

Jan. 18, 1945.

Rehearing Denied Feb. 15, 1945.

Hearing Denied March 15, 1945.

1. Partition ⇐77(3), 88, 114(7)

Where plaintiff's undivided three-fourths interest in realty was encumbered by first lien held by defendant, who also owned the other undivided one-fourth interest, court, in partition action, could make division in kind and require defendant to substitute for its lien a lien upon that portion of property awarded to plaintiff as her share upon partition, after the property had been charged with just proportion of cost of partition. Code Civ. Proc. § 769.

2. Partition ⇐116(2)

Generally, where a judicial partition is made in kind, existing lien on an undi-

vided interest in the whole attaches to land allotted to cotenant against whose interest the lien was a charge. Code Civ.Proc. § 769.

3. Partition ⇐13

Where prior judgment created an express trust for a limited time and for a particular purpose by requiring parties to convey property held by them as cotenants, and, after trust was terminated, the property was reconveyed to parties, prior judgment did not create a new and different estate in parties, preventing partition of the property. Code Civ.Proc. § 752 et seq.

4. Partition ⇐88

Where judgment in original action conveying defendant's undivided one-fourth interest in and releasing any right to lien on certain property was by stipulation and contained no provision whereby deeded portion would again be subjected to lien of trust deed, in event that remainder held by parties as cotenants was ordered partitioned, trial court, in ordering partition of remainder, did not abuse its discretion in failing to order a lien on property previously deeded. Code Civ. Proc. § 752 et seq.

5. Contempt ⇐25

Where stipulation and judgment pursuant thereto made adequate provision for procedure to be followed in case of default in payment by present plaintiff, present plaintiff could not be held in contempt of court because of failure to make required payment.

6. Partition ⇐94(3)

Under statute, report of referees in partition proceedings was not final until approved by court and adopted in its judgment. Code Civ.Proc. §§ 765, 766.

Appeal from Superior Court, San Bernardino County; Kenneth E. Morrison, Judge.

Action by Bessie L. Cathcart against Redlands Security Company and another to partition realty. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Fred A. Wilson, of San Bernardino, for appellants.

Jesse W. Curtis, Jr., of San Bernardino, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action to partition certain real property under the provisions of section 752 et seq. of the Code of Civil Procedure. It is alleged that plaintiff and defendant Redlands Security Company, a corporation, hereinafter referred to as the company, are the owners as tenants in common of the real property described in the complaint; that plaintiff is the owner of a three-fourths interest and that defendant company is the owner of a one-fourth interest therein; that defendants are in possession thereof; that on February 20, 1931, plaintiff executed to defendant company a promissory note for $18,000 secured by a trust deed, in the usual form, constituting a first lien upon plaintiff's three-fourths undivided interest; that defendant Security Title Insurance & Guarantee Company, a corporation, is named as trustee therein. The petition prays for a partition of the real property and if partition cannot be had that the premises be sold, etc. Defendant company answered, and after trial the court found the allegations of the complaint to be true and ordered, by interlocutory judgment, that partition of the premises be made in accordance with the several respective interests of the parties and that in case partition cannot be so made without prejudice thereto then compensation shall be made by one of the parties to the other for equality of partition. The order appointed three referees with full power and authority to make partition accordingly and report thereon to the court in accordance with the provisions of the Code of Civil Procedure above mentioned.

The factual background of the present action is disclosed in Cathcart v. Gregory, 45 Cal.App.2d 179, 113 P.2d 894. At the trial defendants placed in evidence the judgment so affirmed on appeal. This action was instituted to effect partition of the portion of the 280 acres referred to in that decree which remained after the conveyance by the company to plaintiff of the parcels and releases therein set forth. Defendants appealed from the interlocutory judgment.

[1] It is now argued first that division in kind cannot be made where an undivided interest is incumbered and that therefore the interlocutory judgment should have provided for a sale of the property and payment of the trust deed out of the plaintiff's three-fourths of the net proceeds,

citing Wernse v. Dorsey, 2 Cal.2d 513, 515, 41 P.2d 935; Deacon v. Deacon, 101 Cal. App. 195, 281 P. 533; Holt v. Holt, 131 Cal. 610, 63 P. 912. These cases are authority for quite a different rule of law than that contended for by defendants. They hold that in the event the court decrees the property should be sold rather than partitioned in kind, that the property should be sold free and clear of all liens and the lienholders are to be satisfied out of the share of the proceeds coming to the person upon whose interest the lien previously existed.

In the instant case, the defendant company, holding a lien upon the plaintiff's undivided interest in the property, and being a party to the action, may be properly required to substitute therefor a lien upon that portion of the property which the court may ultimately award to the plaintiff as her share upon partition, such a lien to attach, however, only after the property has been charged with its just proportion of the cost of partition. There was no evidence introduced at the time of the trial which would indicate in the least the impropriety or undesirability of partitioning the property in question in kind. The trial court's direction to so partition it has the full support of the authorities of this state.

[2] In 93 A.L.R. 1267, 1272, the general rule is stated "* * * that when a judicial partition is made in kind, an existing lien on an undivided interest in the whole attaches to the land allotted to the cotenant against whose interest the lien was a charge." See, also, section 769, Code Civ.Proc.; 20 Cal.Jur. p. 656, § 68; Oliver v. Sperry, 220 Cal. 327, 30 P.2d 402.

[3] It is next argued that the judgment in the case of Cathcart v. Gregory, supra, has created a new and different estate and one which cannot be properly partitioned because the judgment provides that the remaining parcel of land be deeded to the Security Title Insurance & Guarantee Company by both the defendant company and plaintiff and that the trust company hold the same as trustee for the purposes set out in the judgment; that the trustee was to convey it to the plaintiff upon the payment of certain sums of money specified in the judgment on or before April 8, 1939, and that in the event the plaintiff failed to deliver to the trustee the amount specified, then the trust would ipso facto be terminated on that date and the trustee must then convey to plaintiff the property conveyed by her and that the trustee should forthwith proceed to sell the property under the trust deed; that in the event of default of the plaintiff in making the payments, the trustee should reconvey to defendant company the undivided one-fourth interest in the property.

It becomes apparent that an express trust was created by the judgment for a limited time and for a particular purpose. It consummated its purpose and was terminated on April 8, 1939. The property was then reconveyed to the defendant and the plaintiff herein in accordance with the respective interests held by each prior to the entry of the judgment. Respondent's interest was held, however, subject to the trust deed in favor of the defendant company. At the time this action was brought, the trust was no longer in effect. The title then stood and now stands in the name of the defendant to the extent of an undivided one-fourth interest in the remaining parcel of land and in the plaintiff to the extent of an undivided three-fourths interest therein subject to the note and deed of trust. The judgment obviously contemplates a continuance of the security relationship. There is nothing in the judgment which in any way destroys the cotenancy of the property described in the complaint or dedicates it to a special purpose, precluding partition. The argument that it would now be inequitable to allow plaintiff to retain, free and clear of incumbrance, the parcels deeded to her and, by partition, compel defendants to resort only to the parcels set aside as plaintiff's three-fourths of the remainder for its security on the trust deed, is equally untenable.

[4, 5] Defendant company, in accordance with the stipulation and judgment, has heretofore conveyed its one-fourth interest in and has released any right to a lien on that property which was conveyed to plaintiff, and has also released it from any indebtedness. Defendants cannot now complain because the security under the trust deed will be diminished if a partition of the remainder of the 280 acres is ordered.

The judgment, as entered in the original action, was by stipulation, and contemplated the very action taken. No provision was made therein whereby the deeded portion would again be subjected to the lien of the trust deed. It cannot here be said that the trial court abused its equitable dis-

cretion in failing to order a lien thereon. Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301. The argument that plaintiff is in contempt of court because she failed to make the payments required by the stipulation and judgment is not meritorious. The stipulation and judgment made adequate provision for the procedure followed in case of default in payment by her.

[6] Other questions raised are equally untenable. No prejudice or abuse of discretion appears from the record before us. Section 765 of the Code of Civil Procedure provides that the referees must make a report of their proceedings and any party may move the court to confirm, change, modify or set aside such report, and the court, in section 766 thereof, has the power so to do. The report of the referees is not final until approved by the court and adopted in its judgment.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



67 Cal.App.2d 602

VINCENT v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 3285.

District Court of Appeal, Fourth District, California.

Jan. 19, 1945.

Hearing Denied March 19, 1945.

1. Judgment ⇐405

In the absence of extrinsic fraud or certain jurisdictional defects, an action in equity does not lie to secure an interpretation of a will disposing of a testamentary trust different from that adopted by the probate court whose decree of distribution has become final.

2. Wills ⇐470

All parts of a will are to be construed in relation to each other, where possible. Probate Code, § 103.

3. Wills ⇐687(1)

A will giving half of the corpus of a testamentary trust to each of two grandsons, if alive, otherwise to his heirs, and then declaring that if either died prior to distribution "his share" should go to his wife, if any, otherwise to his heirs, was properly construed as giving a deceased grandson's one-half share of the corpus to his wife, if any, otherwise to his heirs, since the words "his share" related to the time of delivery of the corpus, and did not include income. Probate Code, §§ 103, 105.

4. Judgment ⇐405

In an equity action to amend and construe a decree of distribution affecting a testamentary trust, where no mistake appeared, it was immaterial that testatrix may have intended or done something different in a former will, later revoked. Probate Code, § 105.

5. Judgment ⇐435, 443(1)

A decree of distribution, such as one disposing of a testamentary trust, is reviewable in equity on a showing of fraud or mistake.

6. Judgment ⇐461(2)

In an equity action to amend and construe a decree of distribution affecting a testamentary trust under a will which clearly disposed of both income and corpus, evidence of testatrix' oral instructions to her attorney, who inadvertently failed to carry them out clearly in the will, was inadmissible. Probate Code, § 105.

7. Judgment ⇐460(1)

Where a complaint, though praying for a declaration of rights, was not for ordinary declaratory relief but sought to amend a decree of distribution and construe the decree and the will on which it was based, a demurrer to the complaint could properly be sustained. Code Civ.Proc. § 1061.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action in equity by Marjorie C. Vincent against the Security-First National Bank of Los Angeles, as trustee under the will of Hattie J. Vincent, deceased, and others, concerning the proper construction of the will and of a decree of distribution. A demurrer to the first amended complaint was sustained without leave to amend, and from a judgment of dismissal, plaintiff appeals.

Affirmed.

Harvey, Rimel & Harvey, of Santa Ana, and A. P. G. Steffes, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment of dismissal after a demurrer to the first amended complaint had been sustained without leave to amend. The action involves the right of the appellant to share in the income from a trust fund established by the decedent, it being conceded that she is entitled to one-half of the corpus of the trust estate at the termination of the trust.

Hattie J. Vincent died on July 27, 1939, leaving a will dated July 26, 1938, which was probated in Orange County. She left most of her property in trust and the only controversy here is with respect to the meaning and intention of two paragraphs of her will relating to the disposition of the income from and corpus of the trust estate. It is not contended that any other parts of the will throw any light upon the testator's intention in these respects. These paragraphs read as follows:

"X. The entire net income received and derived from the trust estate and applicable therefor shall be payable in the sum of Twenty-five Dollars ($25.00) per month to my mother, Julia Smith, for and during the period of her natural life, and the remaining net income shall be payable to the order of my grandsons, Ronald Emerson Vincent and Robert Leroy Vincent, in equal shares quarterly, or other convenient installments, for the duration of this Trust, which shall be from the date of my demise to and including the first day of July, 1955, provided, further, that in the event of the demise of either Ronald Emerson Vincent or Robert Leroy Vincent, prior to July 1st, 1955, then this trust shall continue during said period, and the entire remaining net income of said trust estate shall be payable to the survivor during the remaining period of this Trust and not to the creditors of his estate.

"XI. This trust shall ipso facto cease and determine on the 1st day of July, 1955, and the entire corpus of the trust estate, together with any accumulations thereto, in the hands of the Trustee, shall go to and be conveyed and delivered in fee by said Trustee, as follows:

"(1) One-half thereof to Ronald Emerson Vincent, providing he survives distribution thereof, otherwise to his heirs at law;

"(2) One-half thereof to Robert Leroy Vincent, providing he survives distribution thereof, otherwise to his heirs at law;

"(3) In the event of the death of said Ronald Emerson Vincent prior to distribution of my estate under this trust, then his share shall go to his wife, if any, otherwise to his heirs at law;

"(4) In the event of the death of said Robert Leroy Vincent prior to distribution of my estate under this trust, then his share shall go to his wife, if any, otherwise to his heirs at law."

A decree of distribution was entered on May 1, 1942. This decree is not in the record, but the appellant sets forth in her brief paragraph "(9)" thereof, which provides that at the termination of the trust the entire corpus of the trust estate "shall be delivered and distributed as follows:

"(a) One-half to Ronald Emerson Vincent, providing he survives such distribution, and, if he does not, his said share shall be distributed to his then wife, if any, if he leaves no wife, then to his heirs at law;

"(b) The remaining one-half to Robert Leroy Vincent, providing he survives such distribution, and, if he does not, his said share shall be distributed to his then wife, if any, and if he leaves no wife, then to his heirs at law."

The terms of the decree of distribution relating to who shall receive the income from the trust during its existence are not specifically set forth but apparently they followed the provisions of paragraph X of the will, as above set forth.

On January 15, 1943, Ronald Emerson Vincent, one of the grandsons, died. The appellant, who is his widow, demanded of the trustee that one-half of the net income of the trust estate be paid to her. On April 29, 1943, the trustee petitioned the court for instructions relative to its duty in this regard. The appellant appeared and presented her claims at the hearing on that petition. The court found that there was no ambiguity in the decree in this respect and instructed the trustee to pay the entire net income from the trust estate to the surviving grandson Robert Leroy Vincent. This order was made on June 16, 1943, and has become final. However, the appellant announced at the hearing that she would bring an action in equity and this action was brought before that order became final.

The first amended complaint alleged, among other things, that on November 22, 1934, the testatrix executed a prior will which had been prepared by one of the present attorneys for the appellant; that in this prior will she had established a similar trust; that in one paragraph thereof she had provided that the net income from the trust estate should be paid to her two grandsons and in the event of the death of either the entire net income should be paid to the survivor during the existence of the trust; that in another paragraph she had provided that at the termination of the trust the corpus should go to the two grandsons or to their issue, if they did not survive, with the further provision that in the event of the death of either prior to distribution of the trust estate one-half of the net income should be paid to the issue of the deceased grandson during the continuance of the trust; that in 1936 Ronald Emerson Vincent and the appellant were married; that in 1938 one of the trustees mentioned in that will died; that the testatrix then instructed this attorney to prepare a new will based upon the old will with certain modifications; that she instructed him to include in the new will a provision to the effect that in the event of the death of Ronald Emerson Vincent his share, both of the corpus and income of the trust, should go to his surviving widow, if any, otherwise to his heirs at law, and that the provisions of the old will should be modified to carry out this intent; that pursuant to her instructions this attorney prepared the new will by carrying these provisions of the old will into the new will with some change of language and by putting certain portions in differently numbered paragraphs; that this was done as a matter of convenience and not with the intent that any paragraph should relate wholly either to income or to corpus of the trust estate; that this new will was executed on July 26, 1938; that the testatrix then understood, intended and believed that paragraph XI of this will meant and provided that the appellant should receive the share of Ronald Emerson Vincent, both corpus and income, in the event of his death; that at the hearing on the petition for distribution the court's attention was called to another matter not material here, but was not specifically called to the matter of the disposition of the income from the trust in the event of the death of either grandson, both of them then being alive; that on May 1, 1942, the decree of distribution was entered but, through the inadvertence of the court, the executor and the attorney the decree failed to include any provision which would clearly express the intention of the testatrix that in the event of the death of Ronald Emerson Vincent during the life of the trust his share, both of corpus and income, should go to his widow, if any, otherwise to his heirs at law; that at all times the court, the executor and this attorney believed that the decree coincided with the language of the will with respect to what should happen on the death of either grandson; that at the hearing on the trustee's petition for instructions as to how the income should be paid the court determined that this portion of the decree of distribution was not ambiguous, uncertain or vague and rejected the offer of the appellant to introduce into evidence the last will of Hattie J. Vincent executed on July 26, 1938, in order to establish the true intent of the testatrix with reference to the payment of one-half of the net income of the trust estate to the appellant; and that the appellant then advised the court that she intended to bring an action in equity for the purpose of having the decree of distribution changed to conform with the language used in the last will, and having that language interpreted to the effect that during the life of the trust one-half of the net income should be paid to the appellant. A second cause of action alleges that a controversy exists with reference to the payment of one-half of the net income from the trust estate since the death of Ronald Emerson Vincent, that the appellant contends that she is entitled thereto under the terms of the will, and that the respondents contend that Robert Leroy Vincent, the surviving grandson, is entitled thereto. The prayer is that the court determine and declare the rights of the parties, that the decree of distribution be amended to set forth verbatim the provisions of paragraph XI of the will, and that when so revised said decree be interpreted and construed as providing that since the death of Ronald Emerson Vincent the appellant is entitled to one-half of the distributable net income from the trust estate.

The appellant first contends that the probate court has erroneously construed this will and, through the mistake of the court and of the parties then before it, has failed to carry the provisions of paragraph XI of the will, as properly interpreted, into the decree of distribution. It is argued that paragraph XI does not relate solely to the

distribution of the corpus at the termination of the trust; that subdivision (3) of paragraph XI provides that in the event of Ronald's death "his share" shall go to his wife; that he had no vested share in the corpus since he might die before the termination of the trust; that the words "his share" must refer to his share at the time of his death; and that since the only share he then had was one in the income this provision relates to the income from the trust and means that his share of that income shall go to the appellant. It is then argued that subdivisions (3) and (4) of paragraph XI of the will are entirely omitted from the provisions of the decree of distribution, and that through this mistake the appellant has been deprived of what was given her under the terms of the will. It is then argued that this is the reasonable interpretation of the language used in the will, that this disposes of the entire estate in accordance with the general plan which the testatrix had in mind, and that the fact that the testatrix had such an intention is further disclosed by the language she used in her first will.

[1-3] In effect, this is an attempt through an action in equity to secure an interpretation of the language used in the will other than and different from that already adopted by the court, whose decree has become final. This may not be done except where the decree may be attacked for extrinsic fraud or certain jurisdictional defects. Cook v. Cook, 17 Cal.2d 639, 111 P.2d 322; Metzger v. Vestal, 2 Cal.2d 517, 42 P.2d 67; Moor v. Vawter, 84 Cal.App. 678, 258 P. 622. Moreover, the will here in question has again been interpreted by the court in the proceeding in which the trustee asked instructions with respect to its duty in this particular matter. Estate of Keet, 15 Cal.2d 328, 100 P.2d 1045. No extrinsic fraud is claimed and the only mistake relied on is that the court, in making the decree of distribution under the guidance of one of the appellant's attorneys, did not adopt the exact language of the will. It is true that two parts of paragraph XI of the will are irreconcilable. Subdivision (1) thereof gives one half of the corpus at the termination of the trust to Ronald if then living, otherwise to his heirs at law. Subdivision (3) of that paragraph, in the event of his death prior to such termination, gives that half to his wife, if any, otherwise to his heirs at law. Under section 103 of the Probate Code all of the parts of a will are to be construed in relation to each other, where possible, and the court correctly construed these two provisions together as meaning that in the event of the death of Ronald the property otherwise going to him under paragraph XI should go to his wife if he had one, otherwise to his heirs at law. Moreover, section 103 of the Probate Code provides that where several parts of a will are irreconcilable the latter provision must prevail. There is no controversy here over what was done in this regard insofar as the distribution of the corpus of the estate at the termination of the trust is concerned.

The language used in paragraph XI of the will is plain and explicit, and it clearly provides for what shall be done with the corpus of the estate at the termination of the trust and for nothing else. There is no room for construction or interpretation in this regard. The use of the words "his share" in subdivision (3) of that paragraph clearly relates to what would be his share if he were then living. The time to which those words relate is not the time of his death but the time of delivery of the corpus at the termination of the trust estate. That is the only time mentioned or referred to in paragraph XI, as clearly shown by the language used.

[4] Nor would appellant be any better off if this will were again to be interpreted and construed. Not only is the construction placed upon it by the Probate Court a reasonable one but it appears to be the only one that could be given it under established rules. The testator's intention is to be ascertained from the words used in the will. Probate Code, § 105. Paragraph X of the will relates to the income from the trust during its existence and clearly provides that in the event of the death of one of the two grandsons the entire remaining income shall be paid to the survivor. Paragraph XI relates entirely to the disposition of the corpus of the trust estate at its termination and does not purport in any way to provide for what shall be done with the income from the trust estate in the event of the death of one of the grandsons pending the termination of the trust. Under such circumstances, no mistake of any kind appears in this connection, either in the will or in the decree of distribution, and what may have been intended or done by the testatrix in her first will, which was later revoked, could not be material here. It may be further observed that even the

first will made no provision for the payment of any of the income to the wife of a deceased grandson.

[5, 6] The appellant further argues, under the authority of Bacon v. Bacon, 150 Cal. 477, 89 P. 317, and similar cases, that this decree of distribution may be attacked in an equity action such as this. It is, of course, well settled that a decree of distribution is subject to review in equity upon a showing that it was procured by fraud or mistake. There are no allegations in this first amended complaint which would bring this action within that rule. No facts are given which show or indicate any extrinsic fraud or any mistake within the meaning of that rule. It is alleged, in effect, that the testatrix instructed the attorney mentioned to prepare the will in a manner somewhat different from the terms set forth in the will as executed. The appellant argues that oral declarations of the testatrix, consisting of instructions given by her to her attorney in connection with the preparation of the will and upon which she intends to rely, constitute an exception to section 105 of the Probate Code and are, therefore, admissible. In support of this she relies on Estate of Dominici, 151 Cal. 181, 90 P. 448, 450, and on Estate of Little, 170 Cal. 52, 148 P. 194, to the same effect. In the first of these cases, no patent ambiguity appeared on the face of the will with respect to the identity of one of the legatees but because of an inaccurate description with respect to the party and the place of residence a latent ambiguity existed and the court held that under those circumstances the instructions given by the testator to his attorney with respect to the preparation of the will could be received for the purpose of clearing up the latent ambiguity. However, in that case, the court said: "For even in cases where extrinsic evidence is admitted to explain latent ambiguities, and to perfect imperfect descriptions of beneficiaries, or the subject-matter of devises or bequests, no evidence is admissible to change or vary the testator's expressed intent. This must always be deduced from the will itself, assisted by such extrinsic evidence." And further: "It should, of course, be unnecessary to add that, where a will without latent ambiguity expresses a clear intent, such evidence would never be permitted in an effort to show that the intent expressed was a mistaken one. It is only where the description of the person or property by extrinsic evidence is shown to be doubtful or imperfect that such evidence may be employed in the effort of the court to arrive at and declare the meaning and intent which the testator, by the terms of his will, attempted, however irregularly, to declare. This under the familiar rule of evidence that a doubt arising from extrinsic evidence may be removed by extrinsic evidence."

There is no latent ambiguity here, and there is nothing in the complaint which would justify the introduction of any extrinsic evidence which would make necessary its removal by other extrinsic evidence. Under these circumstances the evidence suggested by the allegations of the complaint in this regard would be inadmissible. The intent of the testatrix, as expressed in the will, is clear, precise and definite and neither calls for extrinsic evidence to explain it nor permits an interpretation or construction which would result in destroying the intention clearly expressed.

[7] At the oral argument of this case some question was raised as to whether a demurrer could properly be sustained to the second cause of action here alleged, if it asked for declaratory relief, because of the rule laid down in Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062. While the second cause of action alleged the existence of a controversy between the parties with respect to their rights under the terms of the will and the decree of distribution, and prayed that the court determine and declare those respective rights, this was not a declaratory action in the ordinary sense. The action was one to set aside the decree of distribution as entered, to amend it, and then to construe it and the will in a certain way. The court correctly found and held that no cause of action was stated which would justify any relief, the entire matter related to the proper interpretation of this will as expressed in the decree of distribution, there was no controversy as to the rights of the parties under the decree as entered, and the entire purpose of the action was to set aside that decree and secure a different one rather than to secure a declaration as to the rights of the parties under the existing decree. Moreover, section 1061 of the Code of Civil Procedure provides that the court may refuse to exercise the power granted in that chapter in any case where its declaration or determination is not necessary or proper under all of the circumstances. Under the cir-

cumstances here appearing, we think the rule referred to is not applicable.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



67 Cal.App.2d 548

NEWMARK v. PACIFIC FREIGHT LINES.

Civ. 14521.

District Court of Appeal, Second District, Division 3, California.

Jan. 17, 1945.

1. Carriers ⇐120

Where motor carrier accepted a plainly marked shipment of fresh, chilled pork sausage to be transported from Los Angeles to Camp Roberts, and failed to notify shipper that there would be a delay in delivery due to road washout and attempts to refrigerate by placing dry ice on top layer of the cartons during the 48 hours shipment remained at the terminal did not prevent the sausage from spoiling, carrier was liable for the loss.

2. Carriers ⇐120

A carrier has duty to take proper measures for the preservation of perishable goods in transit and a failure to comply with this duty which results in loss to the shipper, renders the carrier liable for the damage sustained.

3. Carriers ⇐123

Where the carrier's negligence concurs in and contributes to the loss or injury to shipper, carrier is not exempt from liability on ground that the immediate damage was occasioned by an act of God.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by R. Newmark against Pacific Freight Lines for damages resulting from the delay in transporting a shipment. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hugh Gordon, of Los Angeles, for appellant.

Samuel Mirman, of Los Angeles, for respondent.

PARKER WOOD, Justice.

The Pioneer Provision Company, a manufacturer of meat products, hereinafter referred to as the shipper, employed the defendant, a common carrier by motor trucks, to transport 7598 pounds of chilled fresh sausage from Los Angeles to Camp Roberts, an army camp near San Luis Obispo. By reason of heavy rainfall which caused the highway to be closed, the defendant did not send the sausage forward immediately after it received it from the shipper on January 22, 1943, but held it at its terminal in Los Angeles about 48 hours. When the sausage arrived at its destination on January 25, 1943, it was rejected by the inspecting officer for the reason that it was spoiled. In this action by the assignee of the shipper to recover damages resulting from the delay in transporting the sausage, plaintiff obtained judgment for $2,110.91 damages. Defendant appeals from the judgment.

Defendant contends that it used reasonable precautions to prevent damage to the sausage; that the loss was not caused by any negligence of defendant; and that the delay was caused solely by an act of God. There is no issue on this appeal concerning the amount of damages.

The sausage was placed on defendant's truck at the shipper's place of business in Los Angeles on Friday, January 22, 1943, about 4 p. m., and at that time the sausage had been made about 10 hours, had been chilled to a temperature of 38 degrees, and was in good condition. Without further refrigeration, the sausage, under the weather conditions then prevailing, would have remained "without spoilage" approximately 30 hours. In the ordinary course of events a shipment "picked up" by defendant at the shipper's place of business about 4 p. m. would arrive at Camp Roberts the following day prior to 1 p. m., that is, the shipment would be in transit about 20 hours. The sausage was in "cellophane casings" and then was packed in corrugated fiber cartons for shipment, each of which cartons contained about 75 pounds of sausage. There were 101 such cartons. In dimensions each carton was about 12 inches by 12 inches by 16 inches. Each carton was stencilled on the end thereof, in letters 1 inch high, as follows: "Pork sausage, Fresh,

Chilled." There was a bill of lading which stated that the shipment contained 101 packages of "Pork Sausage" which weighed 7598 pounds net, and also stated the name of the shipper. At the time of loading the sausage on defendant's truck the shipper's employees took the cartons of sausage from the refrigerator and handed them to defendant's employees who were on the truck and who placed them in the front part of the truck, close together, in 4 tiers 4 cartons high. The sausage did not fill the truck. The truck had a 20-foot open stake-body. The stakes or "side racks" were about 6 feet in height and the ridge pole was about 7 feet above the floor of the truck. The open portion of the truck was covered with a tarpaulin which rested on the ridge pole and the side racks, and extended downward to, and was fastened to, the outer edges of the floor. From the shipper's place of business the truck went to defendant's terminal in Los Angeles, where it arrived about 4:30 p. m. When it arrived there, the only freight on it was the sausage. The defendant then completed the loading of the truck with various shipments of other freight. For several days prior to the time the sausage was placed on the truck, a heavy rainstorm had been prevalent in Southern California. It was raining when the truck arrived at the Los Angeles terminal. After defendant had the load ready to go and had called a driver to proceed with it, the defendant received a report from the State Highway Patrol to the effect that by reason of the heavy rains the roads to Camp Roberts were not open. As a result of that report and of a similar report received the next afternoon, Saturday, January 23, the truck did not leave defendant's Los Angeles terminal until Sunday, January 24, at 3:15 p. m. that is, approximately 48 hours after the sausage had been loaded on the truck.

Defendant did not notify the shipper that there was a delay, and left the loaded truck, covered with a tarpaulin, in the open yard of its terminal. On Saturday, January 23, about 4 p. m. defendant rolled the tarpaulin back, and placed 50 pounds of broken dry ice over the top layer of the cartons of sausage and replaced the tarpaulin. On Sunday afternoon, January 24, defendant placed another 50 pounds of dry ice on the sausage in the same manner that the first 50 pounds had been placed thereon. The truck left the Los Angeles terminal for Camp Roberts on Sunday, January 24th, at 3:15 p. m. It arrived at Camp Roberts on Monday, January 25th, about 1:30 p. m., that is, it arrived at its destination about 70 hours after the sausage had been loaded on the truck. An army officer, who inspected the sausage upon its arrival, rejected it for the reason that it was unfit for human consumption. Defendant notified the shipper that the sausage had been rejected, and the shipper instructed defendant to reice the shipment and return it to the shipper in Los Angeles. At Camp Roberts defendant placed 80 pounds of dry ice, which was all defendant "could get," on top of the sausage and returned it to the shipper.

[1] The principal question is whether defendant used reasonable precaution to prevent damage to the sausage. Even if the rains caused the roads to be in such condition that defendant was justified in delaying the shipment, the question remained as to whether defendant used reasonable care to protect the sausage after it knew there would be a delay. When defendant determined on Friday afternoon, January 22d, that it would not start the truck to Camp Roberts that afternoon, as was contemplated by the shipper, the defendant did not notify the shipper that afternoon that there would be a delay. The defendant did not notify the shipper on the following day, Saturday, or on the next following day, Sunday, or at all that there would be a delay. Defendant contends that it could not notify the shipper that there was a delay for the reason there "was no record at the time of the names of shippers whose shipments were thus delayed," and that to have ascertained the names of the shippers it would have been necessary to unload 29 trucks, containing approximately 1200 shipments, and that defendant did not have a sufficient number of men to do such work. The truck upon which the sausage was loaded was No. 217. It appears that defendant did not keep a record from which it could determine what or whose freight was on a particular truck. The failure of defendant to keep sufficient records from which it could determine the names of shippers and the kinds of freight on a particular truck was not a circumstance tending to prove that defendant used reasonable care in protecting the sausage. It does not appear that the shipper knew that defendant did not keep records which would show what and whose freight was on a particular truck, and the shipper was not chargeable with knowledge of defendant's failure to keep such records. There was no duty on

the part of the shipper to make inquiry as to whether the shipment was going forward without delay. The shipper had shipped sausage by way of defendant's lines on previous occasions and it was entitled to assume, until it had notice to the contrary, that the shipment would proceed according to schedule. The contention of defendant, that it would have been necessary to unload 29 trucks in order to ascertain the names of the shipper, implies that if a truck were unloaded and thereby a particular shipment was located then the name of that shipper could be ascertained. It does appear that defendant did ascertain that there was a large quantity of sausage on truck 217, inasmuch as defendant iced the sausage on Saturday and Sunday. Having located the sausage, even though the truck was not unloaded, it would seem that the name of the shipper could have been readily ascertained either by inspection of the packages or by inquiry among the employees who loaded the sausage on that truck. Furthermore, as above shown, there was a bill of lading which stated the name of the shipper, and that the shipment was 7598 pounds of pork sausage. It therefore appears that defendant located the sausage even though it had not unloaded the truck; that defendant recognized the sausage as perishable property, inasmuch as it placed ice on it; and that defendant could have ascertained the name of the shipper readily through the bill of lading and otherwise. If defendant had notified the shipper that there was a delay, even as late as 4 p. m., Saturday, when it iced the sausage, such notice being given about 24 hours after the sausage was taken from the refrigerator would have afforded the shipper sufficient time to properly protect the sausage. The defendant failed in its duty to notify the shipper of the delay. By reason of such failure the shipper was deprived of an opportunity to protect the sausage.

Defendant undertakes to excuse its failure to notify the shipper of the delay by asserting that the method of icing which it employed was the "usual and customary method employed in the trucking industry for the refrigeration of perishables" which are not "loaded in refrigerator trucks." The army officer, who inspected the sausage and who qualified as an expert in methods of refrigerating meat and sausage, testified that the method of icing used by defendant would have "very little" effect on sausage, but "might" refrigerate the top layer a few inches down; that if the sausage remained at defendant's terminal approximately 23 hours and was iced on Saturday and Sunday in the manner asserted by defendant, it would spoil; that "that type of icing did not constitute icing" of such a shipment; and that a "canvas covered truck" is "not insulated against heat," and the canvas "does not hold the temperature, it radiates." Since there were 7598 pounds of sausage to be protected by the ice it appears that the 50 pounds used in each icing was in the approximate proportion of 1 pound of ice to each 150 pounds of sausage. As above noted, the sausage was in 101 cartons which were close together in 4 tiers 4 cartons high, and the ice was placed on the top layer of cartons. The method of icing used by defendant was altogether inadequate and defendant did not use reasonable care in protecting the sausage.

Defendant asserts further that a carrier is not liable for failure to render a service which it has not undertaken, and that defendant did not operate or offer to the public a refrigerator service. Counsel for defendant stated in his brief that: "It may be conceded that if the shipper had notified the defendant by a statement on the bill of lading or otherwise that the shipment was perishable and required refrigerants in case of delay, reasonable diligence would have required different action on the part of defendant in the discharge of its common carrier duty * * *." The evidence shows that each of the 101 cartons of sausage was plainly marked that it contained chilled fresh sausage; that defendant's employees loaded those cartons on the truck at the shipper's meat packing plant; that the defendant did undertake to carry the sausage knowing it was perishable; that it had undertaken to and had transported fresh sausage to Camp Roberts for this shipper on other occasions; that it was customary for defendant to use dry ice to preserve perishables; and that in the usual course of events this shipment would have been transported successfully to its destination.

[2, 3] It is a carrier's duty to take proper measures for the preservation of perishable goods in transit, and a failure to comply with this duty, which results in loss or injury to the shipper, renders the carrier liable for the damage sustained. 3 Cal. Jur.Supp. 321, sec. 46a; Jacobs, Malcolm & Burtt v. Northern Pac. R. Co., 1925, 71 Cal. App. 42, 43, 44, 234 P. 328. "The general rule is that, in order to excuse the carrier for a loss upon the ground that it was

caused by an act of God, such act must have been the proximate cause of the loss." (9 Am.Jur. 853, sec. 712.) "Even though the immediate or proximate cause of a loss in any given instance may be what is termed the act of God, nevertheless, if the negligence of the carrier mingles with it as an active and co-operative cause, the carrier is still responsible; in other words, where the negligence of the carrier concurs in, and contributes to, the loss or injury, the carrier is not exempt from liability on the ground that the immediate damage is occasioned by vis divina. The act of God, to excuse the carrier, must, according to the better opinion, be not only the proximate but also the sole cause of the loss." (9 Am. Jur. 854, sec. 713.) As above stated, irrespective of the cause for the delay, defendant did not use reasonable diligence to protect the shipment of sausage after it was known there would be a delay.

By reason of the foregoing, it is not necessary to discuss defendant's other contention to the effect that the finding that defendant negligently delayed the shipment was unsupported by the evidence.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.



67 Cal.App.2d 531

PEOPLE v. JONES et al.

Civ. 3336.

District Court of Appeal, Fourth District, California.

Jan. 12, 1945.

1. Eminent domain ⇐107

A compensable claim does not exist in favor of a landowner in condemnation merely by virtue of the fact that a new highway is constructed which results in travel following the new highway rather than choosing to follow the old highway passing owner's improvement or property.

2. Eminent domain ⇐124, 134

Ordinarily, the market value of land which is taken in eminent domain, estimated at the time of commencement of action, is the measure of damage for condemnation thereof, and in estimating the market value, any and all purposes to which the land may lawfully and reasonably be adopted are considered.

3. Eminent domain ⇐134

When land taken in eminent domain is reasonably suitable and may be legally used for purposes which would enhance its value, that fact should be considered in estimating the market value of the tract.

4. Eminent domain ⇐69

The apparent fact that there is no market value of land, in a strict sense, does not entitle plaintiff to take lands in eminent domain without paying just compensation.

5. Eminent domain ⇐134

Where owner is making only a minor use of the premises, he cannot be deprived in eminent domain of his value for a major use if that major use is authorized and gives property a higher market value, irrespective of whether the owner does or does not utilize the property for purposes which give it its major use.

6. Evidence ⇐474(18)

Owner of lands whose property is sought to be taken for a public use, who has resided upon it and owned it for many years, will be presumed to have acquired sufficient acquaintance with it, and of the value of the land in that neighborhood, to be able to give an intelligent estimate of its value.

7. Eminent domain ⇐240

In proceeding to condemn land for relocation of a highway, where sufficient competent evidence was produced by landowners to create a conflict with that produced by plaintiff on question of value, trial court's action in striking in its entirety testimony of landowners and their witnesses was error where at least part of evidence was material and did bear on valuation of property condemned. Code Civ.Proc. § 1248, subds. 1, 2, 7.

8. Eminent domain ⇐240

In proceeding to condemn land for relocation of a state highway, where there was evidence that owner's improvements on property were left by the relocation in such a condition as to form a cul-de-sac, trial court should have found whether a cul-de-sac was formed by virtue of the improvement and whether the owners were entitled to recover damages therefor. Code Civ.Proc. § 1248, subds. 1, 2, 7.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Proceeding in eminent domain by the People of the State of California, etc., against D. Paul Jones and others to acquire certain property for the relocation of a state highway. From an insufficient judgment, defendants appeal.

Reversed.

Harry W. Horton, of El Centro, for appellants.

Holloway Jones, Lincoln V. Johnson, George C. Hadley, Joseph F. DeMartini, and Jack M. Howard, all of San Francisco, for respondent.

GRIFFIN, Justice.

This is a proceeding in eminent domain commenced by the People of the State of California acting by and through the Department of Public Works to acquire certain property for the relocation of a state highway. Trial was had by the court without a jury. Defendants and appellants are the fee-simple owners of a small tract of land known as Boulder Park, containing about 70 acres, located at the crest of Mountain Springs grade on State highway route 12, in Imperial County, near the San Diego County line. The State highway from El Centro to San Diego formerly traversed defendants' fee property upon which had been constructed certain improvements consisting of a garage, service station, restuarant, and auto court. Adjoining and to the east of the Boulder Park property defendants had located two mining claims which are unpatented. No part of the fee-simple property, i. e. Boulder Park, was taken in this condemnation proceeding.

Traveling toward Imperial Valley, at a point (Station 35, Exhibit A) approximately 1200 feet south of defendants' filling station, the new highway and old highway meet and form a junction. The old highway was a narrow, winding, concrete highway. The new highway leaves the old one in an easterly direction and immediately proceeds through a cut approximately 80 feet below the grade of the old highway. It then follows, in the shape of an arc, the general course of the old highway, at a distance approximately 400 feet east of the east line of that highway. It again intersects the old highway, for the first time, at a point about 8,000 feet north of Station 35, i. e. Station 115. At Station 35 access to the property of defendants was left available. However, because of the cut and lower grade of the new highway, defendants' property was left invisible to traffic proceeding on the new highway and because of the change of grade access to the old highway at Station 115 was not traversible, and for that reason was closed by a barricade. Access to defendants' property on the old highway from the north, i. e. from Imperial Valley, was not possible.

Plaintiff's evidence shows that from defendants' buildings south and along the old road to Station 35 thence northerly along the new road to Station 115, the distance is shorter than by the old road and less hazardous. The old highway between the points mentioned was abandoned by the Highway Department.

At the trial the defendants produced witnesses who testified as to the value of the acreage taken and the large depreciation in the value of defendants' property by reason of the new highway construction.

Seasonable objections were made by plaintiff to the offered testimony as to the claimed market value and damages in each instance on the grounds that it was incompetent, irrelevant and immaterial. The trial court overruled the objections and received the testimony. Before final submission of the case a motion was made to strike the testimony of each defendant and their witnesses. The motion was taken under submission by the trial court. The judge, by stipulation, viewed the premises. Subsequently, and at the time of rendering its decision, the court granted the motion and struck out the entire testimony of defendants and their witnesses.

The trial court then found that the defendants' rights of access to their property from the highway constructed on the parcel condemned were not and had not been impaired by the construction of the new highway; that the diversion of traffic from the old highway was noncompensable; that defendants are not entitled to any compensation for any alleged damage or depreciation to their remaining property by reason of the construction of the highway and that the value of the property sought to be condemned (i. e. easement across unpatented mining claim) is $65; that there was no damage to defendants' remaining property by reason of the severance and the construction of the highway in the manner proposed.

[1] The case of People v. Gianni, 130 Cal.App. 584, 20 P.2d 87, followed by City of Stockton v. Marengo, 137 Cal.App. 760, 31 P.2d 467, lays down the rule that a compensable claim does not exist in favor of a defendant in condemnation merely by virtue of the fact that a new highway is constructed which results in travel following the new highway rather than choosing to follow the old highway passing the defendants' improvement or property. This rule is conceded by defendants but they argue that the evidence conclusively shows that their property, after the taking, was rendered valueless (1) by reason of the change of ingress and egress to and from the property; (2) by reason of leaving their property invisible to or from the highway; (3) its isolation by virtue of the claimed cul-de-sac; (4) that the trial court struck material evidence relating to the value of the acreage actually taken; and that therefore the ruling of the court striking the testimony in reference to the market value and claimed damages was error, citing Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505; Bacich v. Board of Control, 23 Cal.2d 343, 144 P.2d 818.

The reason for striking, in its entirety, the testimony of defendants and their witnesses is not set forth nor do we find any justification for such action. The trial court refused to strike the testimony of plaintiff's witnesses bearing on the same subject matter, i. e., the value of the property taken.

We will summarize a portion of that testimony which was stricken to illustrate the error of which defendants complain.

Defendant J. F. Jones testified that he was one of the co-owners with the other defendants of the property and claims here involved; that in January, 1936, they looked the property over for the possibility of future developments; that the property was the first point of view of the Salton Sea and floor of the valley for travelers to the East; that a spring of water was located on one of the mining claims, which water was necessary to develop in connection with the proposed use of the entire property as a mountain resort; that it was on the main highway and was the first stopping place for people coming out of the valley where they could obtain water after ascending a nine-mile grade; that there was a natural point of rock where people assembled to view the valley and which defendants prized highly; that in January, 1936, they acquired the fee property, and in September, 1936, located the two claims mentioned; that they subsequently did all assessment work required thereon and that they are now entitled to a patent at any time; that a cement tank or reservoir was constructed on the mining claims property which reservoir held approximately 7500 gallons and the water therefrom was pumped on the other claim and then used on the fee property; that the 80-foot cut was made about midway between the first reservoir site and the buildings on the fee property; that the same cut through a higher and larger reservoir site which they had planned for future use and which is now unusable as such; that a horseback trail was built through rocks from the defendants' buildings to the first reservoir site; that plans were made to build a swimming pool on the claim about 200 feet below the springs and that the deep cut constructed by the State crossed the natural pathway to it from the resort site, cutting off egress and ingress to it; that calcium and lime deposits were discovered on the claims when they were first staked out; that a large rock building was built on the fee property; also a garage and engine house, two cabins and a 25,000 gallon tank of rock and cement; that when these buildings were completed defendants enjoyed a good business.

The defendant was then asked the following question: "* * * Mr. Jones, what was the value of the real estate inclusive of the buildings or improvements and exclusive of any mineral values of these three parcels of property that adjoined each other there as of the time this suit was started in October, 1938?" To which he answered that he considered the property there was worth or valued at about $18,000; that the value of the improvements was about $16,000; that the mineral value of the claim was worth about $20,000; that a strip about 400 feet wide and 190 feet long running across the main deposit on the claim was taken by this condemnation (about two acres) which was worth about $15000; that the value of the ground alone (13 acres) which was and which ran across the placer claims was $1600, i. e. "a little over $125 an acre"; that the value of the entire property and improvements, exclusive of the minerals at the time of the taking was $34,000; that the value depreciated to $1,500 and that the loss eliminated from consideration the

matter of diversion of traffic; that there never were any sales of property in that vicinity during his knowledge of it except such sales as were made to the State for highway purposes; and that he heard that the property adjoining his property was sold to the State for that purpose for $125 an acre; that since the construction of the new highway, travelers thereon could not see any of his buildings or structures on his property; that the old highway was blocked off or barricaded about 400 yards north of his place of business forming a cul-de-sac or "blind alley", as well as being blocked off at Station 115; that the "Y" intersection leading to his place of business from the new highway at station 35 was so poorly constructed as to make it so dangerous as to be practically impassable and discouraged patrons from coming to his place of business; that it is necessary for him, in going from his place of business to Imperial Valley via the new highway to travel one-fourth of a mile farther by reason of the cul-de-sac; and for these reasons he had been damaged in certain sums (which were separately specified); and that his property value had been reduced to $1,500.

In open court defendant offered testimony of the other defendants and other witnesses. Counsel for plaintiff then stipulated that all of them would testify "* * * in substance as to the same values, and as to the same improvements, and as to the same reasons for depreciation in value that has been given by the last witness on the stand." Counsel for plaintiff then called witnesses in rebuttal who testified that the mining property, as such, was worthless and that there was no market for that type of land considering all the uses to which the property might be put; that the portion taken was worth $5 an acre or $65 for the entire 13 acres taken, together with any improvements thereon; that the remaining land, i. e., the 40-acre claim, had not been damaged or depreciated in value by reason of the taking; that this figure did not take into consideration any damage to the fee property.

The trial court allowed defendant $65 in accordance with the testimony of plaintiff's witnesses and disregarded and struck from the record all testimony of defendants and their witnesses.

There was sufficient competent and material evidence produced by the defendants to create a conflict with that produced by the plaintiff and should at least have been considered in arriving at a just and fair determination of the issues presented, particularly in view of the finding of the trial court that the defendants were not entitled to any compensation for any damage or depreciation to their mining claim property by reason of the construction of the highway and that the value of the property sought to be condemned was only $65.

[2-5] Ordinarily, the market value of land which is taken in eminent domain, estimated at the time of the commencement of the action, is the measure of damage for the condemnation thereof, and in estimating the market value, any and all purposes to which the land may lawfully and reasonably be adapted shall be considered. When land taken in eminent domain is reasonably suitable and may be legally used for purposes which would enhance its value, that fact should be taken into account in estimating the market value of the tract. People v. Olsen, 109 Cal.App. 523, 293 P. 645; City of Los Angeles v. Hughes, 202 Cal. 731, 262 P. 737; City of Los Angeles v. Klinker, 219 Cal. 198, 25 P.2d 826, 90 A.L.R. 148. The apparent fact that there is no market value of land, in a strict sense, does not entitle plaintiff to take lands without paying just compensation. City of Stockton v. Ellingwood, 96 Cal.App. 708, 275 P. 228. If an owner is making only a minor use of the premises, he cannot be deprived of his value for a major use if that major use is authorized and gives it a higher market value, irrespective of whether the owner does or does not utilize the property for the purposes which give it its major use. City of Stockton v. Ellingwood, supra.

[6] In Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681, it was held that the owner of lands whose property is sought to be taken for a public use, who has resided upon it and owned it for many years, will be presumed to have acquired sufficient acquaintance with it, and of the value of the land in that neighborhood, to be able to give an intelligent estimate of its value.

Section 1248 of the Code of Civil Procedure provides in such actions that "The court * * * must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: 1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of

different parcels, the value of each parcel and each estate or interest therein shall be separately assessed; 2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff; * * * 7. As far as practicable, compensation must be assessed for each source of damages separately." People v. Marblehead Land Co., 82 Cal.App. 289, 255 P. 553; City of Stockton v. Morengo, 137 Cal.App. 760, 31 P.2d 467; 10 Cal.Jur. p. 357 et seq., secs. 68, 69, 70; 5 Cal.Jur.Supp. p. 450 et seq., secs. 54, 55, 56, 58.

In addition to defendants' testimony, a witness who was familiar with and handled many mining claim proofs and who acted as proof officer in making valuations for the government and who in addition had testified as an expert witness in court on many occasions to such valuations, testified that he made detailed investigation of every part of defendants' claims and lands; that defendants filed on one claim, claiming mineral rights and all "water and timber rights appurtenant thereto" and "allowed by law"; that water was pumped from the spring on one dam to a reservoir on the other claim and from there the water was piped and flowed by gravity to the fee property for use. The witness also testified that water is a mineral and that the user thereof is permitted under the government regulations to use it for "placer and domestic purposes in connection with the dwellings thereon". He gave an opinion as to the separate valuation of each improvement on the entire property, the valuation of the two placer mining claims independent of any mineral value, and testified that the mineral deposit thereon was almost entirely within the strip of land taken and that the deposit on such claims was obliterated by a fill of 45 feet; that the 40 acres in the two claims was worth $875 per acre.

[7, 8] All of this evidence was ordered stricken by the court. We are convinced that at least part of this evidence was material and did bear upon the valuation of the acreage condemned and may have had an important bearing upon the remaining property, depending upon proper findings which should be made from the entire evidence offered. Whether the evidence in this case, if considered in its entirety, established as a fact that defendants' improvements and property were left in such a condition by the acts of the plaintiff as to form a cul-de-sac and bring it within that definition depends upon a proper finding of the court based upon the entire evidence submitted in reference thereto. A proper finding should be made upon the subject so as to determine whether or not the decision in Bacich v. Board of Control, supra, in reference to a cul-de-sac, may be applied to the conditions here presented. In that case it is said, at page 349 of 23 Cal. 2d, at page 823 of 144 P.2d:

"In the instant case we are concerned with a property right known as the right of access which an owner has in the street upon which his property abuts and which is appurtenant to such abutting property. The function of the court is to determine and define the character and extent of that right. The right of access, being by its terms general in nature, requires definition and clarification as to its extent and character. This is especially true where we are concerned with the constitutional provision which requires that compensation be paid where property is taken or damaged. The property right of access generally is firmly established. * * * That right has been described as an easement of ingress and egress to and from his property or, generally, the right of access over the street to and from his property, and compensation must be given for an impairment thereof. * * *

"Whether or not such impairment is compensable must depend upon the character and extent of his easement of access. * * * If he has access to the next intersecting street in both directions and one way is cut off, his easement, if it has any value to him at all, has certainly been impaired. We conclude, therefore, that the right of access extends in both directions to the next intersecting street."

It will be noted, however, in that case, that the court specifically stated the rule as applied to intersecting streets, and stated further that it was not concerned with the correct rule in a case where the obstruction occurs beyond the next intersecting street, nor what the rule may be for rural property. The trial court should therefore make a proper finding based upon the entire testimony as to whether or not a cul-de-sac was formed by virtue of the improvement and whether defendants were entitled to

recover from such source of damage in the light of the Bacich decision under the latest interpretation of the cul-de-sac rule.

In upholding the order of the trial court striking the entire testimony of all of the defendants and their witnesses, plaintiff relies principally upon the rule stated by Mr. Justice Gibson in his minority opinion in Rose v. State of California, supra, to the effect that where the opinion of a witness as to diminution in the value of property is based partially on non-compensable items of damage which he is unable to segregate from the lawful elements of damage, a motion to strike his testimony should be granted. In the instant case the witnesses not only gave opinions as to the diminution in value of the property in its entirety, but also segregated the damages as to the mining claim property and other claimed damage. We therefore believe that the rule stated has no application in the instant case, and the trial court should comply with the provisions of section 1248, subdivision 7 of the Code of Civil Procedure, and as far as practicable, separately assess compensation for each source of damage properly allowable.

Judgment reversed.

BARNARD, P. J., and MARKS, J., concur.



67 Cal.App.2d 512

In re SCHWARTZ' ESTATE.

SCHWARTZ v. SCHWARTZ et al.

Civ. 14425.

District Court of Appeal, Second District, Division 1, California.

Jan. 12, 1945.

1. Wills ⇐55(7)

Evidence sustained finding that notwithstanding aged testatrix' lapses of memory, she had sufficient mental capacity to make a will.

2. Wills ⇐55(1)

A will cannot be set aside for lack of testamentary capacity unless alleged mental abnormalities had a direct bearing on testamentary act, and evidence must establish that testatrix bequeathed her property in a manner which, except for the claimed mental infirmities, she would not have done.

3. Wills ⇐55(10)

Dislike of one's relatives, with or without reason, is not necessarily proof of insanity or testamentary incapacity.

4. Wills ⇐52(1), 55(1)

Testamentary capacity is presumed to exist, and contestant has burden of showing by preponderance of evidence that testator at time of executing will, was of unsound mind which actually affected or controlled testamentary capacity.

5. Wills ⇐21

The test of testamentary capacity is not what may have been testator's mental state at time of testamentary act, but what it actually was.

6. Evidence ⇐568(2)

It is presumed in law that a subscribing witness had his attention directed to and was cognizant of testator's mental capacity, hence opinion of such witness on question of testamentary capacity is entitled to considerable weight.

7. Wills ⇐53(2)

Evidence as to condition of testatrix' mind before and after date of execution of will is admissible on issue of testamentary capacity, but it assumes importance only in so far as it bears on that condition at very time of execution of will.

8. Wills ⇐50

"Testamentary capacity" exists when testator understands nature and situation of his property and recalls and understands his relation to persons having claims on his bounty and whose interests are affected by provisions of will.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Capacity".

9. Wills ⇐55(1)

What others than testator think as to justice or injustice of will is mere matter of opinion, and, hence, before law will permit judges or juries to make disposition of a deceased's property irrespective of his desires as expressed in will, substantial evidence is required to show lack of testa-

mentary capacity at time of execution of will.

10. Executors and administrators ⇐19

Where contestant named in will as coexecutor, not only failed for over 30 days and thereafter to petition for his appointment as coexecutor, but instituted proceeding to invalidate will for testatrix' lack of testamentary capacity, he thereby "renounced" his right to letters within Code provision, authorizing appointment of another competent person as administrator, and finding that he refused to act as executor was warranted. Probate Code, § 324.

See Words and Phrases, Permanent Edition, for all other definitions of "Renounce".

11. Wills ⇐211

One of foremost duties of executor named in will is to offer will for probate and to carry out its provisions. Probate Code, § 324.

12. Wills ⇐52(3)

A permanent and progressive mental disease, such as senile dementia, when stated as ground for lack of testamentary capacity, will be presumed to continue, in absence of contrary evidence.

13. Wills ⇐53(2)

Proof of mental condition of testatrix two years before death and about a year and a half before execution of will was, in itself, too remote to prove unsoundness of mind or show her actual mental condition at time of execution of will.

14. Wills ⇐322, 360

Where contestant desired to offer proof of testatrix' unsoundness of mind because of senile dementia, he should have so advised court, and in absence of offer of such proof, court properly sustained objection to evidence as to testatrix' mental condition about a year and one half before execution of will as too remote, and such offer of proof could not be made for first time on appeal.

15. Evidence ⇐471(9, 11)

In will contest on ground of testamentary incapacity, testimony that witness knew how testatrix was situated and how she intended to leave her property, offered to show that she would have left property otherwise than she did by the will, was properly excluded as a conclusion.

16. Wills ⇐384

The exclusion of testimony offered to show that testatrix would have left her property otherwise than as provided in will, for purpose of showing lack of testamentary capacity, was harmless where witness had previously given her opinion on question.

17. Wills ⇐358

An order denying motion for a new trial in a civil case is not appealable, and appeal from such order in a will contest was dismissed.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Proceeding in the mattter of the estate of Laura Schwartz, deceased, wherein Harold I. Schwartz petitioned for probate of the alleged will of decedent, which petition was contested by Bernerd Schwartz, and in which Lois Schwartz, a minor, appeared by guardian ad litem. From an order admitting the will to probate and appointing petitioner as sole executor, and from an order denying contestant's motion for a new trial, contestant appeals.

Affirmed.

John J. Beck, of Los Angeles, for appellant.

Samuel A. Miller, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal by the contestant of a will from an order admitting that will to probate after trial of a will contest before the court sitting without a jury.

Laura Schwartz, the deceased, lived at Los Angeles, where she died on December 18, 1942, at the age of 74 years. Her sole surviving heirs at law were two sons, Harold I. Schwartz and Bernerd Schwartz. Both sons were married and living with their wives. Phyllis Schwartz is the wife of Harold I. Schwartz and they have as their only issue a daughter, Lois, approximately of the age of eight years. Ethel Schwartz is married to Bernerd Schwartz but they have no issue.

One of the sons, Harold I. Schwartz, offered for probate a document dated June 2, 1942, alleged to be the last will and testament of the decedent. Upon the sole ground that his mother was of unsound

mind at the time she executed her will and therefore incompetent to make the same, one of the sons, Bernerd Schwartz, contested the admission of the proffered will to probate.

By the terms of the will in question, all of the property of the decedent, both real and personal, appraised at $12,500, was given in fee to the granddaughter, Lois Schwartz, there being reserved to the sons one-third each of the net income of said estate during the life of her said sons. Upon the death of either son, his share of the net income was to go to his wife until she remarried or died. The remaining one-third of the net income was given to the granddaughter. In the will decedent named both her sons, Harold and Bernerd, as co-executors.

Following a trial, the court made findings and ordered the will admitted to probate, appointing Harold I. Schwartz as sole executor of said will.

Upon the grounds of insufficiency of the evidence to sustain the order admitting the will to probate and upon newly discovered evidence, the contestant made a motion for a new trial, which was denied. This appeal is from the order admitting the will to probate and appointing Harold I. Schwartz as sole executor as well as from the order denying a new trial.

[1] In support of his contention that his mother was of unsound mind and memory at the time she executed her will, the contestant presented evidence that on January 1, 1942, decedent was admitted to Cedar Lodge Sanitarium at Los Angeles and discharged therefrom on May 9, 1942. With reference to the reason for the discharge of the decedent from Cedar Lodge Sanitarium, the owner thereof testified, "We sent for the family to come and take her home because she was causing such a disturbance and she was so uncooperative; we had to call the family and ask them to please come and take her home." Decedent was removed from the above-named sanitarium to the home of her son, Harold, where she remained for some six weeks, and at which place she executed the will here in controversy. On June 20, 1942, decedent entered Virginia Sanitarium in Los Angeles, where she remained until the date of her death on December 8th of the same year.

With reference to his mother's condition on June 6, 1942, four days after the execution of the will, her son, Bernerd Schwartz, testified: "She was in very bad shape. She had a nurse day and night; in fact, I went out and secured a special bed for the nurse to sleep on. I thought it was too hard for my brother to keep her there, and I wanted to find another sanitarium. The reason she was taken from the Cedar Lodge Sanitarium, I understand, was because she was in such bad physical condition that she called up her physician * * *"; that "Her memory was very bad. It took her about four days at the Virginia Sanitarium to learn she had been moved."

There was also testimony that while at Cedar Lodge Sanitarium the decedent "* * * did have spells when you could not control her very well" and the family would have to be called "to come out and control her"; that she would "run around the halls in her night-gown"; would also say that "she did not have her meals and that the nurse hadn't been near her all day", when in fact she had received both meals and nursing attention; and that she refused medication because of her apprehension that some one was attempting to poison her.

The owner of Virginia Sanitarium testified as follows regarding the condition of the deceased while at that sanitarium: That while there the decedent "was at times all right, and at other times she would have more or less lapses of memory. That seemed to be her big fault; she would not remember; she would keep repeating and wanting to know dates; she used to keep a diary because she could not remember"; that, on occasions when her sons would visit her, the decedent would say "No one was here to see me today"; that "many times; she would hear someone talking and would think the Army was taking over the place", even though she was told time and again such was not the fact. That it was necessary to keep a rail about the bed in order to keep the decedent in it.

Coming now to a consideration of the circumstances immediately surrounding the preparation and execution of the will, it is revealed by the record that on June 1, 1942, the decedent informed Mrs. Phyllis Schwartz, wife of the proponent of the will, that "she wanted to write a will", and that "she would not be happy without writing a will". Decedent thereupon requested Mrs. Phyllis Schwartz to "bring me a paper and pencil", with which request Mrs. Schwartz complied and, according to the latter's testimony the decedent "was in the process of

writing the will practically all the day before I delivered it to Paul Joseph's office". This witness further testified that on this same day she telephoned to the contestant advising him that his mother was "making a will all that day", and that the witness "felt that Bernie should come out to my house and know what was going on". That on the same evening about 9:30 o'clock, the contestant arrived at his brother's home, and went to his mother's room, where the latter said to him, "Bernie, I am writing a will. I would like to discuss it with you", to which the contestant replied, "Maw, I am not interested." The foregoing testimony was given in rebuttal and the contestant did not take the witness stand to deny it. However, he did testify that when he visited his mother on June 6th, which was four days after the execution of the will, "she was in very bad shape", and he gave his reasons for so testifying.

From the record it appears that on June 2, 1942, which was the day after the decedent had completed the aforesaid writing, the witness Phyllis Schwartz, at the request of decedent, delivered the written document to Attorney Paul Joseph in his office, stating that the decedent had "instructed me to get it copied". Shortly thereafter, Attorney Joseph handed Phyllis Schwartz a sealed white envelope which the witness returned to the decedent. That evening Attorney Joseph and his wife called upon decedent and the will here in question was executed, with the attorney and his wife acting as subscribing witnesses thereto. It also appears that the attorney had previously prepared at least one and possibly two wills for the decedent.

Concerning the actual execution of the will, Attorney Joseph testified that he had practiced law since 1928; that he was acquainted with decedent for some 20 or 25 years and had acted as decedent's attorney "at different intervals, different times". The attorney testified that for some three-quarters of an hour prior to the execution of the will he talked alone with the decedent, after which he invited his wife into the room and in her presence and in the presence of the decedent the attorney stated that "Mrs. Schwartz had read over the will", to which the decedent replied "Yes, she had read it over". The lawyer then asked decedent "if she was ready to sign it", and "she indicated she was ready to sign it". Decedent then requested Attorney Joseph and his wife to act as witnesses to the will. The attorney testified that he then "asked her if this will was as she wanted it" and she said "Yes, it was, and it was a good will"; and I said, "You know it is. You have gone over it for a half an hour". "And then before we signed the will, Mrs. Schwartz and my wife talked over various things—just what they were I don't recall now, and then she signed the will." In answer to a question as to whether decedent read the will before she signed it, Attorney Joseph testified: "Yes, she had read it for a period of a half hour before Mrs. Joseph came into the room. She was there with me and she was reading this will, and some pencil notes from which this will was drawn for her, and she was comparing the will and the notes; and she eventually signed; with the pencil notations, we went over the will paragraph by paragraph, and discussed the provisions of the particular paragraphs. That took place before Mrs. Joseph came into the room."

When interrogated as to whether at the time she signed her will the decedent appeared to be of sound mind, the lawyer testified: "She told us she certainly did not want her property sold, and that one of her sons might sell her property, and that was the last thing she wanted because she eventually wanted her granddaughter, Lois, to get the property; and that she would not get the property if they sold the property and disposed of the proceeds, and I said, 'It is not as bad as you make out', that nobody was going to do that, in my opinion; but she said I did not know her sons so well, and she did."

Mrs. Jane B. Joseph, the other subscribing witness, corroborated the testimony given by her husband that at the request of decedent they acted as subscribing witnesses to the will, that decedent signed the testamentary document in their presence and that they in the presence of each other and of the decedent, affixed their respective signatures as such subscribing witnesses. Mrs. Joseph also testified that she had known the decedent for some six or seven years; that at the time decedent signed the will she was of sound mind, conscious, and required no assistance in signing her name. That her conversation was clear and coherent and, "In fact, she even asked me about my mother's sisters who were visiting here, and at different times she had met them".

In his effort to establish the fact that his mother was of unsound mind at the time

she executed the document here in question, contestant places great reliance upon a diary kept by decedent during the year in which she died, and which was introduced into evidence and is by stipulation now before us. Our attention is especially directed to: (1) the grammatical construction of the sentences; (2) the spelling; and (3) the chronological order of the entries. Contestant urges that by comparison of the spelling and the grammatical construction contained in the diary with that of the pencilled form of will prepared by decedent, the conclusion is inescapable that decedent could not have drafted the pencilled will unaided, or even by copying it from another will. It is not disputed that the memorandum form of will, from which the formal testamentary document was framed, is in the handwriting of the decedent, and from a comparison of it with the writing of the testatrix contained in the aforesaid diary we are not impressed with contestant's claim that the decedent did not herself and unaided prepare the pencilled form of will. There is no such disparity in the writing contained in the respective documents to reasonably warrant the inference that decedent was aided in the actual writing of the pencilled memorandum. Our conclusion in this regard is strengthened by comparison of the pencilled memorandum with the writing contained in the memorandum made by decedent on May 24, 1942, which was received in evidence as proponent's exhibit 7.

While it would reasonably appear, as contended by contestant, that the use of legal language and technical terms in the pencilled memorandum might indicate the receipt of some help by decedent in its construction, it must be borne in mind that the testatrix had made one or more previous wills and was to some extent familiar with the phraseology in which testamentary documents are couched. And, in the absence of some facts or circumstances to the contrary, we cannot ignore the positive testimony in the record as to the manner in which the pencilled memorandum was prepared.

[2, 3] Whatever may be said as to the claimed indecision of decedent and her lapses of memory as indicated by a perusal of her diary, it cannot be doubted from a reading of the pencilled memorandum that the trial judge was justified in concluding that the decedent was aware of the nature and extent of her property and as well of those who had a claim upon her bounty. She minutely describes therein her personal property and wearing apparel, sets forth where some of the articles were stored, giving the street address of such storeroom. In clear and understandable language, she describes her real property and the street address of same, clearly sets forth her wishes in regard to its disposition as well as the manner in which the income therefrom was to be divided. Though it be conceded that decedent was somewhat uncertain as to dates and events or even confused, there is no evidence that she was afflicted with a mental derangement sufficient to invalidate the will here in question. In other words, the evidence does not establish that decedent was the victim of some hallucination or delusion or that she suffered from insanity of such broad character as to establish incompetency generally. Nor does the evidence establish the fact that the will as made was the creature or product of any such hallucination or delusion which bore directly upon and influenced the terms of the testamentary document. In short, before a solemnly executed will may be set aside, the claimed abnormalities of mind must have had a direct bearing upon the testamentary act, and the evidence must establish the fact that the decedent devised or bequeathed her property in a manner which, except for the claimed mental infirmities, she would not have done. There is no such showing here. Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Collins, 174 Cal. 663, 164 P. 1110; Estate of Redfield, 116 Cal. 637, 48 P. 794; Estate of Casarotti, 184 Cal. 73, 192 P. 1085. In Estate of Kendrick, 130 Cal. 360, at page 364, 62 P. 605, 607, it was said: "Prejudices, dislikes, and antipathies, however ill-founded, or however strongly entertained, cannot be classed as insane delusions; nor is every delusion an insane delusion." Dislike of one's relatives, with or without reason, is not necessarily proof of insanity.

[4-9] Until the contrary is established, testamentary capacity is always presumed to exist. Upon the contestant rests the burden to show affirmatively and by a preponderance of the evidence that the testator, at the time of executing the will, was of unsound mind and that such unsoundness of mind actually affected or controlled testamentary capacity. The question is not what may have been the testator's mental state at the time of the testamentary act, but what it actually was. The testimony

of the subscribing witnesses to the will, Paul B. Joseph, who had known the decedent for nearly a quarter of a century and who had for some years been her attorney, and his wife who was also well acquainted with decedent, was direct, clear and unequivocal to the effect that the testatrix was of sound mind. It is presumed in law that a subscribing witness had his attention directed to, and was cognizant of, the testator's mental capacity. Consequently, the opinion of such a witness is entitled to considerable weight and certainly to more weight than is the opinion of one who is merely passive. Estate of Holloway, 195 Cal. 711, 733, 235 P. 1012. True, evidence of the condition of the testatrix' mind, before and even after the date of her testamentary act, is admissible, but it assumes importance only in so far as it bears upon that condition at the very time of the execution of the will. Testamentary capacity exists when the testator understands the nature and situation of his property; recalls and understands his relation to the persons who have claims upon his bounty and whose interests are affected by the provisions of the will. That decedent herein possessed such understanding is fortified by the writing of the pencilled document prepared by her on the day before she executed her will and upon which the formal testamentary document was based and framed. Application by the trial court of the principles of law herein enunciated to the evidence adduced in the case at bar warranted the conclusion arrived at that the contestant failed to sustain the burden of establishing the fact that, at the time of the execution of her will, the testatrix was so mentally incapacitated that she did not possess the requisite testamentary capacity. What others than the testator may think as to the justice or injustice of a will is simply a matter of opinion and therefore, before the law will permit judges or juries to make disposition of a decedent's property irrespective of his or her desires, substantial evidence is required to show lack of testamentary capacity at the time of the execution of the will. Such evidence is not present in the instant proceeding.

[10] It is next contended that the court erred in appointing Harold I. Schwartz as sole executor when, according to the provisions of the will offered for probate, said Harold I. Schwartz and Bernerd Schwartz were named as coexecutors. Contestant urges that nowhere in the record does it appear that he waived his right to act as coexecutor or that he refused to act in such capacity.

Section 324 of the Probate Code provides: "If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator and that he is named as executor, fails to petition the proper court for the probate of the will and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown."

That the contestant had knowledge of the fact that he was named as one of the executors of decedent's will clearly appears from the petition for probate of such will filed by the proponent thereof, and to which petition the contestant filed his contest. In the petition for probate of the will appears the following: "That Bernerd S. Schwartz named as co-executor in said will has indicated that he would not be a proponent thereof and has evinced the intention to contest said will, so for that reason this petitioner is offering said will for probate."

[11] That contestant failed, for a period of more than 30 days, and in fact for many months, to petition the court for his appointment as coexecutor admits of no doubt. On the contrary, he instituted legal proceedings to invalidate the will on the ground that the maker thereof was of unsound mind and without testamentary capacity at the time she executed the testamentary document. Contestant's entire course of conduct has been inconsistent with any desire upon his part to act as a coexecutor, and at no time did he petition or request the court to so appoint him. It seems clear to us that one of the foremost duties of an executor named in a will is to offer the same for probate and to carry out its provisions. We are persuaded that contestant's failure to petition the court for probate of the will and for the issuance of letters testamentary to him as a coexecutor, coupled with his action in commencing legal proceedings in opposition to probate of the will, may be held as a renunciation of his right to letters (Probate Code, § 324), and supports the finding made by the court "That Bernerd Schwartz, also named in said last will as an executor, refused to act as such by filing herein specifications of objections to the probate of said last will and testament".

[12-14] Finally, contestant urges that the court committed prejudicial error in sustaining objections to certain proffered evidence. In that regard, the record reveals that, during the direct examination of contestant, Bernerd S. Schwartz, the following occurred:

"Q. What was the condition of your mother previous to her death, two years previous to her death?

"Mr. Miller: That is objected to as incompetent, irrelevant and immaterial, and too remote.

"The Court: Yes; we are only concerned with the date of the will."

It is now urged that the ruling of the court "precluded the possibility of contestant's showing that the testatrix was suffering from senile dementia and gave the proponent the opportunity of contending that the will in controversy was executed during a lucid moment". But at no time during the trial was the court apprised of the fact that contestant was urging that his mother was suffering from senile dementia. If the contestant desired to offer proof of his mother's unsoundness of mind emanating from a permanent and progressive mental disease such as senile dementia, which will be presumed to continue in the absence of evidence to the contrary, he should have so advised the court, but the record is barren of any evidence, showing, or statement that such was contestant's contention. The objection was therefore properly sustained on the ground that the time element involved in the question was too remote to prove unsoundness of mind or to show the actual mental condition of the testatrix at the time of the execution of the will. Where, as here, the court was not advised of the particular issue, viz. senile dementia, upon which evidence of the particular type or character was offered, and had not intimated that no evidence would be received upon such issue, it became necessary for contestant to make an offer of proof. Lawless v. Calaway, Cal.Sup., 147 P.2d 604. The purpose of such evidence and an offer of proof in that regard cannot be urged for the first time on appeal.

[15, 16] Appellant also complains of the action of the court in sustaining an objection to the following questions propounded to a witness and the answers given thereto.

"Q. Did she ever discuss her property affairs with you? A. Certainly she did. I know just how she was situated.

"Q. And you know to whom she wanted to leave her property? A. Yes."

An objection on the ground that the testimony was "incompetent, irrelevant and immaterial and not within the issues of this case" was sustained by the court.

Counsel for contestant then stated to the court that the purpose of the testimony was to prove unsoundness of mind by showing that the testatrix had bequeathed her property "in a way different from the way they would have left it, as they had indicated, when they were of sound mind, it shows that at the time they left their property in a way different, they were of unsound mind". The court thereupon stated: "To which she has already testified. I will sustain the objection. She has already given her opinion".

During further examination of this same witness, the record discloses the following:

"Q. The conversation you had with Mrs. Schwartz regarding her property, what was said in regard to who she was going to leave her property to? A. Just to her two children. That was her whole thought; that was all she thought of, her two children. That is what she wanted. But that is not what I wanted to tell you: When I went to see her, she would say to me—I would say to her, 'Was your son here today?' And she would say, 'Oh, Sarah, I wish I could tell you, but I cannot remember'. Could a woman like that make a will?

"The Court: I will strike that all out."

The rulings of the court were obviously correct. The answer to the first aforesaid interrogatory was manifestly a conclusion of the witness while the answer to the second question was for the most part open to the same criticism. Furthermore, as the court correctly stated, the witness had previously given her opinion that while decedent was in the two sanitariums "she was in terrible condition". Therefore, in view of the stated purpose and object of the questions, had the rulings been erroneous, any harmful effect which might have been produced thereby was obviated by the testimony of the witness, previously given, as to the condition of the testatrix at the time referred to in the questions. McNulty v. Lawley, 42 Cal.App. 747, 751, 752, 184 P. 50; John Breuner Co. v. King, 9 Cal.App. 271, 273, 98 P. 1077.

[17] Since an order denying a motion for a new trial in a civil case is not appealable (Pipoly v. Benson, 20 Cal.2d 366,

368, 125 P.2d 482, 147 A.L.R. 515) the purported appeal herein from the order denying a new trial is dismissed. The evidence is sufficient to support the decision. The record discloses no error, and the order appealed from should be affirmed.

It is so ordered.

YORK, P. J., and DORAN, J., concur.



67 Cal.App.2d 574

ALVAREZ et ux. v. RITTER.

Civ. 7113; Sac. 5683.

District Court of Appeal, Third District, California.

Jan. 17, 1945.

1. Executors and administrators ⇐431(2)

Where scrivener in drawing lease inadvertently omitted therefrom provision that lessor should refund to lessees rentals paid under lease in the event of a sale of the property before crops were planted, and thereafter, following death of lessor, lessor's executor sold land before crops were planted, in action for reformation of lease to insert omitted clause and compel enforcement thereof lessees were not required to file a claim against estate.

2. Reformation of Instruments ⇐45(9)

Clear and satisfactory evidence sustained findings and judgment reforming a lease to include an inadvertently omitted provision for refund to lessees of rents advanced under lease in event of a sale of property before planting of crops, and enforcing provision. Civ.Code, § 3399.

3. Reformation of Instruments ⇐45(1)

To justify reformation of a written instrument, clear and satisfactory proof of a mutual mistake of the parties must be shown. Civ.Code, § 3399.

4. Appeal and error ⇐1009(2)

Sufficiency of evidence to support finding of mutual mistake which will justify reformation of a written instrument is primarily for trial court, and its decision may not be interfered with on appeal when there is substantial evidence to support finding. Civ.Code, § 3399.

5. Witnesses ⇐138

In action by lessees against lessor's executor to reform lease for mutual mistake, attorney who drew the lease, real estate broker who had talked with decedent concerning lease, and witness to a conversation between decedent's agent and lessee, none of whom were parties to litigation or interested therein, were competent to testify that a provision of lease was inadvertently omitted. Civ.Code, § 3399; Code Civ.Proc. § 1880, subd. 3.

6. Appeal and error ⇐1050(1)

In action by lessees against lessor's executor to reform a lease, where one lessee's testimony that a particular provision which was part of agreement of the parties was omitted from lease through mutual mistake was merely cumulative of testimony of other competent witnesses, testimony of lessee was not prejudicial even if incompetent. Code Civ.Proc. § 1880; Civ.Code, § 3399.

7. Witnesses ⇐138

The Code section disqualifying parties and assignors to an action against an executor or administrator upon a claim or demand against the estate does not make friends, neighbors, or other individuals not so interested as parties or assignors of parties incompetent to testify to admissions or statements of a deceased person occurring before his death. Code Civ.Proc. § 1880.

8. Witnesses ⇐167

A party or an assignor of a party to an action against an executor or administrator to establish a resulting trust, to quiet title to property, or to require an accounting of a partnership, is not disqualified to testify to facts occurring before death of decedent, since such actions are not based upon claims or demands against estate. Code Civ.Proc. § 1880.

9. Witnesses ⇐167

In lessee's action against executor to reform a lease executed by decedent, where court determined that lease as reformed provided that rental advanced by lessee was to be refunded because of sale of land before crops were planted, so that in effect executor held money as a resulting trust for benefit of lessees, lessees were competent to testify as to events occurring before decedent's death. Code Civ.Proc. § 1880.

Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Joe Alvarez and Lorenza Alvarez, his wife, against C. E. Ritter, as executor of the last will and testament of John D. Van Ormer, deceased, for reformation of a lease, and for a return of rentals paid under lease. Judgment for plaintiffs, and defendant appeals.

Affirmed.

J. Kingsley Chadeayne, of Tracy, for appellant.

George Wadsworth, of Tracy, and Maxwell M. Willens, of Stockton, for respondents.

THOMPSON, Justice.

The executor of the last will of John D. Van Ormer, deceased, has appealed from a judgment reforming a lease of real property and awarding plaintiffs judgment for return of $1,862.50 paid to the deceased as rental advanced pursuant to the terms of the lease, which was to be refunded in the event of sale of the property before the crops were planted.

John D. Van Ormer lived at Turlock and owned a ranch in San Joaquin County. In August, 1942, he executed a lease to plaintiffs of the ranch for one year for the purpose of raising beans and sugar beets for the annual rental of $3,725, one-half of which was paid at the time of the execution of the lease. The lessor reserved the right to sell the ranch at any time. It was orally agreed that in the event of a sale prior to the planting of crops, the money advanced as rental would be repaid to the lessees. Mr. Van Ormer went to Oklahoma before the lease was drawn. He left the written lease to be prepared by his agent Claude M. Powell, who went in company with Joe Alvarez to an attorney by the name of George Wadsworth to draw the lease. The question of the right of the lessor to sell the property was then discussed. Wadsworth was told of the agreement of Mr. Van Ormer to return the rental paid in the event of sale before the crops were planted. He directed his inexperienced stenographer to type the lease, furnishing her with a copy of another lease to follow. She failed to include the provision for returning the rental in the event of sale. Wadsworth failed to discover the omission. Alvarez returned to his office and signed the lease without reading it and without knowledge of that omission. He then paid Powell $1,862.50. The lease was forwarded to Van Ormer who signed and returned it to his agent. The plaintiff Joe Alvarez and two or three other disinterested witnesses testified to the lessor's agreement to refund the rental in the event of the sale of the property before the crops were planted.

The lessees did not take possession of or reside on the property, but they did plow the land in the fall of 1942, before the lease became effective, in preparation for the planting of the crops the following season. They were subsequently paid for that labor by the purchaser of the land. We are not concerned with that transaction.

[1] Mr. Van Ormer died January 6, 1943. Upon proceedings duly had his will was admitted to probate in San Joaquin County and C. E. Ritter was appointed and qualified as executor. The ranch was sold April 2, 1943, before any crops had been planted. Demand was duly made upon the executor to return to plaintiffs the rental advanced by them, which was refused. Upon examination of the lease the plaintiffs for the first time discovered the omission of the agreement to refund the rental in case of sale of the property before the crops were planted. They then filed a claim against the estate for that amount, which was rejected. The filing of the claim is immaterial under the circumstances of this case.

This suit was commenced September 20, 1943. The complaint was couched in three counts. The first one asks for reformation of the lease to include the agreed provision to return to the lessees the rental advanced in case of sale of the property before the crops were planted. The second count is for money had and received. The last count is based on the rejected claim for the rental previously paid.

The court adopted findings favorable to the plaintiffs in every respect, and rendered judgment reforming the lease as prayed for. Plaintiffs were also awarded judgment for the rental advanced in the sum of $1,862.50 and interest from the date of demand. From that judgment this appeal was perfected.

The appellant contends that the findings and judgment are not supported by the evidence; that there is no evidence that Claude M. Powell, as agent, was authorized to determine the terms of the lease, and

that the court erred in receiving evidence of the oral agreement of the lessor, over objection that the witnesses were disqualified under the provisions of Section 1880, Subdivision 3, of the Code of Civil Procedure.

[2-4] There is ample evidence to support the findings and judgment reforming the lease under Section 3399 of the Civil Code, and restoring to plaintiffs the money advanced by them as rental for the farm. It is true that clear and satisfactory proof of a mutual mistake of the parties must be shown to justify the reformation of a written instrument. Moore v. Vandermast, Inc., 19 Cal.2d 94, 119 P.2d 129; 22 Cal. Jur. 742, sec. 24. But the question of the sufficiency of the evidence to support the finding of mutual mistake which will justify reformation of a written instrument is primarily a problem for determination of the trial court which may not be interfered with on appeal where there is substantial evidence to support the finding. Sullivan v. Moorehead, 99 Cal. 157, 33 P. 796; Siem v. Cooper, 79 Cal.App. 748, 754, 250 P. 1106; 22 Cal.Jur. 743, sec. 24.

In the present case the trial court found that due to the mutual mistake of the parties the lease failed to include the agreement that in the event of a sale of the property prior to the planting of crops during the season of 1943, any sums paid as rental under the terms of the lease would be refunded to the lessees. The judgment provided for reformation of the lease to incorporate that provision, and awarded plaintiffs judgment for said sum of $1,862.50, so paid by them. The evidence of the mutual mistake with relation to the omission of the provision to refund rental paid in the event of sale of the property prior to planting of the crops is clear and satisfactory. Several witnesses, in addition to the plaintiff Joe Alvarez, testified to those facts. John Cavala, a real estate broker, talked with the deceased, John D. Van Ormer, in the summer of 1942. He was then given an option to sell the property. He said Mr. Van Ormer told him he had leased the property to plaintiffs and that he then said, "I have had an understanding with Mr. Alvarez, in case a sale is made I'll return—refund his money back." Mr. William R. Lewis, another real estate broker, who lived at Tracy, testified that he also had a talk with Mr. Van Ormer in the summer of 1942, and that the property was then listed with him for sale; that the deceased then told him he had leased the property to plaintiffs with the agreement that if it was sold before the crops were planted, he would refund to the lessees the cash rent which he had received. George Wadsworth, the attorney who drew the lease at the request of Powell, testified that he was instructed by Powell in the presence of Mr. Alvarez to provide for the refunding to the lessees of all rental paid by them in the event of a sale of the property before the crops were planted. Wadsworth testified that he left the document with an inexperienced stenographer to prepare by following the form of another lease which he handed to her, but that she inadvertently omitted that provision. He said that Alvarez signed the lease without reading it, and that he sent it on to Mr. Van Ormer without discovering the omission. Gertrude L. Warner, who had charge of a warehouse at Tracy, testified that after the sale of the property in April, 1943, Alvarez and Powell came to the warehouse and discussed the return of the money and read the lease in her presence. She said that Powell then stated Mr. Wadsworth made a mistake in omitting from the lease the provision for returning the rental to plaintiffs in the event that the property was sold before the crops were planted. She stated that Powell then said "It was Mr. Van Ormer's wish if that land was sold Mr. Alvarez was to receive his money back." Mr. Alvarez also testified that was their agreement. That evidence furnished sufficient competent proof of the mutual mistake to justify the trial court in reforming the lease in that respect, and in awarding to plaintiffs judgment for the money advanced.

[5, 6] The court did not err in receiving evidence of that mutual mistake over the objections of appellant that the witnesses were disqualified under the provisions of Section 1880 of the Code of Civil Procedure on account of their interest in the litigation upon a claim against the estate of a deceased person. None of the foregoing witnesses were parties to this action or interested in the litigation, except Mr. Alvarez. His evidence was merely cumulative.

[7] Section 1880, supra, merely disqualifies witnesses who are parties or assignors of parties to an action against an executor or administrator *upon a claim or demand against the estate* of a deceased

person from testifying to facts occurring before his death. It does not disqualify witnesses who are not parties or assignors of parties interested in the litigation. Friends, neighbors or other individuals not so interested as parties or assignors of such parties are competent to testify to such admissions or statements of a deceased person occurring before his death. Warder v. Hutchison, 69 Cal.App. 291, 298, 231 P. 563; 11A Cal.Jur. 903, sec. 639; 3 Bancroft's Probate Practice, 1533, sec. 893. The admission of the testimony of the plaintiff Alvarez in that regard was harmless, since it was merely cumulative of other competent evidence to the same effect.

[8] Moreover, the disqualification of witnesses under Section 1880, supra, applies only to parties or assignors of parties in an action or proceeding *upon a claim against the estate of a deceased person.* It has been uniformly held in California that neither a party nor an assignor of a party to an action to establish a resulting trust, to quiet title to property or to require an accounting of a partnership, is disqualified to testify to facts occurring before the death of the decedent, since such actions are not based upon claims or demands against the estate. Myers v. Reinstein, 67 Cal. 89, 7 P. 192, 194; 11A Cal.Jur. 890, sec. 632; 12 So. Cal.Law Rev. p. 10. In the text of 11A Cal.Jur. at page 890, it is said in that regard:

"Claims to property adverse to the estate are not within the statute, because, if the property belongs to the claimant, the recovery in the action does not tend to diminish the estate to which the judgment might decide it did not belong."

In the Myers case, supra, it was held that S. H. Collins, who had been a partner of the deceased, Reinstein, and who had assigned to the plaintiff Myers his claim to partnership funds with which a parcel of land had been bought in the name of the deceased was a competent witness in the action against the estate to establish a resulting trust in his portion of the funds with which the land was purchased. The court said:

"We are of opinion that the witness was competent. The action was not on a claim or demand against the estate of Reinstein. The plaintiff asserted that the interest in the land sued for constituted no part of M. Reinstein's estate, but was held in trust by Reinstein for Collins or his assigns, and, after his death, by the defendants, his devisees and successors. * * * The very question to be determined here was whether the interest sought to be recovered was a part of Reinstein's estate or not."

[9] In the present case the court determined that the lease, as reformed, provided that the rental advanced by plaintiffs was to be refunded and belonged to them, since the land was sold before the crops were planted. In other words, that money did not belong to the estate, but was held by the executor, as a resulting trust, for the benefit of plaintiffs.

But it is immaterial whether Mr. Alvarez's testimony was competent or not. It was harmless since there is an abundance of evidence from other witnesses who were in no way interested in the litigation to establish the facts which warranted the court in reforming the lease.

It is immaterial whether Claude M. Powell was the agent of the deceased with authority to determine the terms of the lease. The only term of that lease which is involved on this appeal, to-wit, the agreement to refund all rental paid by the lessees in the event of a sale of the property before the crops were planted, was conceded by Mr. Van Ormer himself before he went to Oklahoma. The record contains adequate competent proof to that effect. The reformation of the lease did not depend upon the authority of the agent to determine any provision of that instrument.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

67 Cal.App.2d 612

JENSKY v. STATE BOARD OF EQUALIZATION et al.

WILL et al. v. SAME.

Civ. 7081; Sac. 5666.

District Court of Appeal, Third District, California.

Jan. 20, 1945.

Rehearing Denied Feb. 15, 1945.

Hearing Denied March 19, 1945.

1. Appeal and error ⇐854(3)

On appeal from judgment entered on failure to amend after a demurrer to complaint had been sustained, judgment will be affirmed if demurrer was properly sustainable on any of the grounds set forth.

2. Officers ⇐103

Where administrative remedy is provided by statute, relief must be sought from the administrative body and such remedy exhausted before courts will act.

3. Injunction ⇐120

A complaint to restrain enforcement of order of State Board of Equalization which revoked a liquor license, on ground that such order had no support under evidence received by board's representative, was demurrable for failure to show that plaintiff had exhausted the administrative remedy before commencement of the action. St. 1937, pp. 2139, 2162, 2163, 2174, 2175, §§ 10, 41, 45, 46, 58, 62; St.1941, p. 1211, §§ 43, 44.

4. Statutes ⇐225

The later statute is the controlling expression of legislative intent.

5. Appeal and error ⇐179(1), 843(1)

Appellate courts need not pass upon questions not brought before them by proper pleadings, nor decide matters of law not necessary for determination of the case made.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Actions by Harry Jensky and by Rose M. Will and another against the State Board of Equalization of the State of California and Richard Collins and others, as members thereof, to restrain enforcement of the orders of the Board revoking liquor licenses and for judgment reversing the orders, wherein defendants demurred. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Eugene H. O'Donnell, Arthur D. Klang, and Ralph Bancroft, all of San Francisco, for appellants.

Robert W. Kenny, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., for respondents.

ADAMS, Presiding Justice.

By stipulation of the parties to the above-entitled actions, which were consolidated by order of the trial court, this appeal is submitted on the record in the Will case, it being agreed that the complaints are identical except as to the names of the parties and the locations of their businesses, and that the same judgment was rendered in both actions.

Plaintiffs' amended complaints alleged that they were operating places of business in San Francisco, duly authorized to sell spirituous liquors under licenses issued by defendant Board of Equalization; that complaints for revocation of their licenses were issued, charging violations of sections 10, 58 and 62 of the Alcoholic Beverage Control Act, Stats.1935, p. 1123, as amended Stats.1937, ch. 758, hereinafter called the Act; that hearings were had before a representative of said board on said complaints, after which defendant board made findings of ultimate facts and found that there was sufficient evidence produced to support the charges, found plaintiffs guilty as charged, and recommended that their licenses be suspended indefinitely; that thereafter the said board, by an order duly given and made, revoked said licenses; that "said order has no support whatsoever under the testimony and evidence submitted to and received by said representative of the board"; that at all times mentioned the said licenses have been in full force and effect, "and these plaintiffs have never committed any act which did or would constitute any ground or cause for the revocation of said licenses"; that plaintiffs elect to apply for relief under the provisions of section 47 of the Act, St.1935, p. 1146, "and for an order setting aside the order of said defendant Board revoking these plaintiffs' licenses." An order restraining enforcement of the order of the board until the final determination of this action and judgment reversing the said order of the board were prayed.

To the foregoing complaint defendants demurred on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action, (2) that the superior court has no jurisdiction of the subject of the action, (3) that the superior court has no jurisdiction of the parties to the action, (4) that the complaint fails to state in what manner or by what means the board acted arbitrarily or capriciously, and (5) that plaintiffs have not exhausted their administrative remedies. The court sustained the demurrer without stating the grounds upon which it acted. Leave to amend was not denied, but plaintiffs failed to amend within the time allowed by law, and thereafter a motion by defendants to dismiss the action was granted after hearing thereon, and judgment was entered for defendants.

Plaintiffs have appealed on a transcript consisting of the amended complaint, the demurrer, and the judgment, together with notice of appeal and a stipulation that the aforesaid records are sufficient.

[1] The only question before this court is whether the trial court properly sustained defendants' demurrer on any of the grounds assigned, for it is well established that on appeal from a judgment entered on failure to amend after a demurrer to a complaint has been sustained, the judgment will be affirmed if the demurrer was properly sustainable on any of the grounds set forth. Haddad v. McDowell, 213 Cal. 690, 691, 3 P.2d 550; Stillwell Hotel Co. v. Anderson, 4 Cal.2d 463, 464, 50 P.2d 441; Buttner v. American Bell Tel. Co., 41 Cal. App.2d 581, 582, 107 P.2d 439; Swasey v. L'Etanche, 17 Cal.App.2d 713, 715, 716, 62 P.2d 753; Penziner v. West American Finance Co., 133 Cal.App. 578, 582, 24 P. 2d 501.

Appellants' brief in this court consists mainly of an argument that section 46 of the Act is constitutional, it being asserted that the demurrer of defendants was based on the alleged unconstitutionality of the Act, and that the demurrer was sustained upon the ground that the section is unconstitutional. However, as stated, the record before us does not show the ground upon which the demurrer was sustained; and as we are satisfied that it was properly sustained upon at least one of the grounds assigned, it is unnecessary to determine in this action whether said section 46 is or is not constitutional.

One of the grounds of demurrer assigned by defendants is that plaintiffs have not exhausted their administrative remedy; and in support of the judgment of the trial court respondents urge in their brief that one aggrieved by a decision of the Board of Equalization must exhaust his administrative remedy before he may have recourse to the courts, citing Collier & Wallis, Ltd., v. Astor, 9 Cal.2d 202, 206, 70 P.2d 171; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715; and Alexander v. State Personnel Board, 22 Cal.2d 198, 199, 137 P.2d 433, and sections 44, 45 and 46 of the Act.

[2] The cited cases definitely hold that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. In the Alexander case a demurrer to a petition for a writ of mandate was sustained on the sole ground that petitioner could not state a cause for relief because application for rehearing by the State Personnel Board had not been made prior to the filing of the petition for relief in the courts; and in the Abelleira case it was held that the exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. Also see Scripps Memorial Hospital v. California Employment Commission, Cal.Sup., 151 P.2d 109.

Section 41 of the Act, Stats.1937, ch. 758, p. 2162, provides for hearings before a representative of the board. Section 43, Stats. 1941, ch. 168, p. 1211, provides that such representative, after such hearing, shall certify his findings to the board and make recommendations in respect to suspending or revoking licenses; that a copy of these findings and recommendations shall be mailed to the licensee, who, within five days thereafter, may file with the board written objections to the findings, and if such objections are filed the board is authorized to hold a further hearing. Section 44, Stats. 1941, ch. 168, p. 1211, provides that after the filing of the findings of its representative and written objections thereto, if any, the board shall consider same and any additional evidence it may have taken, make its decision, and notify the licensee. It also provides that within ten days after mailing of a notice of such decision to a licensee, such licensee may petition the board for a reconsideration of the cause. Section 45, Stats. 1937, p. 2163, provides that with-

in thirty days after receipt of a petition for reconsideration the board may *itself rehear the entire matter de novo,* and if it holds such hearing shall, within ten days after the conclusion thereof, either affirm, modify or set aside its previous order. Section 46 as amended in 1937 (Stats. 1937, ch. 758, pp. 2163, 2164) provides:

"The person affected by any ruling, order or decision of the board * * * on suspension or revocation of a license may, *after exhausting the remedies such person may have with, the board,* and within thirty days after *final* action by the board, file an action in the superior court of California in and for the county of Sacramento. Said action shall be for a *review* of the ruling, order, decision or other official act of the board. Said court shall review all records on file with the board which pertain to said ruling, order, decision or other official act, and if furnished by the board, a transcript of evidence taken by the board, and said court shall take such additional relevant and competent evidence as said court may require or as may be submitted by the board or the person filing such petition for review and shall then render, according to the weight of evidence adduced before said court, judgment affirming, reversing or modifying the action of the board." (Italics ours.)

As originally enacted, that section provided that "the action of the board upon a petition for a license, a protest, complaint, or a petition for reconsideration shall be subject to review by any court of competent jurisdiction." In its present form as above stated it plainly provides that only after exhausting the remedies such person may have with the board, and after *final* action by the board, may an action be filed in the superior court.

[3] Appellants' complaint entirely fails to show that before filing this action they filed any written objections to the findings or any petition for a reconsideration by the board, or that any hearing de novo by such board was ever asked or had. On the contrary, the allegation of the complaint that said order has no support whatsoever "under the testimony and evidence submitted to and received by said representative of said board," indicates that no resort to the board itself for a hearing was had, and that said matter was not heard de novo by it, but that its order which appellants seek to have reviewed by the court was based solely upon the findings of its representative before whom the hearing was had pursuant to section 41 of the Act. Plainly, then, appellants failed to show that they had complied with the very requirements of section 46, that before filing an action in the superior court they must have exhausted their remedies before the board, and the action of the board must have become final.

Appellants argue that under section 47 of the Act it was not necessary for them to exhaust their administrative remedy. That section provides that the *filing* of a petition for reconsideration with the board shall not be a *bar* to any application to the courts for relief, and shall not prevent a court from reviewing or setting aside the action of the board upon a petition for a license, protest or complaint. However, that section was enacted as a part of the Act of 1935. Section 46 in that act merely provided that the "action of the board upon a petition for a license, a protest, complaint, or a petition for reconsideration shall be subject to *review* by any court of competent jurisdiction." It did not at that time provide, as it now does, that after exhausting the remedies such person may have with the board, and after final action by the board, an action may be filed in the superior court. Furthermore, the language of said section 47 does not compel the conclusion that administrative remedies need not be exhausted before recourse to the courts, but may reasonably be construed as meaning that the fact that a party filed a petition for a reconsideration by the board shall not estop him from thereafter seeking review by a court.

[4] Section 46, which is the later and therefore the controlling expression of the legislative intent (Patchett v. Webber, 198 Cal. 440, 447, 245 P. 422; United Milk Producers v. Cecil, 47 Cal.App.2d 758, 765, 118 P.2d 830; People v. Weitzel, 201 Cal. 116, 118, 255 P. 792, 52 A.L.R. 811; California Employment Commission v. Butte County Rice Growers Association, Cal.Sup., 154 P.2d 892), plainly indicates that only *after exhausting his remedies before the board* and after the board's action has become *final* shall a person affected by its ruling file an action in the superior court.

[5] From the foregoing it becomes apparent that if this court should in this proceeding consider the constitutionality of section 46, supra, appellants' position would be no better: for if the section were held

to be valid no reversal of the judgment of the trial court could be had, since, if the section is valid, as appellants contend that it is, the sufficiency of their complaint would not thereby be established. The facts would still remain that the complaint is insufficient for failure to show that appellants exhausted their administrative remedy, and that, though given leave to amend, they declined to do so. Furthermore, it is doubtful whether plaintiffs' complaints contain allegations sufficient to create an issue of fact for trial by the superior court. The only issues presented, if we assume that such allegations are not mere conclusions, are found in the allegation that the order of the board "has no support whatsoever under the testimony and evidence submitted to and received by said representative of said board," and the allegation "that these plaintiffs have never committed any act which did or would constitute any ground or cause for the revocation of said licenses." Whether or not they committed the acts charged before the board as grounds for revocation of their licenses is not put in issue in the complaints for trial de novo in the superior court, if such a trial is what plaintiffs are seeking. But these matters need not be decided here, since appellate courts are not obligated to pass upon questions not brought before them by proper pleadings, nor to decide matters of law not necessary for a determination of the case made.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.



67 Cal.App.2d 619

FRIEDLAND v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.

Civ. 7127; S. F. 17104.

District Court of Appeal, Third District, California.

Jan. 20, 1945.

Rehearing Denied Feb. 15, 1945.

Hearing Denied March 19, 1945.

1. Courts ⇐39
Mandamus ⇐31

A court having jurisdiction will not be permitted by arbitrary or erroneous order to divest itself of jurisdiction, but should be compelled to proceed with the case to judgment, and mandamus is an appropriate remedy.

2. Mandamus ⇐164(4)

Where mandamus proceeding was submitted to the appellate court without the taking of evidence, the allegations of respondent must be deemed true.

3. Mandamus ⇐72

Mandamus may not be used to compel exercise of official discretion in any particular manner.

4. Mandamus ⇐28

Generally, courts do not interfere with matters within discretion of inferior tribunals.

5. Mandamus ⇐28, 31

Mandamus may not be employed to compel a court to decide in any particular way, and only when it refuses to accept jurisdiction or when it has wrongfully divested itself of jurisdiction is mandate a correct remedy, and then only to compel the further duty to act, and not to coerce as to manner or result of action.

6. Mandamus ⇐48

Where superior court stated that it was unwilling to hear as a trial de novo an action to restrain the State Board of Equalization from enforcing an order revoking a liquor license but was willing to try such issue as a proceeding in mandamus, and it did not appear that the plaintiff in such action would not be afforded all the relief to which his complaint entitled him if the trial proceeded as in mandamus, the plaintiff was not entitled to mandamus to compel the superior court to proceed with his action as a trial de novo to review the board's action. St.1935, p. 1146, § 47; St.1937, p. 2163, § 46; St.1941, p. 2852, § 7; St.1939, pp. 2139, 2169, §§ 10, 53.

7. Mandamus ⇐48

Mandamus did not lie to compel superior court to hear as a trial de novo an action to restrain enforcement order by State Board of Equalization which revoked a liquor license but which court was willing to proceed with the action as a mandamus proceeding, because court allegedly stated that the statute under which the plaintiff proceeded was unconstitutional, since purpose of mandamus is not to enforce abstract rights and it cannot be invoked to forestall anticipated error. St.1935, p. 1146, § 47;

St.1937, p. 2163, § 46; St.1941, p. 2852, § 7; St.1939, pp. 2139, 2169, §§ 10, 53.

8. Mandamus ⇐173

In mandamus proceeding to review decisions of state-wide administrative agencies such as the State Board of Equalization, a petitioner is entitled to present independent evidence, and to have in effect a trial de novo.

9. Mandamus ⇐1, 7, 10

A petitioner is not entitled to writ of mandamus as matter of right and the writ will be granted only where necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by petitioner if writ is denied.

10. Mandamus ⇐14(3)

Mandamus is never granted to compel performance of an act until there has been an actual, as distinguished from an anticipated, refusal.

11. Mandamus ⇐3(2)

Mandamus will issue only when there is no plain, speedy and adequate remedy in the ordinary course of law. Code Civ.Proc. § 1086.

12. Mandamus ⇐4(1)

Where judicial action can be reviewed and corrected by appeal, a writ of mandamus will not ordinarily lie. Code Civ. Proc. § 1086.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Petition for mandamus by Edward Friedland to compel the Superior Court of the State of California, in and for Sacramento County, and Honorable Dal M. Lemmon to proceed to trial of an action brought by the petitioner against the State Board of Equalization and its members, wherein respondent filed a demurrer.

Writ denied.

Eugene H. O'Donnell and Ralph Bancroft, both of San Francisco, for petitioner.

John Quincy Brown, Dist. Atty., and William A. Green, Asst. Dist. Atty., both of Sacramento, for respondents.

ADAMS, Presiding Justice.

Petitioner, in a petition for writ of mandamus before this court, alleges that he is plaintiff in an action filed in the Superior Court of Sacramento County, against the State Board of Equalization and its members, in which action he "seeks a review by way of trial de novo under the provisions of sections 46 and 47 of the Alcoholic Beverage Control Act, St.1937, p. 2163, § 46, and St.1935, p. 1146, of the actions and decisions" of the board and its members under the authority of the aforesaid act; that said action is at issue and, pursuant to stipulation of the parties, came on regularly for trial on October 9, 1944; that the court refused to proceed to trial upon the ground that sections 46 and 47 of the act are unconstitutional and that it had no jurisdiction to pass upon and determine the issues in said action; that on the date set for trial, because the court refused to proceed therewith, petitioner asked for a continuance until October 21st, in order to grant him time to apply for a writ of mandate, which continuance was granted; that petitioner has no plain, speedy or adequate remedy at law, and unless the respondent court is commanded to proceed with the trial of said action will suffer great injury, to wit, that his business conducted on his premises will be ruined and he will suffer great financial loss, etc.

A copy of the complaint filed in the superior court is attached to the petition as an exhibit and made a part thereof, as is the answer thereto of the board and its members. The complaint is similar to that filed in Jensky v. State Board of Equalization, Cal.App., 155 P.2d 87. It alleges that plaintiff was operating a place of business licensed to sell beer, wine and distilled spirits; that a complaint for revocation of plaintiff's license was issued charging plaintiff with violating sections 7, 10 and 53 of the Alcoholic Beverage Control Act (Stats. 1935, p. 1123, and amendments, hereinafter called the act) and Rules 1, 2 and 27 of the board; that plaintiff was notified of a hearing to be had before a representative of the board, which hearing was had; that the representative filed findings that there was sufficient evidence to support the charges, and recommended that plaintiff's license be revoked; that the board revoked said license; that (par. VIII) "said order has no support whatsoever under the evidence submitted to and received by said representative of said board"; that thereafter plaintiff filed with the board a petition for a reconsideration of the cause, which was denied; that (par. XI) plaintiff has never committed any act which did or would constitute any ground or cause for the revoca-

tion of his license. The answer of defendants to the complaint admits the allegations thereof except those contained in paragraphs VIII and XI which are denied. It also alleges that at the hearing before the representative of the board evidence both oral and documentary was introduced proving that the allegations of the complaints filed against the licensee were true and that he was guilty of offenses in violation of sections 7, 10 and 53 of the act and of Rules 1, 2 and 27 of the board; and that the action of defendant board in finding plaintiff guilty was not capricious or arbitrary, and was founded upon substantial evidence.

This court issued an alternative writ of mandate and in response thereto respondent demurred to the petition on the ground that same does not state facts sufficient to constitute a cause for the issuance of a writ of mandate, and also filed an answer in which it denied that it had refused to proceed with the trial of the action before it, alleged that it was willing and ready to hear same as a proceeding in mandamus, but was unwilling and declined to hear it as a trial de novo under the provisions of sections 46 and 47 of the act. It also denied that petitioner has no plain, speedy or adequate remedy in course of law.

A copy of the minutes of the court of October 9th continuing the trial to October 21st on stipulation of counsel, and a copy of the minutes of October 21st continuing it to October 28th, by stipulation of counsel, were attached to the answer to the petition as exhibits.

The first question for our determination is whether petitioner has presented to this court a case justifying resort to mandamus. In his points and authorities filed in support of his petition he contends that he has made out such a case, asserting that the decision of a court that it will not hear and determine a cause upon a mistaken position that it does not possess the requisite jurisdiction is equivalent to a refusal to exercise its jurisdiction, citing Katenkamp v. Superior Court, 16 Cal.2d 696, 108 P.2d 1; Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 P. 978; City of San Diego v. Andrews, 195 Cal. 111, 231 P. 726; Pacific States Corporation v. Superior Court, 72 Cal.App. 241, 236 P. 938. Respondent in its brief answers that it has not refused to act in the case, that no evidence has been offered, and that the cause has been continued by stipulation for trial at a future date; that the court has informed counsel that it is willing to take evidence and hear the cause as a proceeding in mandamus; that mandate cannot be resorted to to prevent an anticipated error in the trial of an action, but that such error, if any, can be corrected only on appeal.

[1, 2] It may be conceded at the outset, as held in the above-cited cases relied upon by petitioner, that where a court has jurisdiction of a cause it may not be permitted by an arbitrary or erroneous order to divest itself of jurisdiction, but should be compelled to proceed with the case to judgment; and that mandamus is an appropriate remedy. But as respondent alleges that it has not refused to proceed with the trial of the action before it and that it is willing to proceed with same as a proceeding in mandamus, it has not divested itself of jurisdiction. These allegations must be deemed true, since this proceeding has been submitted to this court without the taking of evidence. Charles L. Donohoe Co. v. Superior Court, 79 Cal.App. 41, 45, 248 P. 1007. The situation presented, then, is not one where a court has refused to proceed to trial of the action, but rather one in which it has stated that it will proceed, but that it will proceed in a certain way. In this state of the case, does it then become the duty of this court, by writ of mandate, to compel the superior court to proceed to try the action in a particular way, that is, in this instance, "as a trial de novo" rather than as a proceeding in mandamus?

[3, 4] It is said in 16 Cal.Jur. p. 809, § 28, that mandamus may not be used to compel the exercise of official discretion in any particular manner; that it may only direct that an officer act, and must leave the matter as to what action he will take, to his discretion. Klevesahl v. Byington, 1 Cal. App.2d 671, 677, 37 P.2d 179; Bank of Italy v. Johnson, 200 Cal. 1, 31, 251 P. 784; Mosesian v. Parker, 44 Cal.App.2d 544, 549, 112 P.2d 705. It is generally true, also, that courts do not interfere with matters within the discretion of inferior tribunals 16 Cal.Jur. p. 820, § 34.

In Cullinan v. Superior Court, 24 Cal. App.2d 468, 75 P.2d 518, 77 P.2d 471, a situation somewhat analogous to that here presented was before this court. There a writ of prohibition was sought to restrain the superior court from trying de novo, in a mandamus proceeding, a matter that had been before the State Personnel Board and in which proceeding that board had ordered the reinstatement of a civil service employee. It was alleged that the superior

court had announced that it proposed to hear the matter de novo; but this court said, citing 50 C.J. 676, that where a lower court has jurisdiction of the person and subject matter prohibition does not lie to prevent an erroneous decision; also, citing Wreden v. Superior Court, 55 Cal. 504, that the mere fact that a court is about to act erroneously or irregularly in a matter of which it has jurisdiction will not warrant the issuance of a writ of prohibition; that such writ cannot be used to prescribe what a court shall or shall not consider in a matter before it and within its jurisdiction "any more than a writ of mandate can be used to compel a court how or what to decide"; that to do either would be to interfere with the judicial functions of a court. It also said: "We may not assume from the trial judge's assertion that he would receive evidence in the mandamus proceeding, and review the order reinstating petitioner, that the superior court will exceed its jurisdiction or erroneously determine the questions which are presented therein."

In denying a hearing in that case the Supreme Court said that since the superior court had jurisdiction to entertain the proceeding it had the power to decide all questions properly presented to it in any such proceeding, and that any limitation placed on that power by the opinion and order denying the writ of prohibition was inappropriate.

[5] In Thomas v. Superior Court, 4 Cal.App.2d 356, 41 P.2d 220, this court held that the writ of mandamus may not be employed to compel a court to decide in any particular way; that only when it refuses to accept jurisdiction or when it has wrongfully divested itself of jurisdiction is mandate a correct remedy, and then only to compel the further duty to act, and not to coerce as to the manner or result of the action.

In Texas Co. v. Superior Court, 27 Cal. App.2d 651, 81 P.2d 575, the court said that mandamus lies to compel an inferior tribunal to perform a duty enjoined by law, if it refuses to do so; but if the duty is judicial the writ cannot prescribe what the decision of the inferior tribunal shall be.

In Lincoln v. Superior Court, 22 Cal.2d 304, 139 P.2d 13, the court said that the mere belief on the part of a lower court in an erroneous proposition of law cannot oust a court of jurisdiction, and does not establish a refusal to act; that by mandamus a court may be compelled to act jurisdictionally but may not be compelled to act correctly.

It is said in 35 Am.Jur. 22, that the remedy by mandamus may be invoked to compel a court to entertain jurisdiction and proceed with the powers vested in it, but not to control or review the court's decision unless there has been an abuse of discretion; also, at page 29, that the writ will not issue to direct in what particular way the court shall proceed or shall decide a particular matter, especially where, in the regular course, the decision may be reviewed upon a writ of error or an appeal. Also see Hayward v. Superior Court, 130 Cal.App. 607, 20 P.2d 348; Hilmer v. Superior Court, 220 Cal. 71, 73, 29 P.2d 175.

[6] In the light of the principles above enunciated, we are of the opinion that petitioner is not entitled to the issuance of the writ. While he alleges in his petition that respondent refuses to proceed with the trial and to allow any testimony to be introduced in support of the allegations of plaintiff's complaint, upon the grounds that sections 46 (Stats.1937, p. 2163) and 47 (Stats. 1935, p. 1146) of the Alcoholic Beverage Control Act are unconstitutional and that by reason of the unconstitutionality of said sections the said court claims that it has no jurisdiction to try, pass upon and determine the issues involved in said proceedings, the record before us fails to sustain such allegations, and shows, on the contrary, that respondent court is willing and ready to try such issues but in a certain way, to wit, as a proceeding in mandamus. It is obvious that that court has not refused to allow testimony to be introduced in support of the allegations of plaintiff's complaint, since the trial of those allegations has not been reached; and it is likewise obvious that said court has not held that it has no jurisdiction to try and determine the issues involved in said proceedings, for it is willing to proceed to try and to decide them as a proceeding in mandamus; and we cannot assume, in advance of a trial, that if they are so tried, and determined, plaintiff will not be afforded all the relief to which he is entitled under his pleading, or that the court will refuse the admission of competent evidence which is relevant and material to said issues; nor can we be called upon in this proceeding to determine what evidence is or will be admissible since such matters are primarily for determination of a trial court.

[7] Nor do the allegations of petitioner's petition that the trial court has stated that the provisions of section 46, supra, violate constitutional mandates, necessitate a determination, in advance of action by said court in violation of the provisions of said section, that the section is constitutional. The purpose of the writ of mandamus is not to enforce abstract rights (16 Cal.Jur. 778), nor may it be invoked to forestall anticipated error. The trial court might change its mind. Lapique v. Superior Court, 24 Cal.App. 313, 314, 141 P. 223.

[8] Furthermore, it does not appear that petitioner will not be afforded all the relief to which his complaint entitles him and for which he prays, if the trial court proceeds as in mandamus. The Supreme Court has held in recent decisions that in mandamus proceedings to review the decisions of state-wide administrative agencies such as the State Board of Equalization, a petitioner is entitled to present independent evidence, and to have, in effect, a trial de novo. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75; Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457; Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304.

In the Drummey and Laisne cases it is held that in a mandamus proceeding the superior court has the power to exercise an independent judgment on all of the material facts relative to the issue of whether petitioner has violated the statutes as charged before the board, and that in the exercise of such judgment it is not confined to the record before the board, as otherwise it would not be exercising an independent judgment; that in such proceeding the superior court has a right to hear independent evidence and hold, in effect, a trial de novo. And while in the Dare case the scope of such a hearing as is held proper in the Drummey and Laisne cases may be somewhat delimited, the right and duty of a trial court to hold, in effect, a trial de novo of the issues before it in so far as the taking of independent evidence is concerned, is reaffirmed.

In the case before us the trial court has evinced a willingness to hear the matter as a proceeding in mandamus; and if the foregoing decisions are followed, as we must assume they will be, the court, proceeding as in mandamus, can, apparently, afford petitioner all the relief he asks. The statement of the superior court that it was unwilling to hear the matter as a trial de novo is, first, not a refusal to do so, and second, is not inconsistent with a willingness to give plaintiff all the relief he prays if the mandamus hearing be governed by the Drummey, Laisne and Dare decisions. Furthermore, as is said in the Dare case, the term "de novo" has been accorded various meanings; and it is not clear, in the case before us, what meaning it is given by either the petitioner herein or by the respondent court. If the court, in asserting its unwillingness to try the case de novo, means that it will only review the decision of the board upon the record made before it, and will not admit independent evidence, and so rules in the course of the trial, such ruling will be subject to correction in a proper proceeding. But we cannot anticipate that such independent evidence will be offered, or, if offered, that the court will then refuse to hear it; also we cannot assume that if the court should refuse to admit such proffered evidence, it will do so solely because of unwillingness to try the case de novo, as the admissibility of such independent evidence, if offered, will depend upon many things—one in particular being whether it is relevant to any issues made by the pleadings. And in this connection it need only be pointed out that by his pleading plaintiff in the court below has pleaded no more than that the order of the board "has no support whatsoever under the evidence submitted to and received by said representative of said board." That issue, if it can be said to create one, calls for no trial de novo. Plaintiff has not, in that pleading, put in issue the truth or falsity of the charges against him filed with the board, nor even stated what they were. He does allege that he has never committed any act which did or would constitute any ground or cause for the revocation of his license; but such allegation is a mere conclusion, and does not put in issue, for trial by the superior court, whatever charges were made against him before the board.

The scope of a hearing on mandamus as defined by the Supreme Court in the foregoing cases is consonant with that provided in section 46, supra, which says that the action shall be for a review of the ruling, order, decision or other official action of the board; that such court shall review all records on file with the board, and the transcript of the evidence taken before the board if furnished by it, and that it shall

take such additional relevant and competent evidence as said court may require or as may be submitted by the board or the person filing such petition for review, and shall then render judgment affirming, reversing or modifying the action of the board. Therefore, it appears that on the trial of petitioner's case in the superior court, whether the court denominates its procedure as in mandamus or as a trial de novo, the practical result will be the same.

[9] We do not purport by what we have said to render an opinion one way or another as to whether, in view of the provisions of Art. XX, sec. 22, of the Constitution, the enactment of section 46, supra, was within the power of the Legislature, as a determination of that question we believe is not necessary to a decision in the matter before us. A petitioner is not entitled to a writ of mandamus as matter of right. Sipper v. Urban, 22 Cal.2d 138, 140, 137 P.2d 425. The granting of same is discretionary, and it will be granted only when necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by petitioner if the writ is denied. Ault v. Council of City of San Rafael, 17 Cal.2d 415, 417, 110 P.2d 379. And in this connection attention is directed to the decision of this court in Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 110 P.2d 453, and to cases cited therein holding that there is no inherent right in a citizen to sell intoxicants. Also see McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, holding that the bail bond business is one subject to reasonable regulation under the police power and that the enactment of regulations thereof results in no deprivation of property without due process of law.

[10] If the superior court, as it alleges it is willing to do, proceeds to try petitioner's action, and, in the course of such trial, commits such errors as are anticipated by petitioner, that is, denies to him rights which he deems to have been granted by the Legislature in the enactment of section 46, supra, such errors can be reviewed on appeal. Mandamus is never granted to compel the performance of an act until there has been an actual as distinguished from an anticipated refusal. George v. Beaty, 85 Cal.App. 525, 531, 260 P. 386. As hereinbefore stated, we cannot, in this proceeding, anticipate errors, and preclude the court from committing them.

[11,12] Under section 1086 of the Code of Civil Procedure the writ of mandamus will issue only when there is not a plain, speedy and adequate remedy in the ordinary course of law. City of San Diego v. Andrews, 195 Cal. 111, 120, 231 P. 726. Where judicial action can be reviewed and corrected by appeal, a writ of mandamus will not ordinarily lie. Snyder v. Superior Court, 24 Cal.App.2d 263, 271, 74 P.2d 782.

The writ is denied.

THOMPSON and PEEK, JJ., concur.



67 Cal.App.2d 540

WELLBORN v. WELLBORN et al.

Civ. 14485.

District Court of Appeal, Second District, Division 3, California.

Jan. 17, 1945.

1. Appeal and error ⇐758(3)

Appellant's contention that injunction order seeking to avoid a multiplicity of suits denied appellant due process presented no question for review in absence of showing of abuse of discretion. U.S.C.A.Const. Amend. 14.

2. Appeal and error ⇐946

A trial judge's purely discretionary ruling will not be reversed on appeal, in absence of abuse of discretion.

3. Appeal and error ⇐190(2), 842(1)

An appeal from order granting temporary injunction against trial of actions instituted by appellant pending trial of respondent's action against appellant raises law question whether facts stated in respondent's affidavits were sufficient in law to justify temporary injunction, though such question is not raised by appellant.

4. Appeal and error ⇐916(1)

On appeal from order temporarily enjoining trial of actions instituted by appellant pending trial of respondent's action against appellant, respondent's com-

plaint must be deemed to have been broad enough to place all pertinent facts before court.

5. Injunction ⇐26(4)

Equity jurisdiction may be exercised to prevent multiplicity of suits where one of two individuals involved in dispute institutes or is about to institute against the other several actions depending on same legal questions and similar fact issues, whether successively or simultaneously.

6. Landlord and tenant ⇐290½

The Superior Court had power to grant temporary injunction, restraining trial of unlawful detainer actions against tenants in justice court pending trial of Superior Court action, brought by lessor against plaintiff in justice court actions, to determine title to and right to possession of leased premises, in order to prevent multiplicity of suits.

7. Judgment ⇐743(2)
Landlord and tenant ⇐290½

A judgment annulling marriage and declaring wife owner of certain realty, subject to lien awarded husband, was conclusive of wife's title thereto as against persons claiming interest acquired after judgment with actual or constructive notice of pendency of annulment suit, so as to entitle wife to temporary injunction restraining trial of such persons' unlawful detainer actions against wife's tenants pending trial of her action to determine title to and right to possession of leased premises. Code Civil Proc. § 1908.

8. Injunction ⇐26(5)

Equity will enjoin repeated attacks on a title previously settled by a judgment which is conclusive as to parties thereto and issues sought to be retried.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Nada Truscott Wellborn against Charles Wellborn, Barry Sullivan, and others to determine title to and right to possession of certain realty and require accounting of rents collected by defendants. From an order granting a temporary injunction, restraining defendant Barry Sullivan from causing trial of three unlawful detainer actions, instituted in a justice's court by him and others, pending trial of the instant action, defendant Barry Sullivan appeals.

Affirmed.

See, also, 155 P.2d 99.

Barry Sullivan, of Los Angeles, in pro. per.

Lorrin Andrews and W. S. Weatherwax, both of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal by Barry Sullivan, one of the defendants, from a temporary injunction restraining him, pending the trial of the instant action in the superior court, from causing to be tried three certain actions which had been instituted by him and others in the justice's court.

The complaint is not in the record but the parties agree that the action is one to determine title and the right of possession of real property, improved with a dwelling house, and for an accounting of rents collected therefrom by the defendants. The litigation over the property has quite a history, which is related in the affidavits and counter affidavits upon which the court based the restraining order. It appears therefrom that in November, 1939, plaintiff obtained an annulment of her marriage to Charles Wellborn by judgment which also declared her to be the owner of the property in question and awarded Charles Wellborn a lien upon it for $1,250. There was no personal judgment for the amount and no provision in the judgment for its collection by foreclosure or otherwise. Charles Wellborn caused execution to be issued, the property to be sold, and bid it in for $1,000. Plaintiff herein made a motion to vacate the writ of execution and the sale, the motion was denied, and the order was reversed on appeal, the writ and the sale being held void. Wellborn v. Wellborn, 1942, 55 Cal.App.2d 516, 131 P.2d 48. Following this reversal the superior court made an order quashing the execution and vacating the sale pursuant to the holding on appeal that they were void. Prior to the reversal Charles Wellborn instituted an action of unlawful detainer in the justice's court against Mary Knight and E. D. Toole, tenants of plaintiff in the property. Plaintiff filed an answer in the case, apparently upon the theory that she was the Jane Doe named in the complaint, but her answer was stricken

out and judgment went in favor of Charles Wellborn, a writ of possession was issued, and Charles Wellborn, Barry Sullivan, D. E. McGregor and S. E. Sullivan took possession of the property and collected rents therefrom. The three newcomers had acquired all or a part of the interest of Charles Wellborn in the property, such as it was. Plaintiff then took up her residence on the property and entered into written leases with Mr. and Mrs. E. V. Morrison and Mr. and Mrs. Earl Brokow. It was stated in the affidavit of Barry Sullivan that he, S. A. Sullivan and McGregor also entered into agreements to rent the premises to Mr. and Mrs. Morrison and Mr. and Mrs. Brokow and that they had been collecting rents thereunder. After the sale to Charles Wellborn had been declared void, the two Sullivans and McGregor brought three unlawful detainer actions, two against Earl Brokow and wife and one against E. V. Morrison and wife. These actions were about to be tried at the time the temporary injunction was issued (December 6, 1943) restraining the trial of the actions until the present action should be tried. Apparently it has not been tried, although it could have been disposed of in far less time than has been required for the disposition of the appeal. The fact that Barry Sullivan has taken the present appeal, instead of going to trial in the superior court, and has thereby delayed the trial of the action on the merits is worthy of notice, in view of the fact that the injunction in question was issued under the equitable power of the court to try in a single action the issues involved in a multitude of actions at law, in order to put an end to unnecessary and vexatious litigation.

[1, 2] Aside from the citation of authority upon well established but irrelevant principles of law, appellant's entire argument in his opening brief (no reply brief having been filed) is as follows: "The order violates the Constitution of the United States (United States Constitutional Amendment 14) in this that the Supreme Court restrains appellant from prosecuting or defending his right to the Justice Court, but does not restrain Brokow or Morrison from rendering judgment against plaintiff in the Justice Court and in favor of Brokow or Morrison or both, pending the hearing of this case the Justice Court judgment would become final and appellant deprived of his right." No doubt this argument was made to the trial judge as a reason why he should exercise his discretion by a denial of the application for an injunction, but it presents no question of law. A ruling which is purely discretionary with the trial judge will not be reversed on appeal if there has been no abuse of discretion. See cases cited 14 Cal.Jur. p. 180, sec. 7. The facts in evidence called for an injunction, if the law permitted one.

[3] The appeal necessarily involves a question of law, although it has not been raised by appellant. The question is whether the facts stated in the affidavits were sufficient in law to justify a temporary injunction. Although appellant has not attempted to answer the question, we shall answer it, inasmuch as the trial court will have to decide whether the temporary injunction will be made permanent.

[4] The complaint must be deemed to have been broad enough to place all the pertinent facts before the court. Plaintiff herein had a judgment against Charles Wellborn establishing her title to the property. The subsequent execution sale under which Charles Wellborn claimed title had been held void. Barry Sullivan was Charles Wellborn's attorney throughout that litigation and also in the unlawful detainer action in which judgment was given in favor of Charles Wellborn against Mary Knight and E. D. Toole for possession of the property. He had actual knowledge of the proceedings to vacate the execution and the sale; he and S. A. Sullivan and McGregor call themselves successors of Charles Wellborn in the ownership of the property but they alleged no facts, in opposing the application for an injunction, to prove that they had any title, that they paid anything for the interests which they claim, or that they acted without notice or in good faith in acquiring such interests, whatever they may have been. They alleged no facts in denial of plaintiff's title and none tending to prove that they had a right to the possession or to the income. They did not deny that the occupants of the premises were plaintiff's tenants; they alleged only that the same tenants had agreed to pay and had paid rent to them. From the affidavits it would

appear that the defendants were claiming the right of possession and were collecting rents solely through the void execution sale to Charles Wellborn and without any right whatsoever. Upon the evidence which was before the court they appeared as mere interlopers who had been collecting rents from plaintiff's tenants and were seeking to oust them. If they had succeeded in their unlawful detainer actions they would have had judgment for possession as against the tenants without any adjudication of their right to possession as between themselves and plaintiff, Nada Wellborn. It appeared that the tenants were being harassed by groundless litigation, to their detriment and to that of plaintiff.

[5, 6] A judgment in the superior court action would determine the right to possession and to the rentals as between plaintiff and the Sullivans and McGregor. It would have been unjust to allow the tenants to be ousted when they held leases from the true owner, but they might not have been able to defend the actions upon that ground. It would be strange indeed if a court of equity did not have the power under these circumstances to bring in the Sullivans and McGregor and require them to prove their rights, if any, to the land, to the possession of it, and to the rentals and by a single judgment determine not only the issues of the justice's court actions but the main issues that could not have been tried in those actions.

In Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 1, p. 395 et seq., there are listed four conditions in which equity jurisdiction may be exercised to prevent a multiplicity of suits. One of these is stated as follows: "2. Where the dispute is between two individuals, A and B, and B institutes or is about to institute a number of actions either successively or simultaneously against A, all depending upon the same legal questions and similar issues of fact, and A by a single equitable suit seeks to bring them all within the scope and effect of one judicial determination. A familiar example of one branch of this class is the case where B has brought repeated actions of ejectment to recover the same tract of land in A's possession, and A finally resorts to a suit in equity by which his own title is finally established and quieted, and all further actions of ejectment by B are enjoined." The various unlawful detainer actions against plaintiff's tenants were indirectly against plaintiff. They were the more vexatious from the fact that plaintiff was not in a position to defend them. The basic controversy was not within the jurisdiction of the justice's court and it was proper to stay the hand of that court until the question of title had been decided as between plaintiff and the defendants herein.

[7, 8] The injunction was proper for another reason. Plaintiff's title had been established in the original action against Charles Wellborn. That judgment was conclusive as to the defendants Sullivan and McGregor, who claimed an interest acquired subsequent to the judgment, provided they had notice, actual or constructive, of the pendency of the suit. Code of Civil Procedure, section 1908. It appeared that plaintiff was in possession through her tenants, which would constitute notice of her rights, and defendants alleged no facts to show that they were bona fide purchasers from Charles Wellborn. If, therefore, the court in the present action should determine that the Sullivans and McGregor are bound by the judgment in favor of plaintiff establishing her title as against Charles Wellborn, it would be proper to enjoin said defendants permanently from bringing to trial their unlawful detainer actions. Equity will enjoin repeated attacks upon a title that has been settled by judgment which is conclusive as to the parties and as to the issues sought to be retried. See Pomeroy's Equity Jurisprudence, supra, section 253, p. 426. The order of temporary injunction was in conformity with established practice under which courts of equity act to prevent a multiplicity of suits.

The order is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

67 Cal.App.2d 545

WELLBORN v. WELLBORN.

Civ. 14511.

District Court of Appeal, Second District, Division 3, California.

Jan. 17, 1945.

1. Appeal and error ⇐1195(3)

A judgment of District Court of Appeal, reversing order denying motion to quash execution and vacate sale of realty thereunder, was conclusive, at hearing in Superior Court on renewed motion to quash writ and vacate sale after receipt of remittitur.

2. Appeal and error ⇐1199

A Superior Court order, denying motion to quash writ of execution and vacate sale of realty thereunder, was not res judicata on renewal of motion after receipt of remittitur from District Court of Appeal, which reversed such order.

3. Army and navy ⇐34

Where husband awarded lien on realty by marriage annulment judgment establishing wife's ownership thereof, was represented, on appeal from order quashing writ of execution on judgment and vacating sale of realty to him, by same attorney as on former appeal from order denying motion for such relief and such attorney was authorized to represent husband when notice was given of renewal of motion after receipt of remittitur from District Court of Appeal, which reversed order denying original motion, Superior Court had authority to make order quashing writ and vacating sale without receiving affidavit that defendant was not in military service or appointing attorney to represent him.

4. Appeal and error ⇐1199

The Superior Court had authority to make, on its own motion, order quashing writ of execution and vacating sale of realty thereunder after receipt of remittitur from District Court of Appeal, which reversed Superior Court's previous order denying motion for such relief, though judgment of reversal was self-executing.

5. Appeal and error ⇐758(3)

A bald assertion by appellant that order appealed from deprived him of unspecified constitutional right presents no question for review.

6. Costs ⇐260(6½)

Damages for frivolous appeal from order quashing writ of execution and vacating sale of realty thereunder could not be assessed against one to whose interest in realty, levied on and purchased by him, other persons have succeeded. Rules of District Court of Appeal, Rule 26a.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Nada Truscott Wellborn against Charles Wellborn to annul the parties' marriage and quiet title to certain realty. Judgment annulling the marriage and establishing plaintiff's ownership of realty, subject to a lien thereon in favor of defendant, who procured issuance of execution on the judgment and purchased the realty at execution sale, and from an order quashing the writ of execution and setting aside the levy and sale thereunder, defendant appeals.

Affirmed.

See, also, 155 P.2d 95.

Barry Sullivan, of Los Angeles, for appellant.

Lorrin Andrews and W. S. Weatherwax, both of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal by Charles Wellborn from an order quashing a writ of execution and setting aside an execution levy and sale of real property. In 1939 plaintiff herein was awarded a judgment annulling her marriage to Charles Wellborn and adjudging her to be the owner of certain residence property situated in the city of Los Angeles. The defendant was awarded a lien on the property for $1,250, with no provision in the judgment for the collection of the lien by foreclosure or otherwise. Defendant had an execution issued on the judgment and caused the property to be sold thereunder, bidding it in himself for $1,000. A motion to quash the execution and vacate the sale was denied and this order was reversed on appeal. Wellborn v. Wellborn, 1942, 55 Cal.App.2d 516, 131 P.2d 48. We refer to that case for a more complete statement of the facts. In reversing the order the court held at page 525 of 55 Cal.App.2d, 131 P.2d 48, that the order for issuance

of the writ of execution and the sale thereunder were void and that plaintiff had a right to disregard them entirely or to attack them at any time. After the remittitur was received in the superior court plaintiff successfully renewed her motion to quash the writ and vacate the sale pursuant to the holding of the District Court of Appeal. Notice of motion was given to defendant's attorney, who did not appear at the hearing.

[1] Defendant contends that his lien was satisfied to the extent of $1,000 by the execution sale and that the order vacating the sale destroyed the lien to that extent. If the clerk had made an entry of a partial satisfaction, appellant had the right to ask that the record in the judgment book and docket be corrected. The sale was declared void by the judgment of the District Court of Appeal and that judgment is conclusive, whatever the consequences may be

[2] Another point raised by defendant is that the order denying the motion to quash the writ and vacate the sale is res judicata and that the court could not make a contrary order. In urging this point appellant ignores the judgment of reversal.

[3, 4] A third point is that the court had no authority to make the order without receiving an affidavit that defendant was not in the military service or appointing an attorney to represent him. Defendant was represented on the former appeal by the attorney who represents him on the present appeal and there is no pretense that the attorney was not authorized to represent him at the time notice was given of the renewal of the motion to vacate the sale. Furthermore, the order for execution and the sale were adjudged void by judgment of the District Court of Appeal; the later order of the superior court adjudicated nothing. Although the judgment of reversal did not direct the superior court to grant plaintiff's motion, the order quashing the writ and vacating the sale was one which the court could have made on its own motion, although the judgment of reversal was self-executing and called for no further order by the superior court.

[5] The bald assertion that the order deprived defendant of some unspecified constitutional right does not deserve attention. The appeal is frivolous and without doubt was taken for the purpose of delaying a trial on the merits.

[6] This in our opinion would be a proper case for the assessment of substantial damages for a frivolous appeal (Rule 26a of the Rules of Court; 2 Cal. Jur. p. 977, sec. 577) were it not for the fact that a doubt exists whether defendant Charles Wellborn is the real party in interest. It would appear from the record in 155 P.2d 95, this day decided, that Barry Sullivan, S. A. Sullivan and D. E. McGregor have succeeded to the interest of Charles Wellborn in the real property in question. If this be the fact, it would be unjust to assess damages against Charles Wellborn. Undoubtedly plaintiff has been sorely harassed by unfounded litigation, including the appeals in this and the companion case, but we think it is not incumbent upon this court to enter into an inquiry whether the attorney concerned, throughout the litigation, has observed the requirement of section 6068(c) of the Business and Professions Code, St.1939, p. 355, which makes it the duty of an attorney "to counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense."

The order is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

PEOPLE v. HASHAWAY.

Cr. 3808.

District Court of Appeal, Second District, Division 3, California.

Jan. 17, 1945.

Hearing Denied Feb. 15, 1945.

See 155 P.2d 823.

1. Homicide ⇐218

In determining whether statements of deceased should be received in evidence as dying declarations, the trial court has the right to consider deceased's physical condition, the nature of his wounds, his knowledge of his serious condition, his conduct and his statements.

2. Homicide ⇐218

It is within the province of the trial court to determine sufficiency of foundation proof which will entitle an alleged dying declaration to be admitted in evidence.

3. Homicide ⇐203(3)

Evidence that deceased at time of making statement to officer said that he wanted to get better, that he had so much to live for, but felt like he would die, and answered in the affirmative when making a later statement, the question, as to whether in giving statement he realized that he was going to die, warranted admission of statements as dying declarations.

4. Homicide ⇐309(4)

In prosecution for first-degree murder, the giving of an instruction upon involuntary manslaughter in the commission of an unlawful act not amounting to a felony was not error where, at time instruction was given, it was a question for jury as to whether defendant acted in self-defense, nor could it be determined as a matter of law that scuffle during which homicide was committed was not "an unlawful act not amounting to a felony".

5. Homicide ⇐340(3)

In prosecution for first-degree murder, the giving of an instruction on involuntary manslaughter was not erroneous as preventing a verdict of manslaughter, but on the contrary was favorable to accused for the reason that the jury might have accepted her version of the shooting which would have resulted in a conviction of manslaughter instead of murder.

6. Homicide ⇐309(1)

In prosecution for first-degree murder, the giving of an instruction on involuntary manslaughter which was proper in view of the evidence was not erroneous as depriving defendant of her claim of self-defense.

7. Homicide ⇐340(4)

In prosecution for first-degree murder where defendant was found guilty of murder and it was not asserted that instructions as to murder were erroneous, any error in instruction concerning involuntary manslaughter would not be prejudicial.

8. Homicide ⇐341

Failure of court, in prosecution for first-degree murder, to give proposed instruction on self-defense, was not prejudicial where jury by verdict of first-degree murder impliedly found that defendant did not act in self-defense.

9. Homicide ⇐253(3)

Evidence in murder prosecution was sufficient to show that killing was premeditated and sustained conviction for first-degree murder.

10. Homicide ⇐22(2)

Premeditation sufficient to constitute the element of premeditation in murder of the first degree, need not exist for any given length of time or for an appreciable time, but such premeditation may be instantaneous.

11. Homicide ⇐282

Whether there was premeditation sufficient to warrant conviction for murder in the first degree was a question for jury.

12. Homicide ⇐147

The existence of a deliberate purpose to kill may be inferred from character of weapons used, the circumstances surrounding and showing the relationship of the parties, and the acts and conduct of the accused.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Zilla Hashaway was convicted of murder in the first degree, and she appeals.

Judgment and sentence and the order denying defendant's motion for new trial affirmed, and appeal from verdict dismissed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of the crime of murder. A jury found her guilty of murder of the first degree and fixed punishment at life imprisonment. Her motion for a new trial was denied, and she was sentenced to life imprisonment. Defendant appeals from the verdict, from the "judgment" denying her motion for a new trial and from the sentence.

Defendant contends: (1) That the evidence was insufficient to support a conviction of murder of the first degree; (2) that the trial court committed prejudicial error in admitting "purported" dying declarations of deceased; and (3) that the trial court erred prejudicially in giving an instruction concerning involuntary manslaughter.

On October 23, 1943, Ceberlee Clark was shot by defendant and died the next day (the time of day is not shown by the record). He was a special policeman, 26 years of age, 5 feet 9 inches in height, and 212 pounds in weight. The weight of defendant was 118 pounds. In April, 1943, Clark moved into a hotel which was on the second floor of a building located at 815½ East 5th Street, Los Angles. The entrance to the hotel was by means of a stairway in the front part of the building extending from the ground floor to the second floor. There was another stairway from the second floor to the third floor. A hallway, about 3 feet in width, extended from the front to the rear of the hotel, and the rooms were along each side of the hallway. At the rear end of the hallway there was a door, which opened inward. Outside the door there was a porch about 2 feet 9 inches wide which extended across the rear of the hotel. The porch was enclosed by a railing about 3 feet high, and there was a stairway from the porch to the third floor, and another stairway from the porch to the ground. The stairway to the ground had been closed, and was not in use at the time of the homicide. The manager of the hotel lived in an apartment consisting of rooms 1 and 2 in the front of the building near the entrance stairway. Clark occupied room 6, which was the fourth room from the manager's apartment and was the second room from the back porch.

He and the defendant became acquainted in July or August of 1943, and 2 or 3 weeks later defendant moved into his room at the hotel. They lived there about 2 months, and then Clark left the state and was gone about 3 weeks. After he had gone, defendant continued to live in his room until the Saturday preceding the Monday when he returned. On that Saturday she moved out of the hotel. According to her testimony, she then went to live with her friend, Beatrice Terry, until she could find a place of her own, and on October 22nd, she moved into an apartment on 1st Street. On the evening of October 23, 1943, about one week after Clark had returned to Los Angeles, he took a woman and a man to his room in the hotel. He left them there, and went back to the street where he saw defendant for the first time following his return. Clark told defendant there was a woman in his room. About 9:00 that evening, he and defendant went into the hotel together, defendant knocked on the entrance door to the manager's apartment, which was the door to the kitchen, and the door was opened by the manager's daughter. Defendant entered, but Clark did not enter at that time. He sat on the steps of the stairway which extended from the second to the third floor. The door of the apartment was left open when defendant entered, and Clark could be seen from the manager's apartment as he sat on the steps laughing. Defendant asked the manager for the return of a butcher knife, which she had either given or lent to the manager while she was living in the hotel. Other statements made at that time concerning the knife will be referred to hereinafter when the testimony of certain witnesses is related. The defendant did not get the knife. A few minutes after defendant had gone into the manager's apartment, Clark entered and sat down in the kitchen. When he entered, and as he sat in the kitchen, he was laughing. At this time defendant was in the bedroom of the apartment, and she told the manager that Clark had a woman in his room. After some conversation about going to the street, hereinafter to be related, defendant and Clark left the apartment together and went into the hallway. While they were in the hallway, it appears that they had a disagreement concerning whether defendant should go into Clark's room. According to the alleged dy-

ing declaration of Clark, defendant wanted to go into his room and he would not permit her to do so. According to the testimony of defendant, Clark tried to push or force her into his room, and she resisted his efforts and refused to go in. Details concerning happenings in the hallway will be stated hereinafter when testimony of certain witnesses is related. Defendant reached into her coat pocket and "pulled out" a pocket knife. The handle of the knife was 3⅜ inches long; one blade was 2 inches long and the other blade was 1⅞ inches long. Clark took the knife away from her, and then defendant snatched Clark's pistol from the holster which was strapped to his waist. Defendant testified that thereupon Clark took a "billy" from his belt, and advanced toward her with it in his upraised hand; that she retreated as far as she could —to the railing of the porch; that he continued advancing, and she fired the pistol in self-defense. The bullet entered the left side of Clark's abdomen, about 2 inches below his heart, followed a horizontal course and lodged in his back. Defendant then went into the street with the pistol in her hand, and was arrested near the hotel.

The manager testified: that on the night of the homicide, she was in her apartment with her daughter and Edward Peters when defendant came to her apartment; that it was the first time she had seen defendant since she moved from the hotel; that defendant had given her the butcher knife in question; that after defendant asked for the knife, she (the manager) looked outside and saw Clark laughing, and sitting "on the third bottom step" of the stairway, and she replied, "'Not no knife'"; that defendant did not say why she wanted the knife; that when Clark came in the apartment, he "started a book—turning the pages," at which time defendant was "walking around the basin" in the bedroom; that it was necessary to go through the kitchen to get to the bedroom; that Clark was laughing and appeared to be jolly while he was in her apartment; that defendant did not appear to be angry or disturbed; that she (the manager) overheard no argument of any kind between them, and she had no reason at that time to feel there was any ill feeling upon the part of either toward the other; that they stayed about 10 minutes; that Clark was playing with defendant; that he "got her leg between his legs," and defendant pulled loose and "went on to the back door to go out from the kitchen to the hall," and said, "'I believe I will go up the street'"; that Clark said "'Well, I am going up the street,'" and defendant replied "'I won't go then,'" and Clark said, "'You don't have to—Just going up the street because I am going—you don't have to speak to me'"; that they went outside and closed the door; that they had been gone about 15 minutes when she heard a shot; that Peters knocked on her door, said "something" to her, and she ran into the street, called a police officer, and did not return until after Clark had been taken to the hospital.

Peters testified: That he lived in the hotel; that he was in the manager's apartment when defendant arrived on the night of the homicide; that defendant, after asking for the knife, said, "'Well, if you don't want to give me the knife, lend me the knife'"; that Clark was laughing while he was sitting on the stairway steps, and defendant was "walking up and around —walking around in the room"; that Clark "continued laughing and talking" after he came into the apartment; that he was "playing with her" when he "moved his leg and her leg caught in between his leg"; that while they were there, defendant "was not in no good humor"; that she talked like she was "angry about something"; that she did not laugh while she was in the apartment; that "she was not pleased"; that defendant said, "'I am going out,'" and Clark said, "'I am going out in the street too'"; that Clark said further, "'I don't have to go your way because I am going down too,'" and that Clark said this "laughing and joking"; that defendant did not reply. At the preliminary hearing the witness had testified that defendant replied, "'Well, I won't go,'" and that Clark said, "'Well you don't have to say that to me.'" Peters testified further: That about 5 or 7 or 8 minutes after they left he (the witness) started to the "restroom," which was on the same floor; that he leaned up against the wall in the hallway before going into the restroom; that he saw Clark and defendant standing in the doorway to the back porch; that the door was open, and they "had the door blocked, one on each side"; that he leaned against the wall 7 or 8 minutes, during which time defendant and Clark remained in the doorway; that he was about 42 feet from them; that they were talking, but were "mumbling low" and he could not hear what they were saying; that he then went into the rest-

room, and "just as soon" as he "got in there" he heard the shot; that he ran into the hall and heard Clark "holler 'Oh, Lord have mercy'"; that defendant was "right by" Clark, about 5 feet away from him, "looking down on him"; that defendant was coming toward the witness with the gun in her hand, "her arm was out straight and the gun was cocked"; that Clark was on the floor of the porch, with his feet "hanging down the stairs," and "his two legs were in between the banister"; that he (the witness) "picked him up and brought him into the door"; that the door to Clark's room was open and he saw defendant walk into the room and bring out a pillow, which Peters (the witness) placed under Clark's head; that while he was leaning against the wall watching defendant and Clark, he did not notice whether the door to Clark's room was open or closed; that when defendant went into Clark's room, he saw a woman in bed and a man "sitting on the chair"; that defendant stooped low over Clark before she went into his room; that he did not see her pick anything up from where Clark was lying; and that she did not have anything except the gun when she went into Clark's room.

A special police officer testified that he had known Clark about 5 months; that "a few minutes after 9" on the night of the homicide, he (the witness) was standing in front of the Crystal Bar (which was across the street from the hotel), when the manager of the hotel told him to come to the hotel; that after he went to the scene of the homicide, he returned to the street where he saw defendant who was about 6 yards from the hotel; that he and two police officers, who "were standing there" with him, approached her from the rear; that the witness "touched her" on the shoulder, and when she turned around he "got hold of her right arm," and took the gun, which was cocked, out of her hand; that defendant was walking when she was arrested; that he left her in the custody of the two police officers, and returned to the scene of the homicide; that he searched the vicinity, and found a penknife, with one blade open, on the third step of the back porch, about 4 or 5 feet from where Clark had been lying; that he saw no blood on the knife; that he saw no club or billy of any kind; and that the only means of departure from the porch was through the hallway of the hotel or up the stairway to the third floor.

A police officer testified that he arrived at the hotel about 9:45 p.m., where he found Clark lying on the back porch facing "toward the banisters, with his feet under the banisters"; that Clark was making sounds which indicated he was in severe pain; that "almost immediately" after the officer arrived he had a conversation with Clark; that he climbed over the banister to get on the step below the place where the stairway was blocked, in order to be in a position so that he could see Clark and hear all that he said. In testifying concerning the conversation between Clark and himself, the officer referred to a report which he said he had made from original notes that he had written soon after the conversation. Over the objection of defendant this conversation was received in evidence as a dying declaration. The officer testified concerning it as follows: "I asked this man that was laying on the back porch, 'What is you name?' He answered, 'Ceberlee Clark.' 'Will you give us a statement concerning the shooting and who shot you.' He answered, 'I feel like I am going to die and can't talk.' Q. 'You are seriously injured and we want to know who shot you,' and he answered, 'Zilla, that girl, shot me.' Q. 'Why,' and he answered, 'She wanted in my room and I would not let her in because I had another fellow and a woman in the room.' Q. 'Where did the shooting occur?' A. 'Right here on the porch.' Q. 'What did it start over?' A. 'I would not let her in and she pulled a knife on me. I took it away from her and she grabbed my gun and shot me.' Q. 'Who was the man in your room?' A. 'Jimmy.'" The officer testified further that he, another police officer and the defendant went to the hospital about midnight, and that he had another conversation with Clark in the presence of the other officer and defendant, which was in substance that he asked Clark if defendant was the woman who shot him and Clark answered, "'What does she say?'" and defendant said, "'Yes, I shot him,'" and then Clark said, "'Yes, she shot me'"; that he asked Clark if he owned a billy club and he said he did but he had "loaned it to a special officer a week before," and that he did not have any other billy club. The officer testified that he (the officer) then had a conversation with Clark's doctor, after which he returned to Clark's room and, in the absence of the other officer and the defendant, had a third conversation with Clark.

This conversation was also received in evidence, over the objection of defendant, as a dying declaration. The officer testified concerning it as follows: "I stated to Clark, 'Clark, my name is McGarry of the Homicide Bureau of the Police Department. I am a police officer. You are a special officer. You are in a very serious condition and I would like to have you tell me all of the facts surrounding the shooting.' His answer, 'I will tell you but I have to talk slow, because I hurt awful bad. I want to get better; I have so much to live for but I feel like I will die.' I answered, 'Take your time and I will listen to you.' And he answered, 'I had another girl in the Crystal Bar who I had just met. I had gone back to Oklahoma and had been gone three weeks. Before that I lived with Zilla. I came back Monday and she had moved. I took the girl to my room, also a fellow named Jimmy Garland. I then went out onto Fifth Street and I met Zilla. She wanted to come to my room. She came upstairs with me and I told her she could not come in because I had another girl in the room. She said, "I don't care, I will come in anyway." I asked her what she had and she said, "I have got a knife." I took the knife away from her and she grabbed my gun from my holster. I backed away from her toward the rear porch. I said, "Zilla, put that pistol down," and she said, "I am going to shoot you." I thought she was—then she pulled the trigger and that is all.'" The officer testified that he questioned him further as follows: "Q. Is this a true statement? A. It is. Q. In giving this statement, do you realize that you are going to die? A. 'Yes.'" The officer testified further: That he did not ask Clark whether he understood the rule regarding dying declarations; and that Clark "was not angry," and gave no indication of having any ill feeling toward defendant.

A guest of the hotel, who occupied room 7 which adjoined the back porch, testified that the pistol shot awakened him; that he "got up," turned on the light, went to the clothes closet, got his trousers and put them on, then "opened the door and peeped out"; that he saw Clark "laying there groaning" and defendant coming from the porch; that she passed his door with the pistol in her hand; that she was "holding it down" and he saw about 4 inches of the barrel of the pistol; and that he did not see anyone in the hallway except Clark and defendant.

Beatrice Terry, a witness called by defendant, testified: That she had known defendant since 1936, and had known Clark about 2 months; that on the Thursday preceding October 23rd she had a conversation with Clark which she had related to the defendant; that on Saturday, October 23, 1943, she and defendant started to a cafe for dinner, and she saw Clark standing in front of the Marcus Cafe "where he was supposed to be working" (which cafe was diagonally across the street from the hotel); that he asked where they were going, and said to defendant, "'I want to talk to you a minute'"; that she (the witness) walked up the street and waited for defendant; that later Clark and defendant joined her about a block up the street, and the three of them went into "a little bar there"; that she drank beer and Clark and defendant "were drinking a highball"; that she overheard Clark ask defendant "to go back to him," and defendant said, "'No, she was not going to live with him any more, because she was expecting her daughter and she did not want to live with him any more because they were not married'"; that she (the witness) remained in that bar with them about 20 minutes; and that when she left they were still there.

Defendant testified that she was married, but separated from her husband; that she had a daughter about 14 years of age; that when she moved in with Clark, she took her clothes and cooking utensils; that she lived with him more than 2 months, until he went to Texas "to see about his child"; that he did not go to Oklahoma, but to Houston, Texas, and she "bought the ticket" for him with her money; that he did not take all of his clothes with him; that he was gone about 3 weeks; that she received one letter from him while he was gone; that she had worked at a packing house and she was permitted "to have two knives"; that she "only had two" knives, and she lent one of them to the manager of the hotel while she was living there; that while Clark was gone she paid the rent for the room, and when she moved from the hotel she paid a week's rent in advance; that, before Clark went away, she had not intended to move from the hotel, but during his absence she received a letter "stating of trouble at home" and she was going to have to care for her child; that it forced her to live alone and she "could not live with a man" that she was not married to and care for her child; that on October 23,

1943, she went to the apartment of a friend, Beatrice Terry, who told her Clark had been at her (Beatrice's) apartment looking for and asking about defendant, and that he had told Beatrice he "did not see how it could be" that he and defendant would have to be apart; that Beatrice and defendant left the apartment to go to the Marcus Cafe, where defendant intended to eat dinner; that they saw Clark standing "right by the door" outside the Marcus Cafe; that Clark and defendant spoke to each other; that he went into the cafe with defendant (and Beatrice stayed outside); that they stayed in the cafe long enough to see "if everything was filled," and then walked out and went to the Crystal Cafe and Bar; that Beatrice was standing "between Marcus' place and the Crystal Bar," and joined them as they passed her; that the three of them went into the Crystal Bar; that she (the defendant) drank; that Clark "appeared to be somewhat knocked off his feet or surprised or something," and he told her and Beatrice "how lonesome it had been for him since he had been back" and the defendant was not "at the apartment any more and it seemed a matter of impossibility for him to remain there and stay on his job" without her "being there"; that he had quit his job the night before the 23rd; that he wanted her to "come home," and she told him he had been drinking; that she explained her "troubles to him," and that she had "to sacrifice" her life for her child; that "it would not be right to live with him unmarried to him and have to care for" her child; that he asked her why she "would not go to the room and meet friends and meet the landlady; that she told him she would not go to his room; that he told her the manager of the hotel had been asking about her and wanted to see her; that "after seeing that he had been drinking" she decided she "would go over just to please for a few minutes"; that while at the Crystal Bar he told her that a man and woman were in his room; that Beatrice stayed in the bar 15 or 20 minutes, and she and Clark were there "around 45 minutes"; that they then went to the hotel, and she went into the manager's apartment; that "they were all surprised" to see her, and offered her "a seat," but she told them she "did not have very much time," and she "refused to sit"; that she told them she was going home and "would like to get" her knife that she "had loaned her [the manager]," and the manager asked her why she would "want to give it to her and take it back," and the defendant replied that she had not given it to her. Defendant testified further that she had an apartment where she would have to cook and care for her child and "would be needing the knife; that she still had her other knife; that after she had been in the manager's apartment 7 or 8 minutes, Clark came in laughing and "they asked him what was he laughing about," and he said, " 'Zib was mad' "; and that she then told the manager that Clark had a woman in his room. She also testified: that she was not "mad"; that the manager told her if she wanted the knife she could " 'get it,' " and that she replied that she "had better not take it" then, because if she did they would say she wanted to fight "as he [Clark] had made the statement" she was mad; that she was tired and said she was "going out on the street"; that Clark said, " 'If you are going, I am going too' "; that she answered, " 'If you are going, I won't go,' " to which he replied, " 'Well, why, the two of us go then—you would not have to say anything to me' "; that she went out of the apartment with the intention of going home, and "started to the restroom [which was toward the rear of the hallway between the manager's apartment and Clark's room] before going out the stairway"; that Clark followed and "grabbed her from the back" and said, " 'Zilla, come on here, I want you to go and let me explain something to you' "; that he said he wanted to talk to her; that he "kept pushing" her toward his room, and said, " 'I have got to tell you something, because it is not the way you think,' " to which she replied, " 'It is nothing that I think; it is nothing to be thought of, a drunk man and a drunk woman in your apartment"; that he pushed her "clear down the hall" to his room, unlocked the door, and said, " 'Why don't you come in?' "; that she refused, and he called to the man in the room and she said, " 'Don't call him—don't disturb him, because I am not going in"; that after he saw she did not intend to go in, he tried to force her in; that he pushed the door open and she "drew" a pocket knife which she had in her coat pocket; that she opened the blade of the knife; that she "went to open the blade of the knife" but Clark "grabbed" her right hand, in which she held the knife, and took the knife away from her; that she did not open the blade; that he grabbed the knife before she had a chance to open it; that Clark asked her what else she had and she told him she did not have anything else—

that she "did not have any business going around with a pocket full of weapons"; that he said she was "too willing for him to take the knife"; that he did not try to search her; that it seemed he said something to the effect that she had better let him search her; that he reached for her, and she tried to jump back, but he kept coming and "When he got close enough" to reach her, she "snatched the gun out of his holster; that they were "in front" of the door to his room at the time and she "started going backwards down the hallway that led onto the back porch"; that then Clark "reached on his belt and pulled off a club or billy," put it over his hand, and said, "'Stop, Zib, you can't get away, come back'"; that she said, "Don't come on me with that billy club, or whatever it is," and he said, "'Zib, stop, you can't get away, you are too close on me to hurt me,'" and she answered that she was not "trying to hurt him," that she was trying to get "out of the place"; that she continued backing down the hall with the gun by her side and pointed down; that the door which "led out on the back porch" was closed; that she backed to the door, reached behind her and unfastened the door with her left hand (the door opened into the hallway), went "out on the porch" and closed the door between them; that he "snatched it open" and she "jumped back" as there was not room "to back two feet," and she "jumped into the railing and threw up the gun"; that she was against the banister at the east end of the porch, to the side of and about 4 feet from the door; that Clark "stepped out of the door" and "had the billy up in his hand all of the time," and could have struck her if he had "gotten close enough"; that she asked him not to come any closer; that he stepped "out of the door" which prevented her from going up the stairway (to the third floor), and she fired the shot; that she fired to keep him from "coming any closer," but she did not intend to shoot Clark; that she did not remember pulling the trigger; that she did not "know whether the gun shot" when she raised her hand "from hitting into the banister or whether it was coming down"; that she was very excited at the time; that she had had nothing to eat since morning; that after she fired, Clark said, "'Look out, Zib,' and grabbed himself"; that she "helped him to lay down," and said, "what in the world is it?"; that he said, "'I am hurt, Zib, call the doctor, call an ambulance and do that quick,'" and he asked her to "hold up his head"; that when Peters came, she went into Clark's room and got a pillow; that, in the room, she saw a man in a chair and a woman in the bed, and defendant said, "'Wake up, because I have had an accident out here on the back porch with "Judge" [Clark] and, if the officers come and catch you, why they will take you and put you in jail'"; that she had removed the billy from Clark's hand, and had taken it and his hat into his room and put them on the wash basin at the time she went in for the pillow; that she returned with the pillow, and placed it under Clark's head; that she told him she was sorry and he told her "he knew" she did not mean to shoot him, but to get help right away, "because he was hurt and hurt bad," and wanted her to get Jack (referring to Jack Spears, a special officer); that she was going for Jack, who was at the Crystal Bar across the street from the hotel, when she was arrested; that she was present at one time when Officer McGarry was questioning Clark at the hospital; that Clark told McGarry the defendant "'did not mean to shoot'" him and that the officer asked Clark if he owned a "billy or blackjack or anything to that effect"; that Clark answered "yes," and said he had lent the club to someone; that the officer asked him if he owned "a blackjack or anything like that," and Clark replied, "'I do'"; that the officer asked him if he thought he was "going to die," and Clark said, "'No; I have got too much to live for'"; that he did not say he thought he was going to die. Defendant testified that the back door was closed all the time they were in the hallway, and that they did not stand in the doorway at all. Defendant testified further that Clark had given her the key to his room on the night of the homicide. In response to a question as to when she received the key, she testified: "That was during the tussle, you know—it was not a tussle or anything—it was during the time he was trying to persuade me to go across the street with him" (to the hotel); that it "was during the time that I promised him that I would go over and see the landlady and no further"; that she took the key to "satisfy" Clark, to "stop argument there on the street"; that she did not intend to go to his room; that after they entered the hotel she went toward Clark's room, then she stopped, returned Clark's key to him and told him she "was not going into the room"; that she told him she "would not take his key," and for him to "unlock his own door"; that she "turned around, with him trying to catch" her; that he had assisted her across the street by the

arm, "and on up the stairs," and still had hold of her arm when she gave him the key, but she "pulled away" from him and went back to the manager's apartment.

A physician, who performed the autopsy, testified that a chemical analysis of the blood for alcohol was negative.

[1-3] Counsel for defendant contends that two statements made by Clark to the officer, purporting to be dying declarations, were hearsay and not dying declarations, and that the court erred in receiving those statements in evidence. His argument in support of that contention is that the statements were not made under a sense of impending death, since Clark said as a part of his last statement to the officer: "'I want to get better; I have so much to live for. * * *" He asserts that said quoted portion of the statement shows that the deceased had a slight hope of recovery, and therefore the statements were not dying declarations. Counsel for defendant omitted to quote a very material part of the statement which followed immediately the portion of the statement quoted by him. The complete sentence, from which counsel quoted a part, was as follows: "'I want to get better; I have so much to live for but I feel like I will die.'" Furthermore, in the last statement to the officer, near the end thereof, the officer said to Clark: "'In giving this statement, do you realize that you are going to die?'" and Clark said, in reply thereto: "'Yes.'" In the first statement the officer said: "'Will you give us a statement concerning the shooting and who shot you?'" and Clark said, in reply thereto: "'I feel like I am going to die and can't talk.'" The first statement was made at the hotel about 10 p. m., and the second statement was made at the hospital soon after midnight. Clark died on October 24th. In determining whether the statements of deceased should be received in evidence as dying declarations the trial court had the right to consider decedent's physical condition, the nature of his wounds, his knowledge of his serious condition, his conduct, and his statements. People v. Wilson, 1942, 54 Cal.App.2d 434, 441, 129 P.2d 149. It is within the province of the trial court to determine the sufficiency of the foundation proof which will entitle an alleged dying declaration to be admitted in evidence. (Ibid.) The trial court did not err in admitting said statements in evidence as dying declarations.

[4] Defendant contends further that the court erred in giving an instruction concerning involuntary manslaughter. The court instructed the jury as follows: "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection." Defendant asserts that the portion of the instruction relating to involuntary manslaughter should not have been given for the reason that "when a person commits a homicide in necessary self-defense, he is not bound to use any due caution and circumspection when protecting himself." That reason, so assigned by defendant, is based upon the assumption that at the time the instructions were given it was known that defendant acted in self-defense. It was a question of fact for the jury as to whether defendant acted in self-defense. At the time the instructions were given, the jury, of course, had not determined whether the defense of self-defense had been proved. The court was required to give instructions which were applicable, not only to the charge expressly alleged but to the offenses included therein, upon the theory that self-defense might be proved and upon the theory that it might not be proved. The court should have given the instruction concerning involuntary manslaughter unless it could have been determined as a matter of law that involuntary manslaughter was not involved. One of the defenses upon which defendant relied was that she did not intend to shoot Clark, that she was holding the gun by her side, pointing it downward, as she was backing away from Clark and trying to get out of the hotel, and that he was advancing toward her and the gun was discharged accidentally when she backed against the railing of the back porch. By reason of the evidence as to that alleged defense, and by reason of the evidence as to the alleged scuffles in the hallway, which might have been found to be "an unlawful act not amounting to a felony," such as assault or battery, it can not be determined as a matter of law that involuntary manslaughter was not involved. It was proper to give the instruction concerning involuntary manslaughter. In making the contention last above men-

tioned, defendant relies upon the case of People v. Hatchett, 1944, 63 Cal.App.2d 144, 146 P.2d 469, 477, and particularly upon the statements on page 161 to the effect that an instruction concerning involuntary manslaughter should not have been given therein. That case is distinguishable from the present case, insofar as the giving of instructions on involuntary manslaughter is concerned, in that there was no evidence therein to the effect that the shooting occurred accidentally or unintentionally, or that there was any scuffling from which it might have been found that an unlawful act not amounting to a felony was committed. Another respect in which that case is distinguishable from the present case is that the charge therein was manslaughter, and not murder. In that case the defendant could not have been convicted of a higher crime than manslaughter, and as a matter of law involuntary manslaughter was not involved, and it was held therein, among other things, that the giving of instructions which were a "part of the differentiation of manslaughter from murder" and which defined involuntary manslaughter, tended to confuse the jury and should not have been given. In the present case, since the defendant was charged with murder which included the lesser offense of manslaughter, and since as a matter of law involuntary manslaughter was involved herein, it was proper to give instructions differentiating murder from manslaughter, and to give the instruction concerning involuntary manslaughter.

[5-7] Defendant asserts further that the giving of the instruction concerning involuntary manslaughter prevented the jury from finding the defendant guilty of manslaughter, since the jury might have found that she did not use due caution and circumspection in committing the "lawful act" of protecting herself and therefore, under that instruction, she could not have been found guilty of involuntary manslaughter. This contention is made in the brief but without explanation as to how the instruction could have prevented a verdict of manslaughter. Upon the contrary, the instruction was favorable to defendant, for the reason that the jury might have accepted a version of the shooting which would have resulted in a conviction of manslaughter instead of murder. It appears to be contended also that the instruction on involuntary manslaughter in some manner deprived defendant of her claim of self-defense. The argument is without merit. As already pointed out, the instruction on involuntary manslaughter was not only proper in view of the evidence, but it was to defendant's advantage that it be given. The jury was fully and correctly instructed as to the law of self-defense. There might have been merit in the argument if there had been no theory of the evidence under which defendant could have been convicted of manslaughter and she had nevertheless been convicted of that offense. The jury rejected the claim of self-defense by returning a verdict of murder. The jury having concluded that the defendant did not act in self-defense, it cannot be asserted accurately that the instruction concerning involuntary manslaughter prevented the jury from finding the defendant guilty of manslaughter. Furthermore, even if it had been error to give the instruction concerning involuntary manslaughter, the giving of such instruction was not prejudicial. The defendant was charged with murder and was found guilty thereof, and it is not asserted that the instructions as to murder were erroneous. In People v. Boggs, 1938, 12 Cal.2d 27, at page 33, 82 P.2d 368, at page 371, the court said: "Defendant first challenges part of instruction number 34 having to do with manslaughter. The language complained of is but part of a long instruction wherein the court, for the guidance of the jury, repeated substantially verbatim the provisions of sections 187, 189 and 192 of the Penal Code wherein are defined the offenses of murder of the first and second degree and manslaughter. The latter portion of the instruction, even if inaccurate, could not have prejudiced the defendant. Particularly is this so, in view of the jury's verdict finding him guilty of murder of the first degree. [Citing cases.] In other words, judging from its verdict, the jury was satisfied beyond a reasonable doubt that the prosecution had established the essentials of murder of the first degree, which essentials were correctly set forth in the instructions."

[8] The defendant contends further that the court erred in refusing to give the following instruction: "You [are] instructed that if the appearances are such as to justify [a] killing in self-defense, the Defendant is not required to exercise any due caution [care] or circumspection in the

killing." The clerk's transcript and original file show that counsel for defendant has not quoted the refused instruction correctly in his brief. That instruction had the word "care" therein in place of the word "caution," and the word "are" and the article "a" should have been included therein as indicated above by brackets. The instruction concerning involuntary manslaughter having been given, that instruction which was refused should have been given. The failure to give it, however, was not prejudicial. The jury found impliedly that defendant did not act in self-defense, and, of course, the proposed instruction concerning due caution or circumspection in committing the lawful act of self-defense was not applicable in view of that finding.

[9-12] Another contention of defendant is that the evidence was insufficient to support a conviction of murder of the first degree. Counsel for defendant asserts that, assuming that the jury rejected defendant's version of the shooting, "the verdict should have been no more than second degree murder." He relies upon the principle of law stated in People v. Wells, 1938, 10 Cal. 2d 610, at page 616, 76 P.2d 493, at page 498, that: "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree." In that case it was stated further, 10 Cal.2d at page 617, 76 P.2d at page 498: "In each of the authorities to which reference hereinbefore has been had, it may be noted that the declaration by the court to the effect that in the circumstances therein assumed to exist, the crime would amount to second degree murder only, is dependent upon the fact that an unlawful killing and 'nothing further' has been shown. In the instant case, much more than the isolated fact that Price was unlawfully killed by defendant was thoroughly established; and considering the law, together with the evidence that hereinbefore has been summarized, it would seem clear that the conclusion of express malice of defendant was fairly deducible." In the present case there was more than the isolated fact of an unlawful killing. The evidence herein was sufficient to prove that Clark was jovial, had not been drinking alcoholic liquor, and did not assault or threaten defendant; that defendant knew that Clark, with whom she had lived, had another woman in his room; that she was angry; that she tried to obtain a butcher knife from the hotel manager a few minutes before she took the pocket knife out of her pocket; that she tried to or did open the pocket knife; that immediately after she was disarmed, that is after the knife was taken from her, she snatched the pistol from the holster; that Clark told her to put the pistol down; that she said she was going to shoot him; that they were just a few feet apart; and that she shot him 2 inches below the heart. These facts were sufficient to prove that the killing was premeditated. It is not a legal requirement that premeditation, sufficient to constitute the element of premeditation in murder of the first degree, should exist for any given length of time, or for an appreciable time. People v. Wells, 1938, 10 Cal.2d 610, 619, 76 P.2d 493. Such premeditation may be instantaneous. People v. Holt, Cal.Sup., 1944, 153 P.2d 21; People v. Aranda, 1938, 12 Cal.2d 307, 310, 83 P.2d 928. It was a question of fact for the jury as to whether there was premeditation. "[T]he existence of a deliberate purpose to kill may be inferred from the character of the weapon used, the circumstances surrounding and showing the relationship of the parties, and the acts and conduct of the accused." People v. Holt, supra, 153 P.2d at page 34. The jury had the benefit of personal observation of the witnesses. The defendant made inconsistent statements concerning material issues, particularly as to whether she opened the knife, and as to whether she fired the gun in self-defense or fired it accidentally. Her testimony that deceased had a billy and that she took it into his room after the shooting was not corroborated and there was testimony that no club was found in the room or elsewhere. The jury found that she gave false testimony. Although no one saw the shooting other than Clark and defendant, there was a witness who saw the happenings in the hallway and in the rear door up to a time within a few seconds of the shooting. The evidence was legally sufficient to support the verdict.

The judgment and sentence, and the order denying defendant's motion for a new trial, are affirmed. The appeal from the verdict is dismissed.

DESMOND, P. J., and SHINN, J., concur.

67 Cal.App.2d 636

MAUD v. CATHERWOOD et al.

Civ. 12727.

District Court of Appeal, First District, Division 1, California.

Jan. 24, 1945.

Hearing Denied March 22, 1945.

1. Trusts ⇐140(3)

Under statutes and a trust instrument which set up a trust estate for the trustor and his wife and children to be distributed on death of the last survivor to the trustor's lineal descendants in such portions as they would have taken as his heirs if he had been the last survivor, his grandchildren did not take per capita, but grandchildren and great-grandchildren took by right of representation. Probate Code, §§ 222, 250.

2. Descent and distribution ⇐21

The "heirs" of a person are those whom the law appoints to succeed to his estate if he dies without disposing of it by will.

See Words and Phrases, Permanent Edition, for all other definitions of "Heir".

3. Trusts ⇐112

Words used in a trust or other instrument disposing of property are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected and such other sense ascertained.

4. Trusts ⇐112

Where a trust or other instrument has been drawn by one skilled in the law, the presence of legal technical terms indicates that the words are to be accepted in accordance with legal definition.

5. Trusts ⇐140(3)

Where a trust instrument terminates the trust on the death of the last beneficiary, the statute then in force governs the portion of the estate taken under another provision directing that the trustor's descendants other than children should take by right of representation.

6. Constitutional law ⇐70(3)

The court may not question the wisdom of statutes determining whether decedents' estates are to be shared per capita or by right of representation. Probate Code, §§ 222, 250.

7. Descent and distribution ⇐43

To take a decedent's estate per capita, descendants must be in the class or degree of next of kin. Probate Code, § 222.

8. Descent and distribution ⇐1

Succession to estates is purely a matter of statutory regulation which cannot be changed by courts.

9. Descent and distribution ⇐28

As used in the statute defining succession to a decedent's estate by "right of representation", the quoted words indicate a substitution of one or more for another in uninterrupted sequence. Probate Code, § 250.

See Words and Phrases, Permanent Edition, for all other definitions of "Right of Representation".

10. Descent and distribution ⇐43

To take "per stirpes" is to take the share of an immediate ancestor who in turn takes the share of his immediate ancestor and so on until a common ancestor is reached.

See Words and Phrases, Permanent Edition, for all other definitions of "Per Stirpes".

11. Descent and distribution ⇐28

The theory of permitting descendants of the next of kin to inherit is to give such descendants the part which the next of kin would have received if living. Probate Code, § 222.

12. Descent and distribution ⇐28

The words "next of kin" in statutes and rules governing inheritance by descendants of next of kin refer to next of kin to the decedent, not to an ancestor or descendant of a decedent.

See Words and Phrases, Permanent Edition, for all other definitions of "Next of Kin".

13. Descent and distribution ⇐43

The Probate Code provides no strict rule of equality governing the right of succession to a decedent's property, but where equality is provided for it is limited to all heirs in the same degree of kindred to decedent. Probate Code, §§ 221, 222, 223, 225–229, 250, 252.

14. Descent and distribution ⇐28

The rule of equality governing the right of succession to a decedent's estate has no effect in applying a statute provid-

ing for succession by right of representation. Probate Code, § 222.

15. Descent and distribution ⇐21, 38

The direct line of lineal consanguinity which connects and determines ascending or descending relationship is measured by generation or degree from the common ancestor, and the same rule applies if the relationship arises through collateral consanguinity. Probate Code, §§ 252, 253.

16. Descent and distribution ⇐1

The right to succeed to an interest in a decedent's estate is not a natural right, but one bestowed by law, and accordingly subject to statutory authority.

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action for partition by Louise C. Maud against Joseph Fiske Catherwood, Harry C. Hastings, William A. Lange, as trustee, the Anglo California National Bank of San Francisco, as trustee, the Provident Security Corporation, and others. From an interlocutory decree determining interests in a trust estate, plaintiff and the named defendants appeal.

Affirmed.

Charles W. Slack and Edgar T. Zook, both of San Francisco, for appellant Louise C. Maud.

L. V. Edwards, of San Francisco, for appellants Joseph Fiske Catherwood and W. A. Lange.

Chickering & Gregory, of San Francisco, for appellants Anglo California Nat. Bank of San Francisco, and Provident Security Corporation.

A. J. Treat and Samuel M. Samter, both of San Francisco, for appellant Harry C. Hastings.

Gregory, Hunt, Melvin & Faulkner, of San Francisco, for amicus curiae Wallace Sheehan.

Perry Evans, of San Francisco, for respondent Ethel H. Crane.

Hadsell, Sweet & Ingalls, of San Francisco, for respondent Jan Casimer Lewenhaupt.

WARD, Justice.

This is an appeal from an interlocutory decree in an action for the partition of real property situated in several counties. An agreed statement constitutes the record on appeal.

The parties appearing in the trial court consisted of plaintiff, Louise C. Maud, a grandchild, and named as defendants, certain grandchildren, the trustees for certain other grandchildren, and two great grandchildren, descendants of S. Clinton Hastings, deceased, who at one time was Chief Justice of the Supreme Court of Iowa, and thereafter the first Chief Justice of the Supreme Court of the State of California, and subsequently the founder and benefactor of a California college of the law.

In 1874 Judge Hastings set up a trust inter vivos of certain real property for the benefit of himself, his wife Azalea, and their seven children. He provided for the termination of the trust upon the death of the last survivor of the beneficiaries. The last survivor was his daughter Ella, who died about sixty-eight years later. The following clause of the trust indenture then became operative: "Upon the death of the last survivor of all the above enumerated beneficiaries, to-wit: the party of the first part, Azalea Hastings, his wife, Marshall, Clara L., Charles F. D., Robert Paul, Flora, Ella and Lillie, the trust herein expressed shall cease, and all the estate, both real and personal, then in the hands of the Trustee, shall be distributed, partitioned and conveyed to the then living lineal descendants of the party of the first part in fee, each of said descendants taking such parts or portions as they would respectively have been entitled to as heirs at law of the party of the first part had he himself been the last survivor of the said beneficiaries last above enumerated."

Four of Judge Hastings' nine grandchildren and two of his great grandchildren survived Ella. They are: Joseph Fiske Catherwood, great grandchild, only son of Charles C. Catherwood, deceased, one of the three children born to Clara L. Hastings Catherwood; Louise C. Maud, the only surviving child of Clara L. Hastings Catherwood; Jan Casimer Lewenhaupt, great grandchild, the only child of Azalea Lewenhaupt, the only child of Flora Hastings Keyes; Ethel H. Crane, grandchild, the only surviving child of three born to Charles F. D. Hastings; Harry C. Hastings and Elizabeth Parker Hastings, grandchildren, the children of Robert Paul Hastings. The attached chart

will serve as a convenience. Thereon the names of the grandchildren are underlined twice; the great grandchildren, thrice.

The trial court divided the estate into four parts and determined the interest of each grandchild and each great grandchild by representation, so that Louise C. Maud, Joseph Fiske Catherwood, Harry C. Hastings and Elizabeth Parker Hastings or their individual trustees were each decreed an eighth interest and Jan Casimer Lewenhaupt and Ethel H. Crane were each decreed a fourth interest. The plaintiff and all of the defendants, with the exception of Ethel H. Crane and Jan Casimer Lewenhaupt, appear herein as appellants.

[1] The question presented is at what generation the estate should be divided. Appellants contend that it should be divided into six parts; that is, at the level of grandchildren rather than at the level of children, and that the two great grandchildren should take the shares of their parents by right of representation. Under this method the grandchildren and the great grandchildren would each receive a like amount, namely, one-sixth.

The question must be determined in accordance with the provisions of the trust instrument, and application of Probate Code, §§ 222 and 250.

The pertinent provision of the trust instrument—the last clause thereof—provides that upon the death of the last beneficiary the trust shall cease and the estate be distributed to the then living lineal descendants of the trustor in such portions as they would respectively have been entitled to "as heirs at law" had the trustor been the last survivor. Appellants note that by the terms of this clause none of the children could possibly take any share of the trust as it was to continue until all of them should have died.

In order to support appellants' theory, which we think untenable, more weight must be given to one particular clause than to the indenture as a whole, and appellants' construction of that clause adopted. It is contended that the provision that at the time of partition the conveyance to each of the descendants should be in the portions they would have been entitled to as heirs at law "had he himself [the trustor] been the last survivor of the said beneficiaries," is conclusive that the judge had in mind that all of his living grandchildren should take per capita and his great grandchildren per stirpes as the issue of deceased grandchildren. The claim that since by the terms of the trust indenture none of the children of the trustor could take any share of the estate upon distribution, any interests therein given to the grandchildren must be per capita, is likewise not tenable.

[2] It must be admitted that no matter how familiar Judge Hastings may have been with probate statutory provisions in this state and elsewhere, and the judicial construction thereof in 1874, he could not know what changes would take place in the language of the statutes or the interpretation that would be given them at the time of the termination of the trust. The provision, in effect, that the trust should not terminate until the trustor, his wife and all of their children were dead —and that consequently a child could not be a remainderman—is immaterial. The children were well provided for during the term of the trust, and likewise the grandchildren in the event of their parents' death. Judge Hastings specifically provided that the properties in trust should be distributed after his death and the death of his children to the "heirs at law" as though he were the last survivor of the beneficiaries. "The 'heirs' of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will." Hochstein v. Berghauser, 123 Cal. 681, 689, 56 P. 547, 549; Estate of Jones, 3 Cal.App.2d 395, 39 P.2d 847.

[3, 4] Words used in an instrument disposing of one's property "are to be taken in their ordinary and grammatical sense unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Estate of Thompson, 18 Cal.App.2d 680, 684, 64 P.2d 984, 987. Where an instrument has been drawn by one skilled in the law, the presence of legal technical terms is an indication that the words are to be accepted in accordance with legal definition. Estate of Thompson, supra.

[5] When the trust instrument is read as a whole it appears that the trustor directed that descendants other than his children should take by right of representation, and of course the portion thus taken by right of representation at the time of the death of the last beneficiary should

be determined by the statute then in force. Snodgrass v. Bedell, 134 Ohio St. 311, 16 N.E.2d 463. That Judge Hastings had no intention that his grandchildren should take per capita during the operation of the trust is illustrated by the provision in the instrument that if a child, entitled to a part of the net income, "shall have prior deceased and have left issue yet alive, then such issue to take by right of representation, such share as would have gone to such deceased child had it been then alive." The indenture further provided "* * * and in the event that such issue shall become extinct prior to the decease of the last survivor of all the said children above enumerated, then the shares of such issue to those of the said children surviving such issue, for and during their respective lives with rights of representation to any issue of any other and prior deceased of the said children until the death of the last survivor of the said children above enumerated." That clause indicates that the grandchildren should receive by right of representation and not per capita during the operation of the trust. Why there should be a change at the time of distribution from the disposition which prevailed during the operation of the trust has not been satisfactorily answered by appellants.

The suggestion that Judge Hastings held the grandchildren in high esteem and affection, and that as a matter of sentiment he intentionally worded the trust so that the grandchildren, irrespective of numbers and parentage, should receive the estate per capita, is to ascribe to Judge Hastings a knowledge of and fondness for some of his descendants who were not in existence at the time the indenture was executed in 1874. It would have been an easy matter had Judge Hastings intended that his grandchildren should inherit per capita, to use the word "grandchildren" instead of descendants. In the absence of a declaration in the trust instrument fixing a different proportion of participation, the grandchildren are entitled to participate by right of representation, Estate of McCrum, 97 Cal.App. 576, 275 P. 971, and not per capita, unless the statute provides otherwise.

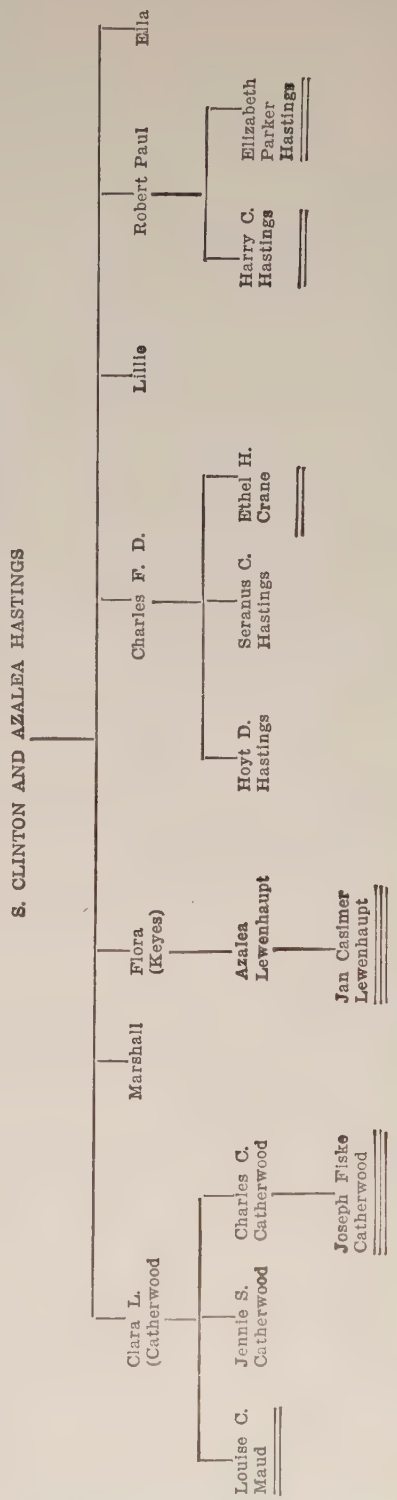
[6-8] The statutes directly controlling are Probate Code, §§ 222 and 250, which provide respectively: "If the decedent leaves no surviving spouse, but leaves issue, the whole estate goes to such issue; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation." "Inheritance or succession 'by right of representation' takes place when the descendants of a deceased person take the same share or right in the estate of another that such deceased person would have taken as an heir if living. A posthumous child is considered as living at the death of the parent." We will first consider appellants' contention that under the above Probate Code sections the grandchildren take per capita. There is quite a difference in distributing property to next of kin in equal degree and in distributing the property equally to kin of unequal degree. It is the latter method that must be adopted as applicable to the facts of this case if appellants are to prevail. It is not necessary to consider all of the possible contingencies that may be suggested or that might have arisen had all of the children died leaving issue, particularly if some had only one child and others more than one. Likewise, it is not necessary to consider whether upon the death of the children, all of the nine grandchildren being then living, the grandchildren would have been entitled to share equally irrespective of parentage. We are not presented with such facts. It is sufficient to say that any strict and fast rule providing distribution to the nearest degree of lineal kindred after the first degree may work out a seeming injustice to a grand, or great grand, or great great, grandchild, depending upon the number of issue and the deaths that may intervene. We may accept the language of section 222 as directing that the estate be shared per capita if all of the descendants are of equal degree of kindred and we may not question the wisdom of the Legislature in so providing, but likewise we must bow to legislative direction when we are told that if the descendants are not of equal degree of kindred "they take by right of representation." To take per capita all must be in the class or degree of next of kin. Am. Jur.Cum.Supp. to Vol. 16 (Descent and Distribution), § 42. "Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts." In re Ingram, 78 Cal. 586, 21 P. 435, 12 Am. St.Rep. 80.

[9] There is no direct authority in California on the question involved herein

except that of Estate of Healy, 176 Cal. 244, 168 P. 124, which deals with collateral kindred. Our statute, sec. 222, provides that if there is no spouse, but issue, the whole of the estate goes to such issue to be shared equally, but only in the event that all of the descendants (in this case grandchildren and great grandchildren) are of equal degree of kindred, otherwise they (all of the descendants, the grandchildren and great grandchildren) take by right of representation. Succession by right of representation as used in section 250 means a substitution of one or more for another in uninterrupted sequence. Once it is determined that descendants are not of equal degree it is necessary to determine the amount each is entitled to per stirpes.

[10-12] In People v. Jose Ramon De La Guerra, 24 Cal. 73, 76, it was said: "At an early day the common law was adopted as the rule of decision in this State; and the rule of the common law prevails except as to those particulars in which modifications have been made by statute. In the statute relating to descent and distribution, the rule of computation which prevails under the civil law has been adopted; but the statute does not purport to extend the rule beyond the purposes contemplated by that Act." This rule has been followed by statute in this state. Probate Code, § 252, is specific in presenting a rule to determine the degree of relationship between parent, child and grandchild. It was not contemplated that heirs might hurdle or eliminate a degree for the purpose of obtaining a larger share of an estate. To take per capita all lineal relations should be in the class or degree of next of kin. Per stirpes means taking the share of an immediate ancestor, who in turn takes the share of his next immediate ancestor and so on until a common ancestor is reached. The theory of permitting descendants of the next of kin to inherit is to give such descendants the part which such next of kin would have received if living. If there is more than one descendant the interest of the next of kin's interest is divided among those descendants in appropriate fractional parts. Next of kin has reference to next of kin to the decedent, not to an ancestor or descendant of a decedent. In re Pearsons' Estate, 110 Cal. 524, 42 P. 960; Estate of Way, 29 Cal.App.2d 669, 85 P.2d 563.

The attached chart is a good example of the necessity of going to the root.



Let us assume that Ethel Crane, a grandchild of Hastings, should die intestate and without husband or issue. Joseph Fiske Catherwood and Jan Casimer Lewenhaupt are kindred in equal degree to Mrs. Crane but other heirs are not, hence all would take per stirpes and would trace the relationship back to the common root. Upon the death of Ella, a child of Hastings, could it be said that the heirs would take other than as the Judge decreed, by going to the family root and designating each interest in accordance with degree of kindred?

In re Poindexter's Estate, 221 N.C. 246, 20 S.E.2d 49, 140 A.L.R. 1138 (involving living sisters and representatives of deceased brothers and sisters), the rule was held to be that the distribution is per capita among the next of kin in equal degree and per stirpes among the claimants of unequal degree who take by right of representation as descendants of relatives, who if living would be of equal degree. In 140 A.L.R. 1141, the Poindexter case receives comment as follows: "Pointing out that the statute of descent and distribution provided that an estate should be distributed equally to every of the next kin of the intestate who were in equal degree, and that if one, if living, would be kin in equal degree with survivors, those who represented him should take his share, the court held that the contention made was untenable and founded upon a misconception of the statute, it not being sufficient that the claimants were related to each other in equal degree but to take in their own right they must be among the nearest of kin of the deceased, and that the statutory provision permitting representatives to take was resorted to only when it was necessary to bring the claimants to equality of position as next of kin, and allowed them the share which the ancestor would have taken if living, because, if living, he would be in equal degree with the surviving next of kin. Accordingly, it was held that distribution among such children, nephews and nieces of the intestate, was per stirpes, each stock or group of such children taking respectively the share which the parent would have received if living." The present case involves lineal kin of unequal relationship. The Poindexter case treats of collateral kindred, but the rule applied is based on the same principle. 16 Am.Jur. p. 806, § 38, in treating of lineal kindred downward, states the rule as follows: "The law divides the property into as many equal shares as there are children and as there are deceased children with surviving descendants. Each child takes per capita, as it is said, one share. The descendants of each deceased child take per stirpes or by representation, as it is said, and divide among them one share."

Referring to the manner in which descendants may share in an estate, section 222 uses the word "they." When read in conjunction with the provisions of section 250, namely, "such deceased person [such child] would have taken as an heir if living", it requires that we start with a child of Judge Hastings. The grammatical propriety of this construction is admitted in the case of Balch v. Stone, 149 Mass. 39, 20 N.E. 322, mainly relied upon by appellants.

[13] California in some statutes provides for equality among next of kin, and in others equality is ignored and relatives by blood or marriage only take by right of representation. The provisions for per capita distribution where the heirs are designated as next of kin appear in Probate Code, §§ 221, 222, 226 and 227. In the above enumerated sections, 226 provides that those who claim through the nearest ancestor must be preferred to those who claim through a remote ancestor. The other sections dealing with a surviving spouse with issue, § 221, and a minor unmarried decedent, § 227, provide that the heirs of the same degree share equally "otherwise they take by right of representation," which is the exact language used in section 222. Where no reference is made to taking per capita, as in the cases of surviving spouse with no issue, § 223, or no surviving spouse nor issue, § 225, or neither issue nor spouse, and the estate is community property, § 228, or under the same conditions and the property is the separate property of the deceased spouse, § 229, no mention is made of those in the same degree of kindred, but the rule of representation is adopted. Under statutory provisions in this state, there is no strict rule of equality governing the right of succession to property of a deceased, but where equality is provided for it is limited to all heirs in the same degree of kindred to decedent.

In Estate of Healy, supra, 176 Cal. page 244, 168 P. page 125, the will left the estate to the grandnephews and grandnieces "by right of representation." The court

defined "by right of representation", 176 Cal. page 246, 168 P. page 125, as that which "occurs when the descendants of a deceased heir take together the same share of the estate of another person that their parents would have taken if living." As authority for that statement, Civil Code, § 1403, was cited. That section was the basis of Probate Code, § 250. In the Healy case, 176 Cal. page 246, 168 P. page 125, the court further stated: "We do not perceive any strong reasons for selecting the nephews as the stocks to which said introductory qualifying phrase refers, which do not point with equal or greater force to the selection of the sisters as the point of beginning of lineage intended. * * * wherever the relationship of the legatees is such that the rule of descent by right of representation would apply, and nothing appears to indicate a contrary intent, the parties are to take 'by right of representation' and not per capita, or, in other words, that the principle of taking by representation should apply to the dispositions made, in all cases to which it could apply." In McComas v. Amos, 29 Md. 132, it was held that the English statute of distribution and the rules observed in many of the American states might be wisely followed in Maryland, did not the statute provide otherwise. At page 143 the court said: "And, in this case, while all the parties having a right to take, stand in equal degree of relationship to the intestate, by force of 27th section of the Statute, they take through the brothers and sisters of the intestate, who are the stirpes, and the estate must be divided, amongst those entitled, with reference to the number of such stirpes." See, also, Stent v. McLeod, S.C., 2 McCord Eq. 354; Iglehart v. Holt, 12 App.D.C. 68; In re Swenson's Estate, 135 Minn. 145, 160 N.W. 253; Pond v. Bergh, N.Y., 10 Paige 140.

[14] It appears to have been impossible to devise a statute which would provide for every contingency satisfactorily to the distributees of an estate. Where there is a provision for succession by right of representation, the equality rule has no effect in the application of the statute. In re Swenson's Estate, supra; Iglehart v. Holt, supra. It may be conceded that circumstances in the birth or death of the children or grandchildren resulting in all succeeding equally, irrespective of whether the succession should be per capita or per stirpes, could have existed, but that condition did not prevail herein at the time of the death of Ella. One great grandchild, Joseph Fiske Catherwood, was the son of grandchild Charles C. Catherwood, one of the three children of a child, Clara L. Hastings Catherwood, whereas Jan Casimer Lewenhaupt is the child of Azalea Lewenhaupt, the daughter of Flora Hastings Keyes. Each of the two great grandchildren is a descendant in a direct line from ancestor S. Clinton Hastings, each is of equal degree of kindred to the common ancestor but not entitled to the same distributive portion for the simple reason that, as shown by the charge in the "agreed statement", Jan, at the time of distribution, is the only child of an only child of a child of Hastings. On the other hand, in the case of Joseph Catherwood, the grandmother, Clara (child of Judge Hastings), left three children: Jennie, deceased without issue; Charles C., with issue (Joseph); and the plaintiff in this case, Louise C. Maud, the aunt of Joseph, who must share with Joseph as the heir of her deceased brother Charles C. the portion represented by Clara. Descendants may be of equal degree as blood relatives, but not on an equality of inheritance when taking by right of representation.

[15] The direct line of lineal consanguinity which connects and determines ascending or descending relationship is measured by generation or degree from the common ancestor. "Thus, the child is, with regard to the parent, in the first degree; the grandchild, with regard to the grandparent, in the second [degree]; and vice versa as to the parent and grandparent with regard to their respective children and grandchildren." Probate Code, § 252. If the relationship arises through collateral consanguinity the degree likewise is established by counting the degree from the common ancestor. Section 253.

A brief has been filed by counsel as amicus curiae interested in a clause in a somewhat similar trust. In appellants', 'and in the brief of amicus curiae, certain cases have been cited as authority for the position taken by appellants. Unless the statute in another state is identical with that in this state, decisions rendered thereunder are not controlling, although they may be accorded persuasive force. Appellants' citations are numerous. The following are sufficient to show that they are not in point and are based upon statutes of other states providing in substance

for the kind of distribution contended for by appellants; statutes with different provisions, for instance, a provision in effect that if grandchildren only should be alive they shall inherit equally irrespective of the number of children. Cox v. Cox, 44 Ind. 368; see, also, Brown v. Taylor, 62 Ind. 295. In Ball v. Ball, 27 Grat. 325, 68 Va. 325, the statute expressly provided that those of the same degree should take per capita, and if part were dead and part living, "the issue of those dead shall take per stirpes." In re Martin's Estate, 96 Vt. 455, holds at page 456, 120 A. 862, that "The right to succeed to the property of an ancestor is not a natural right * * * but a 'gift of the law.'" In construing the statute providing "'In equal shares to the children of said deceased person or the legal representatives of deceased children'" the court declared, 96 Vt. at page 458, 120 A. at page 863, that "the effect is the same as if the statute read 'in equal shares to the descendants of such deceased person'—the clause providing for representation applying only when inequality of relationship exists." In the present case inequality of relationship exists. Differences in facts and in statutory provisions of other states and this state exist also in Von Overbeck v. Dahlgren, 6 Cir., 28 F.2d 936.

Snodgrass v. Bedell, 134 Ohio St. 311, 16 N.E.2d 463, is a fair sample of appellants' authorities. In that case Martha Smith was the intestate. The statutes had been enacted at various times. The court said, 134 Ohio St. at page 315, 16 N.E.2d at page 465: "Paragraphs 7 and 8 of Section 10503-4, General Code, now clearly provide that, in event distribution is to be made either to grandparents or their lineal descendants, the estate is to be divided equally into halves. One half portion would be distributed or descend to those on the paternal side, and the other half portion to those on the maternal side of the intestate. If there be no descendants on one side then the other which would have descendants of grandparents would inherit more than one-half. Only in event that there be neither grandparents nor lineal descendants of grandparents on both sides would the next of kin of the intestate inherit." It was held that descendants, whether lineal or collateral, of equal degree of consanguinity of the respective paternal and maternal grandparents, took per capita and not per stirpes, and the descendants of those of the same degree whose parents were dead took per stirpes. Under the circumstances a relative in the fourth degree obtained 1/28 and on the maternal side a relative in the fifth degree received 1/8, which is in part another illustration of seeming unfairness depending upon the death of relatives.

In support of appellants' position, Vernier's American Family Laws, § 239, is cited. Attention is particularly called to the following paragraph on page 114: "In the absence of express statutes on this subject, it is usually considered that the grandchildren take in their own right under the general statutes of descent and distribution and do not 'represent' their deceased parents." This rule, according to the author, applies to "lineal descendants" of the same degree of kindred to the intestate, "if not, the usual rule of representation applies to the issue of deceased descendants." Without supporting citation or an analysis of the Probate section, California is listed as following this rule, but the author notes that "the problem is more often than not one of construction of indefinite, ambiguous statutes."

Appellants' line of decisions headed by Green v. Hussey, 228 Mass. 537, 117 N.E. 798, may at first reading seem to be in point as the Massachusetts statute is similar to that of California. In that case the court held that the essential words of the will followed the statute and that, the statute having been construed in Balch v. Stone, supra, and followed in other cases, no sufficient reason was advanced why the previous decisions should not be followed. The only Massachusetts case necessary to analyze is Balch v. Stone, supra, since all other cases from that state followed the Balch case without further discussion of the soundness of the rule. In Massachusetts there was some historical background to follow. This is not true in California. No previous decision in this state has followed the construction adopted in Massachusetts and the decision itself seems to admit its impropriety. In the Balch case, the court said, 149 Mass. at page 42, 20 N.E. at page 324: "We are of opinion that in the statute of 1805, and in the several revisions of the statutes which have since taken place, it was not the intention of the legislature to change this rule of descent. The policy of our laws is that heirs or next of kin, who are in equal degree of kindred to the intestate,

inherit per capita in equal shares, while those in a more remote degree take per stirpes, or such portion as their immediate ancestor would inherit if living." But, 149 Mass. at page 40, 20 N.E. at page 323 the court also said: "If we regard merely the grammatical construction of this provision, the more obvious meaning would seem to be that where an intestate leaves nephews and nieces, and also grandnephews or grandnieces, the nephews and nieces who are his next of kin would take per stirpes, and not per capita. The pronoun 'they,' following 'otherwise,' has no antecedent directly expressed except 'all such issue;' and, if this is controlling, it would follow that all such issue must take according to the right of representation." It appears that in the Balch case the court gave the statute the construction which the court thought the Legislature intended instead of following and construing the language of the statute. Healey v. Cole, 95 Me. 272, 49 A. 1065, is also cited. Maine was merely following the interpretation given by its mother state in Balch v. Stone, supra. The error appearing in the Massachusetts cases does not require that we should likewise adopt an incorrect interpretation.

Finally, appellants urge that sections 222 and 250 should be construed to make the provision "fair." Undoubtedly appellants mean fair as applied to their view of the facts and the law of this case. If there is unfairness in the rule, we are reminded that " 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts.' " Estate of Nigro, 172 Cal. 474, 156 P. 1019, 1020.

Death and birth in varying numbers may change the amount of the share to which a relative may succeed to an estate. In view of the possibility of a seeming unfairness, under any rule there should be less claim of injustice if there is followed the requirement that the right of inheritance of a representative descendant should be fixed by reference to the first generation common to each as the criterion to determine the degree of relationship of subsequent relatives in the descending line.

[16] The right to succeed to an interest in an estate of a deceased is not a natural right but one bestowed by law and accordingly subject to statutory authority. Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231. It appears that Judge Hastings adopted the California probate statutes which means that he directed that the trust should be distributed according to the statutes in force at the termination of the trust.

The trust indenture and the statutes in force covering the facts in this case require that the interlocutory decree entered on December 20, 1943 be affirmed. That is the order.

PETERS, P. J., and KNIGHT, J., concur.



67 Cal.App.2d 657

In re THRAMM'S ESTATE.

THRAMP et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 14533.

District Court of Appeal, Second District, Division 3, California.

Jan. 24, 1945.

1. Executors and administrators ⇐82

The statute governing instructions to executor or administrator is restricted to matters as to which no other procedure is provided. Probate Code, § 588.

2. Executors and administrators ⇐82

The statute authorizing instructions to executor does not empower court at any stage of the proceedings to make an order which purports to adjudicate persons who take under the will and the shares which they take. Probate Code, § 588.

3. Executors and administrators ⇐82

The court in probate has no power to decide how an estate is to be distributed through probate, except in proceedings expressly authorized for that purpose, and none is authorized for trial of issues that may be presented other than proceedings for distribution or to determine heirship. Probate Code, § 588.

4. Executors and administrators ⇐82

Any intermediate orders directing executor which may require interpretation of a will must be tentative in effect insofar as

they relate to matters which must be determined by decree of distribution. Probate Code, § 588.

5. Executors and administrators ⇐82

Where will made legacies to residents of Germany but provided that "a year after my death my estate should be settled if it is impossible to do so, with Germany, then everything should go to my brothers", rights of named legatees or brothers could not be determined on executor's petition for interpretation of a will under statute authorizing instructions to executors prior to hearing on petition for distribution. Probate Code, §§ 259, 259.1, 588.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Maria Thramm wherein the Bank of America National Trust & Savings Association, executor, petitioned for interpretation of the will. From an order interpreting the will, Ernst Thramp and another appeal.

Reversed.

J. V. McDermott, of Los Angeles, for appellants.

A. S. Goldflam, of Los Angeles, for respondent.

SHINN, Justice.

The instant appeal was taken from an order interpreting the will of Maria Thramm. The will disposed of the estate which remained after the payment of debts and expenses as follows: "To Mr. Ernst and Walter Thramp now living in Berlin Germany, 37 Steinmetz Str $2000 each and if they be deseased to their heirs. Also my husband's watch, his mother's diamot ring, cuff buttons and old ring should go to Ernst and Walter Thramp;" then followed eleven specific bequests of cash, jewelry and United States war bonds to relatives and friends in the United States. Bank accounts, trust deeds and other securities were listed and described in detail, and following this the will provided: "A year after my death my estate should be settled if it is impossible to do so, with Germany, then everything should go to my brothers Otto & Fred Tilsner and *her* children."

The court construed this clause to mean "that if the war between Germany and the United States is not concluded within one year after testatrix' death then the sum of $4,000 shall go in eight equal shares to the following persons, to wit: [naming Otto Tilsner and Fred Tilsner and their six children]."

Notice of the hearing of the petition for interpretation of the will was served upon the Alien Property Custodian. The order interpreting the will recites that the German beneficiaries were represented at the hearing by an attorney duly admitted to practice in California. The notice of appeal is signed by him as attorney for such heirs and it is stated in the brief that he was appointed to represent them by the Alien Property Custodian. The appeal is taken by Ernst and Walter Thramp from the portion of the order above quoted.

The will was olographic and was dated February 3, 1942. Mrs. Thramm died June 7, 1943, and the order interpreting the will was made December 2, 1943. The petition of the executor for interpretation of the will alleged that the executor was in doubt as to how the estate should be distributed. No facts were alleged as to the necessity for an interpretation of the will prior to the hearing on a petition for distribution. The executor, so far as appeared, had nothing to do apart from the usual procedural steps, to and including the rendering of a final account and petition for distribution.

Section 588 of the Probate Code reads as follows: "In all cases where no other or no different procedure is provided by statute, the court on petition of the executor or administrator may from time to time instruct and direct him as to the administration of the estate and the disposition, management, operation, care, protection or preservation of the estate or any property thereof. * * *"

[1-5] It may be questioned whether the section adds anything to the general powers which the court would have without it, but, if it does, the authority conferred does not extend beyond the giving of instructions in those matters as to which no other and different procedure is provided. It does not provide alternative procedure and hence does not empower the court at any stage of the proceedings when the executor may petition for instructions as to the management of the estate, to make an order which purports to be an adjudication as to the persons who take under the will and the shares which

they take. The proceedings which follow the filing of a petition for partial or final distribution (or to determine heirship) constitute the procedure for the determination of those questions. The court in probate has no power to decide how an estate is to be distributed through probate, except in proceedings expressly authorized for that purpose, and none are authorized for the trial of the issues that may be presented other than proceedings for distribution, or to determine heirship. Any intermediate orders giving directions to an executor for his guidance during the course of the administration, which might require an interpretation of the will, must be tentative in effect, insofar as they relate to matters which must be determined by decree of distribution. The controversy here was one which could not be determined by an order purporting to interpret the will. The order must therefore be reversed.

The views of the parties as to the disputed clause are fully set forth in the briefs, but for the reasons heretofore stated the appeal cannot be decided on the merits. Although the reversal is on a point of procedure, we deem it proper to say, after considering the merits of the appeal, that if the question were properly before us we would be unable to agree with the conclusion of the trial judge as to the meaning of the language in question. We would suggest that the point be reconsidered with the aid of the briefs that have been filed upon the appeal. These may contain a more thorough presentation than was made originally. If, after mature consideration, the court should conclude that the disputed clause means that Ernst and Walter Thramp or their heirs (as the case may be) were to take their bequests unless it was impossible, by reason of the existence of a state of war between this country and Germany, to close the administration and distribute the estate within a year after the death of testatrix, and if it should be found not to have been impossible to so distribute the estate, the question would then be presented whether Ernst and Walter Thramp or their heirs had been able to establish their right to take the bequests under sections 259 and 259.1 of the Probate Code. The question would be whether proof had been made of the existence of a reciprocal right upon the part of citizens of the United States to take by succession or testamentary disposition from estates of persons dying in Germany, in accordance with the provisions of said sections. The only purpose of these suggestions is to expedite the disposition of questions which remain for decision before the estate can be closed. They are not intended to and could not foreclose a full consideration of the questions in the trial court or on any further appeal. They are made, however, after a careful study of the question as presented by the briefs and upon the present record.

The order is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.



67 Cal.App.2d 589

In re MALOUF'S ESTATE.

MALOUF v. WILLETTE.

Civ. 3169.

District Court of Appeal, Fourth District, California.

Jan. 18, 1945.

1. Executors and administrators ⇐188

Where interlocutory decree of divorce was granted to wife because of husband's extreme cruelty, and they were living apart at time of husband's death more than 60 days after entry of the interlocutory decree, court must assume that the separation was not caused by any voluntary act or misconduct of the wife, as respects her right to have husband's estate set aside to her as his widow. Probate Code, §§ 640–646.

2. Executors and administrators ⇐188

Where interlocutory decree of divorce was granted to wife because of husband's cruelty and parties were living apart at time of his death, and there was no contract settling their property rights nor waiving wife's right of support from husband's estate, which was less than $2500 in value, and wife did not possess an estate of the value of $5,000, the wife was entitled to have the entire estate set aside to her as a member of husband's family. Probate Code, §§ 640–646.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Proceeding in the matter of the estate of Najeeb M. Malouf, also known as N. M. Malouf, also known as Najeeb Mahfoud Maloof, also known as Jim Maloof, deceased, wherein Mary Malouf filed a petition to have the entire estate set aside to her as widow of deceased, which petition was opposed by O. R. Willette, guardian of the estate of Viola Malouf, a minor daughter of deceased. From a decree denying her petition, Mary Malouf appeals.

Reversed.

West & Vizzard, of Bakersfield, for appellant.

Harvey, Johnston & Baker and H. E. McCombie, all of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a decree denying appellant's petition to have the estate of Najeeb M. Malouf set aside to her. Appellant is his widow and Viola Malouf is their minor daughter who was made a beneficiary under the will of deceased.

It was found by the trial court that the total value of the estate of deceased did not exceed $2,500, and that appellant's estate did not exceed $5,000 in value. Both were of the appraised value of less than those amounts. The truth of these facts are not questioned.

On February 10, 1943, appellant obtained an interlocutory decree of divorce from Najeeb M. Malouf on the ground of extreme cruelty. She was given the family furniture and two-thirds of the community real estate. An automobile and the remaining one-third interest in the real estate was given to Najeeb who was also given the custody of Viola. Najeeb was not required to pay appellant anything for her support, the interlocutory decree being silent on that subject.

Najeeb died on April 29, 1943, more than sixty days after the entry of the interlocutory decree of divorce, from which no appeal had been taken.

The trial court found that appellant and Najeeb were living separate and apart at the time of his death, and that since the rendition of the interlocutory decree he had not contributed to her support. The conclusion was drawn that at the time of his death "the deceased was under no legal obligation to support his wife, and that said petition ought to be denied". There is nothing indicating that appellant had waived by contract any of her rights as a widow given by our statutes.

The decree in question is based on the theory that appellant was not a member of the family of the deceased, although his widow, at the time of his death and, therefore, was not entitled to any of the benefits conferred on a widow by section 640 et seq. of the Probate Code.

Counsel seek to support this holding by the citation of such cases as Estate of Miller, 158 Cal. 420, 111 P. 255; London Guarantee and Accident Co., Ltd. v. Industrial Accident Commission, 181 Cal. 460, 184 P. 864; Estate of Fulton, 15 Cal.App. 2d 202, 59 P.2d 508, and Estate of Ruiz, 53 Cal.App.2d 363, 127 P.2d 945.

In each of those cases, except one, it is held that a wife forfeited the benefits provided for her by sections 640 to 684, inclusive, of the Probate Code, when, through her own fault or misconduct, she is living separate and apart from her husband, or by contract has waived the right to support by him and to participate in his estate.

[1] We have no such situation here. The interlocutory decree of divorce was granted to the wife because of the extreme cruelty of her husband. We must therefore assume that the separation was not caused by any voluntary act or the misconduct of appellant but by mistreatment by her husband. Estate of Ruiz, supra. There was no contract settling their property rights nor waiving her right of support from his estate.

[2] Under these circumstances it is generally held that the widow is entitled to have an estate of less than $2,500 in value set aside to her where she does not possess an estate of the value of $5,000. Secs. 640 to 646, inclusive, Probate Code. The following cases support this rule: Estate of Breitter, 69 Cal.App. 424, 231 P. 351; Estate of Gould, 181 Cal. 11, 183 P. 146; Estate of Boeson, 201 Cal. 36, 255 P. 800; Estate of Woodburn, 212 Cal. 683, 300 P. 22.

The foregoing rule is recognized in the cases relied upon by respondent. See Estate of Miller, supra; Estate of Fulton, supra; Estate of Ruiz, supra.

London Guarantee & Accident Co., Ltd. v. Industrial Accident Commission, supra, contains language supporting the judgment

before us. However, it really turned on the language of the Workmen's Compensation Act which is not involved in this proceeding so it cannot be considered controlling here.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.



67 Cal.App.2d 583

AMERICAN PAINT CO. et al. v. McCUNE et al.

Civ. 14722.

District Court of Appeal, Second District, Division 1, California.

Jan. 18, 1945.

Hearing Denied March 15, 1945.

1. Health ⇐21

The provision of State Health and Safety Code that no portion of apartment house or hotel shall be used as a paint shop, gasoline or oil service station or vulcanizing shop is valid exercise of police power. Stat.1939, p. 933, § 17704.

2. Constitutional law ⇐45

The action of the Legislature is not conclusive with regard to valid exercise of police power, but a definite responsibility is imposed on judicial branch of government in connection with ultimate determination of such question.

3. Municipal corporations ⇐616, 625

A city, in exercise of police power, has right to regulate businesses, such as operation of paint stores, within city limits, but such a regulatory ordinance must be reasonable and must be for purpose of protecting the public health, comfort, safety or welfare.

4. Municipal corporations ⇐63(1)

Every intendment must be made in favor of lawfulness of exercise of municipal power in making regulations to promote public health and safety, and it is not province of courts, except in clear cases, to interfere with exercise of such power.

5. Constitutional law ⇐45
Municipal corporations ⇐63(1)

Ordinances and statutes regulating useful business enterprises may be judicially reviewed to determine whether the law or ordinance is lawful exercise of police power or whether, under guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with constitutional right to carry on a lawful business, to make contracts, or to use and enjoy property.

6. Health ⇐19

A paint retailer who sought to enjoin city health authorities from compelling him to cease from carrying on his paint business in building containing an apartment or rooming house was entitled to findings of trial court on issues of fact raised by complaint, alleging that Code provision that no portion of any apartment house or hotel shall be used as a paint shop violated owner's constitutional rights, and to determination whether police power had been properly exercised. St.1939, p. 933, § 17704; Const.Cal. art. 1, §§ 13, 21, art. 4, § 25; U.S.C.A.Const. Amend. 14.

7. Evidence ⇐20(1)

The court may not take judicial notice whether a paint store is inherently dangerous and whether operation thereof constitutes a self-evident hazard. Stat.1939, p. 933, § 17704.

Appeal from Superior Court, Los Angeles County; Hartley Shaw and W. Turney Fox, Judges.

Action by the American Paint Company and another against George W. McCune and others, as members of and constituting the Board of Commissions of the Department of Health of the City of Los Angeles, and others, to enjoin defendants from carrying out their threats of compelling plaintiff to cease carrying on his paint store at certain premises. From a judgment dismissing the action after sustaining the demurrer to the complaint without leave to amend, plaintiffs appeal.

Reversed with directions.

Paul Vallee and James E. Mahon, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from a judgment of dismissal following the court's action in sustaining defendants' demurrer without leave to amend.

The complaint alleges that plaintiff corporation has owned, maintained and operated a retail paint store in the City of Los Angeles as an incident to the business in which such plaintiff is engaged. The store is located on Santa Monica Boulevard in a two story frame building, the upper floor of which is an apartment or rooming house. Two other stores in the same building operate as a cocktail bar and retail liquor store respectively.

It is further alleged that "Defendants claim and assert the power, by virtue of Section 17704 of the Health and Safety Code of the State of California, St.1939, p. 933, to compel plaintiff to cease carrying on said business and paint store at and in the place where it is located, as above set forth, and have threatened and now threaten to compel plaintiffs to cease carrying on said business and paint store by whatever legal action is provided by law in such cases aginst plaintiffs, unless said plaintiffs immediately cease carrying on said business and paint store at said location at and in the building where it is located, as above set forth, and will enforce said threats unless restrained and enjoined from so doing by this court." Section 17704 of the Health and Safety Code of the State of California is as follows: "No portion of any apartment house or hotel shall be used as a paint shop, paint store, a gasoline or oil service station or store, or a vulcanizing shop."

It is also alleged that the business of selling paint and conducting a paint store is "useful, innocent and harmless in every way, and that plaintiff's said business and paint store, as it always has been and now is carried on and conducted at said address, is useful, innocent and harmless and in no manner dangerous to person or property." Then follows the allegation that said section 17704 violates Article I, sections 13 and 21, and Article IV, section 25, of the Constitution of California, in the manner therein particularly set forth. The complaint is extensive and comprehensive in this regard.

It is contended on appeal that the act in question is special and discriminatory; that as applied to paint stores it is unreasonable and arbitrary and not based upon any natural, inherent or intrinsic distinction; that it is in violation of the 14th Amendment to the Constitution of the United States and the due process clause as well.

[1-5] It should be noted at the outset that the act in question depends for its validity upon a proper exercise of the police power. No authority need be cited in support of the proposition that, with regard to a valid exercise of the police power, the action of the Legislature is not conclusive. In connection with the ultimate determination of such questions a definite responsibility is imposed upon the judicial branch of the government. For example, as pointed out by the Supreme Court, In re Throop, 169 Cal. 93, at page 99, 145 P. 1029, at page 1031: "The city of South Pasadena, in the exercise of the police power vested in it by our state Constitution, has the undoubted right to regulate the business of operating a stone crusher within the city limits, but such ordinance must be reasonable and must be for the purpose of protecting the public health, comfort, safety, or welfare. As stated by the Supreme Court of the United States in Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169: 'It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business, to make contracts, or to use and enjoy property.'"

[6, 7] In the within action, the complaint sufficiently tenders valid issues of fact; manifestly, as to such issues, plaintiffs are entitled to findings. See Brock v. Superior Court, 12 Cal.2d 605, 86 P.2d 805. Whether a paint store is inherently danger-

ous and the operation thereof constitutes a self-evident hazard clearly is not something of which the courts may take judicial notice. Plaintiffs were denied a trial on valid issues of fact. By no other process, in the circumstances, could the validity of the act in question as a proper exercise of the police power, be judicially determined.

For the foregoing reasons the judgment is reversed, with directions to allow defendants a reasonable time within which to answer the complaint herein.

YORK, P. J., and WHITE, J., concur.



67 Cal.App.2d 689

CLARK v. CAHILL BROS. et al.

No. 12697.

District Court of Appeal, First District, Division 1, California.

Jan. 26, 1945.

Hearing Denied March 26, 1945.

1. Admiralty ⇐20

Admiralty jurisdiction and jurisdiction under Workmen's Compensation Act are exclusive. St.1937, p. 265 et seq., § 3201 et seq.

2. Admiralty ⇐20

The fundamental test in determining whether injured employee's remedy is in admiralty or under Workmen's Compensation Act is whether application of Workmen's Compensation Act will interfere with characteristic features or disturb uniform application of general maritime law. St.1937, p. 265 et seq., § 3201 et seq.

3. Admiralty ⇐20

If circumstances of employee's injury are only of local concern, determination of rights and liabilities of parties by local law will not interfere with characteristic features of general maritime rules.

4. Admiralty ⇐20

Where employee who was employed as a pile-driver in construction of a wharf was injured when he slipped and fell on a landing or float attached to a wharf after he had disembarked from a tug used in transporting employees to work, Industrial Accident Commission had exclusive jurisdiction of employee's right to recover for injuries, and recovery could not be had under admiralty jurisdiction of superior court.

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus, Judge.

Action by David H. Clark against Cahill Brothers and others to recover damages for injuries sustained when the plaintiff slipped and fell on a landing or float owned and maintained by the defendants. From a judgment granting the defendants' motion for nonsuit on the ground that the Industrial Accident Commission had sole and exclusive jurisdiction, the plaintiff appeals.

Judgment affirmed.

John J. Taheny, of San Francisco, for appellant.

Burbank & Laumeister and John P. McFarland, all of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiff brought this action under the admiralty jurisdiction of the superior court to recover damages for injuries alleged to have been sustained when he slipped and fell on a landing or float, owned and maintained by defendants, after he had disembarked from a tug operated by defendants which had transported him from Vallejo to Mare Island, where he was employed by defendants as a pile driver in the construction of a wharf or pier. The trial court granted defendants' motion for nonsuit on the ground that the Industrial Accident Commission had sole and exclusive jurisdiction of the case; and from the judgment so entered plaintiff has appealed. The sole question raised by the appeal is whether the jurisdiction of the case is in admiralty, and therefore triable in the superior court.

The facts pertinent to the question thus raised on the appeal, as shown by the plaintiff's evidence, may be stated as follows: The accident happened January 11, 1942, a few minutes before 7 o'clock in the morning. Plaintiff and some forty other workers left Vallejo in a tug which had been chartered by defendants for the purpose of taking employees to their work on a concrete pier being constructed by defendants on Mare Island. The distance

between the two points was about a mile and a half, across the Mare Island Straits. Those being transported on the tug were all employees of defendants; no fare was charged for the ride, and no persons other than employees were allowed on the tug. When the tug pulled up at the wharf where the men were to work, it berthed at a float or landing which was fastened to the wharf by cables. The men then left the tug, stepped down about 2 feet to the float or landing, went up a ramp to the wharf and to a tool room maintained by defendants, where they procured their tools and changed into their working clothes, then reported for work on the pier at 7 a. m.

The float or landing where the men stepped upon disembarking from the tug was about 50 feet long and 15 or 16 feet wide. It was placed alongside the concrete pier, between it and the place where the tug stopped, and was attached at one end by a cable fastened to the floor of the float and then passed around the concrete piling and back to the float; at the other end a girt (a 4 x 16 timber) had been extended out from the concrete piling and bolted to some temporary wooden piling driven in about 12 or 14 feet from the dock proper, and another cable was fastened to the deck of the float and passed around the temporary wooden piling and back to the float; that is, the float was fastened at one end and on the side nearest the pier to the concrete piling, and on the other end and the offshore side to the temporary wooden piling, by cables attached to the float, so that the float rose and fell with the tide. The float itself was constructed of used piles, laid parallel to each other. They were held together by stringers laid across the top, and the floor, made of planking with the rough side up, was laid on top of the stringers. The piles were waterlogged, so that the end of the float where the thick ends of the piles were, floated low; consequently the northerly third of the float was under water a considerable part of the time, and was covered with slime from the overwash of the water.

At the time the accident happened, it was dark and foggy, and there were no lights on the landing. The tug pulled up so that the opening in the rail thereof, through which the men disembarked, was opposite the slimy part of the float. On previous occasions the tug had stopped farther south, so that the opening in the rail would not be opposite the slimy part of the float. Plaintiff and the other men stepped from the tug to the float, and plaintiff took four or five steps and traversed about half the distance to the ramp when he slipped and fell, striking his back and the back of his head, sustaining injuries thereto. About two and a half hours after the accident to plaintiff, a higher floor was built on the float, about 8 inches above the original floor, and the cable which had been used to fasten the float on the upper end—the offshore side—was eliminated and the float was fastened at that end by two protruding parallel boards and a cross-piece. Thereafter the surface of the float remained entirely above the water.

Appellant contends in substance that the accident happened on navigable waters, and that therefore the jurisdiction of the case was in admiralty, and the state Workmen's Compensation Act is not applicable. In this regard he argues that because the injury occurred on an instrumentality used solely as a means of passage from the vessel to the land, which rested on navigable waters and rose and fell with the tide, the same general rules apply which would be applied if his injury had occurred while on the vessel.

[1] Admittedly, in California, both the admiralty jurisdiction and that of the Workmen's Compensation Act, St.1937, p. 265 et seq., § 3201 et seq., are exclusive; that is, if the employee's remedy is under the Workmen's Compensation Act, he is barred from proceeding in admiralty. But the question of defining the boundary between admiralty and state jurisdictions in compensation cases has arisen in a great many adjudicated cases, in the United States Supreme Court and in lower federal and state courts, and has been found extremely difficult to define. Mr. Justice Holmes, in The Blackheath, 195 U.S. 361, 25 S.Ct. 46, 47, 49 L.Ed. 236, said that "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." This uncertainty is pointed out in the recent case of Davis v. Department of Labor, 317 U.S. 249, 63 S.Ct. 225, 227, 87 L. Ed. 246, wherein the court, in reviewing the history of the question, said: "A line of opinions of this Court beginning with Southern Pac. Co. v. Jensen, 244 U.S. 205, 216, 37 S.Ct. 524, 529, 61 L.Ed. 1086, 1098, L.R.A.1918C, 451, Ann.Cas. 1917E, 900 [14 NCCA 597], held that under some circumstances states could, but under

others could not, consistent with Article III § 2 of the Federal Constitution, apply their compensation laws to maritime employees. State legislation was declared to be invalid only when it 'works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.' When a state could and when it could not grant protection under a compensation act was left as a perplexing problem, for it was held 'difficult, if not impossible' to define this boundary with exactness." The court then related the attempts made by Congress to clarify the situation and eliminate the confusion, with the result that as it now stands, "Harbor workers and longshoremen employed 'in whole or in part, upon the navigable waters' are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must 'be determined in view of the surrounding circumstances as cases arise.' [John] Baizley Iron Works v. Span, 281 U.S. 222, 230, 50 S.Ct. 306, 307, 74 L.Ed. 819, 821. The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here. The very closeness of the cases cited above and others raising related points of interpretation has caused much serious confusion."

[2] However, without attempting to reconcile the many cases cited and argued here by both appellant and respondents in support of their respective contentions, or to resolve what appear to be conflicting holdings in the many cases, and considering the present case strictly on its own facts, we are of the opinion that the jurisdiction of the case lay properly within the Workmen's Compensation Act of the State of California. Regardless of the numerous tests suggested in the various cases cited, the real and fundamental test and the underlying and ultimate deciding factor in all of the cases is whether the application of the local Workmen's Compensation Act to them will interfere with the characteristic features or disturb the uniform application of the general maritime law. As said in Campbell on Workmen's Compensation, vol. 1, p. 523: "On fundamental principles, it was no part of the purpose of the framers of the Constitution of the United States, in giving to the Federal Government jurisdiction over interstate and foreign commerce by land and sea, to take from the States the regulation of personal injuries within their borders in matters which do not lay burdens upon or destroy the uniformity of the effect of Acts of Congress governing interstate and maritime commerce. Jurisdiction is still reserved to the States by the Tenth Amendment to the Federal Constitution in all matters of local significance. The major purpose of the constitutional provision is to permit the securing of uniformity in matters of interstate and international commerce only."

[3] The leading case enunciating the doctrine that where the matter is only of local concern, to permit the rights and liabilities of the parties to be determined by the local law would not interfere with the characteristic features of the general maritime rules, is Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 42 S.Ct. 157, 158, 66 L.Ed. 321, 322, 25 A.L.R. 1008. In that case a workman was employed as a carpenter on an incompleted vessel lying in navigable waters at a dock forming a part of the shipbuilding plant of the employer, and the injury occurred during the employment. It was held that the contract for constructing the vessel was nonmaritime, and that neither the workman's general employment, nor his activities at the time, had any direct relation to navigation or commerce, and that "Under such circumstances regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations. Southern P. Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas.1917E, 900; Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210. * * * In Western Fuel Co. v. Garcia we recently pointed out that as to certain local matters, regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or supplemented by

state statutes. The present case is controlled by that principle." See also State Industrial Comm. v. Nordenholt Corporation, 259 U.S. 263, 42 S.Ct. 473, 66 L.Ed. 933, 25 A.L.R. 1013, note at page 1029.

In another leading case, Millers' Indemnity Underwriters v. Braud, 270 U.S. 59, 46 S.Ct. 194, 195, 70 L.Ed. 470, it was held: "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist." (See 56 A.L.R. p. 356.) Other cases which may be cited to the same effect are Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 referred to in the Grant Smith-Porter case, and the California cases, Oakland v. Industrial Acc. Comm., 198 Cal. 273, 244 P. 353, and Alaska Packers' Ass'n v. Industrial Accident Comm., 200 Cal. 579, 253 P. 926, affirmed 276 U.S. 467, 48 S.Ct. 346, 72 L.Ed. 656.

The question was also presented to our Supreme Court in the case of Teahan v. Industrial Accident Comm., 210 Cal. 342, 292 P. 120, 121: There an assistant wharfinger went on board a vessel plying navigable waters to get manifest papers for the disposition of cargo being discharged, and while still on board the vessel, but returning to the dock, he fell down a ladder or stairway and was injured. The court held that the Industrial Accident Commission had exclusive jurisdiction of the case upon the ground that it was one of predominantly local interest, without any direct or substantial relation to commerce. In so holding the court said: "The fact that such employee suffered injury while thus temporarily on navigable waters is not alone determinative of the exclusiveness of maritime jurisdiction to adjudge the rights and obligations growing out of such a situation (Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 475, 476, 42 S.Ct. 157, 66 L. Ed. 321, 25 A.L.R. 1008), nor is the fact that, at the moment of his injury, the employee was engaged in performing services which might be classed as maritime in character. Sultan Ry. [& Timber] Co. v. Department of Labor, 277 U.S. 135, 48 S. Ct. 505, 506, 72 L.Ed. 820. The later decisions of the United States Supreme Court lay down additional tests, namely: (1) Had the injured person's activities at the time of the accident 'direct relation to navigation or commerce'? (2) Under the circumstances of the particular case, would the regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule, necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with its proper harmony or uniformity? Grant Smith-Porter Co. v. Rohde, supra; Millers' Indemnity [Underwriters] v. Braud, 270 U.S. 59, 64, 46 S.Ct. 194, 70 L.Ed. 470; Alaska Packers' Ass'n v. Industrial Acc. Comm., 276 U.S. 467, 469, 48 S.Ct. 346, 72 L.Ed. 656 [supra]. State statutes providing compensation for injured employees may be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations. Oakland v. Industral Accident Comm., 198 Cal. 273, 275, 276, 244 P. 353, 355. If a reasonable view of the facts involved in any particular case warrants a negative answer to the above questions, admiralty will yield to the local law, even though such law be a Workmen's Compensation Statute. It is not necessary, therefore, to determine whether admiralty could have jurisdiction, but only whether or not our state Workmen's Compensation Act can apply, notwithstanding general admiralty jurisdiction; or, otherwise stated, whether the deceased, when injured, was engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law."

[4] The present case, in our opinion, comes clearly within the "mere local concern" rule, and therefore the state Workmen's Compensation Act is applicable. Even though the injury may have occurred on navigable waters, navigation as such had come to an end. The tug was not then being operated in maritime commerce. The accident happened after the employee had alighted from the tug and was walking along a landing or float attached to a wharf, and the injury was in no way connected with the actual navigation or operation of the tug on navigable waters. Nor

can it be said that the maintenance and construction of the float was a matter vital to navigation and commerce, the regulation of which by the state would be of international or interstate importance, or would "[interfere] with the proper harmony and uniformity of" maritime law (Southern P. Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524, 529, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann. Cas.1917E, 900) or "materially affect any rules of the sea whose uniformity is essential." Grant Smith-Porter Ship Co. v. Rohde, supra, as quoted in Teahan v. Industrial Acc. Comm., supra [210 Cal. 342, 292 P. 122].

Therefore, whether or not the general maritime rules relied on by appellant would have been applicable had the injury actually occurred on the vessel is a question we are not called upon to decide here, because such was not the situation in the present case. In view of the many admonitions that each case must be decided on its own particular facts, and under the rules laid down by the cases above cited and quoted from, it is our opinion that under the particular circumstances of the present case the application of the state law and the regulation of the rights and liabilities of the parties by a local rule will not work material prejudice to any characteristic feature of the general maritime law, or interfere with its proper harmony or uniformity, and that therefore "admiralty will yield to the local law" (Teahan v. Industrial Acc. Comm., supra) and the exclusive features of the Workmen's Compensation Act abrogate the right to resort to the admiralty court which otherwise might exist. Millers' Indemnity Underwriters v. Braud, supra.

In many cases language is used indicating that because the injured employee's work or his contract of employment was nonmaritime or not directly connected with navigation and commerce, the rules of admiralty were not applicable. See Carlin Construction Co. v. Heaney, 299 U.S. 41, 57 S.Ct. 75, 81 L.Ed. 27; Grant Smith-Porter Ship Co. v. Rohde, supra; Los Angeles Shipbuilding Co. v. Industrial Accident Comm., 57 Cal.App. 352, 207 P. 416; Alaska Packers' Ass'n v. Industrial Acc. Comm., supra; United Dredging Co. v. Industrial Accident Comm., 92 Cal.App. 110, 267 P. 763; Woodworth v. Industrial Accident Comm., 127 Cal.App. 625, 16 P.2d 302. But in apparent conflict with this holding, that where the work itself is nonmaritime the state law is applicable, is the case of Spencer Kellogg & Sons v. Hicks, 285 U.S. 502, 52 S.Ct. 450, 76 L.Ed. 903, strongly relied on by appellant. In that case, employees (and others) were being transported to work in New Jersey on a vessel owned and operated by the employer, and the vessel sank when it struck ice, with a resulting loss of over 35 lives. The United States Supreme Court held that the accident was due to the master's negligence —that it was a maritime tort—and that therefore the New Jersey Workmen's Compensation Act was inapplicable and the complainants were entitled to relief under the maritime law. However, an examination of the cases cited first above in this paragraph, with the possible exception of the Carlin case, shows that the underlying principle upon which they were all decided was that the work, not being directly connected with navigation and commerce, was a matter of purely local concern, and the application of the state compensation acts would not necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity. As said in Alaska Packers' Ass'n v. Industrial Acc. Comm., supra, 276 U.S. 467, 48 S.Ct. 346, 72 L.Ed. 656: "When injured, certainly he [the injured employee] was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character. The doctrine announced in Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321, 25 A.L.R. 1008, and Millers' Indemnity Underwriters v. Braud, 270 U.S. 59, 64, 46 S.Ct. 194, 70 L.Ed. 470, is incompatible with the petitioner's [employer's] claim." But in the Kellogg case it is obvious that the accident was not one of "mere local concern" but had a direct bearing on the regulation of navigation and commerce, which is a matter reserved by the Federal Constitution to the exclusive jurisdiction of admiralty courts. And in the Carlin case, supra, the Kellogg case is distinguished, but on other grounds.

In view of the conclusion reached on this question, it is not necessary to discuss any of the other contentions made or arguments presented by the briefs of either party, including the question of contributory

negligence, since our conclusion that the state Workmen's Compensation Act is applicable to the present case sustains the trial court's action in granting the motion for nonsuit.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



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MULLANIX et al. v. BASICH et al.

Civ. 7069.

District Court of Appeal, Third District, California.

Jan. 25, 1945.

Rehearing Denied Feb. 15, 1945.

Hearing Denied March 22, 1945.

1. Appeal and error ⇐1052(8)

Where truck driver's negligence was conceded, admission of testimony by police officers who talked with driver shortly after the accident was not prejudicial, particularly in view of driver's testimony to the same effect.

2. Appeal and error ⇐1051(1)

Alleged error in admitting hearsay evidence was harmless where fact thereby sought to be shown was otherwise fully established by unobjectionable evidence.

3. Appeal and error ⇐1170(7)

To justify reversal of judgment on ground of erroneous admission or rejection of evidence, reviewing court must be of opinion that from examination of entire case, including evidence, questioned error complained of has resulted in miscarriage of justice. Const. art. 6, § 4½.

4. Trial ⇐260(1)

Proposed instructions covered by instruction given were properly refused.

5. Appeal and error ⇐901, 1032(1)

The burden cast upon party claiming error is not only to show it, but also to show that such error is sufficiently prejudicial to justify reversal. Const. art. 6, § 4½.

6. Trial ⇐285

A reviewing court should adopt a construction and effect of an instruction which will support rather than defeat the judgment if it is reasonably susceptible of such interpretation. Const. art. 6, § 4½.

7. Appeal and error ⇐204(1)

A party desiring to take advantage of alleged error in admission of improper testimony must object to its admission when it is offered, and objections will not be considered for the first time on appeal.

8. Evidence ⇐99

The admissibility of testimony depends on whether it tends to prove some issue in the case.

9. Trial ⇐127

Testimony which was relevant and material on issue of relationship of master and servant between defendant and driver of truck causing injuries was not inadmissible because it tended to show that alleged master carried insurance.

10. Trial ⇐127

In action for injuries caused by truck wherein defendant first used witness' signed statement in effort to impeach his testimony and then put the statement in evidence, it was proper for opposing counsel on redirect examination to question the witness about circumstances under which the statement was written by liability insurer's agent and signed by the witness in interest of the party who procured the statement.

11. Appeal and error ⇐1060(1)

Even if the question of liability insurance was presented to jury directly or indirectly through activities of plaintiffs' counsel, a reversal would not necessarily follow unless a contrary holding would have the effect of preventing the complaining party from having a fair trial.

12. Appeal and error ⇐1060(1)
Trial ⇐127

Ordinarily, a denial of motion for new trial wherein proceedings are attacked as being irregular and plaintiff is charged with misconduct for improperly injecting insurance into the case will be deemed a determination of good faith on part of counsel and that defendants were not prejudiced.

13. Appeal and error ⇐978(2)

A denial of motion for new trial based on improper injection of insurance into the case is not binding upon the appellate court, but is entitled to great weight upon appeal in which complaint is made of such alleged misconduct.

14. Trial ⇐127

The question whether the injection of insurance into a case constitutes error depends upon particular facts.

15. Appeal and error ⇐882(16)

A judgment will not be reversed for improper injection of insurance into the case where defendant has invited the error.

16. Trial ⇐131(1)

Seasonable objections must be made and trial court requested to admonish jury to disregard improper reference to insurance in personal injury action.

17. Appeal and error ⇐1060(1)

In action against partnership, and another whose truck was hired by the partnership, for injuries caused by truck wherein material issue was whether driver was employed by the partnership or such other person, judgment was not reversible for alleged injection of insurance into the case, where each defendant sought to shift responsibility to the other, plaintiff did not attempt to obtain judgment solely against the partnership, and attacked language of plaintiffs' counsel was reasonably susceptible of meaning attributed to it by counsel.

18. Damages ⇐132(3)

$38,000, $8,053.65 of which was special damages, to 31 year old lumberjack earning $300 a month, who was married and had three children, who suffered back, spine and brain injuries, who had life expectancy of 34.63 years, and who was permanently incapacitated, was not excessive.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Don Mullanix and another against Risto L. Basich and others, doing business under the firm name and style of Basich Bros., a copartnership, to recover for injuries and damages sustained when a truck demolished a motor court cabin. From orders denying its motion for judgment notwithstanding the verdict, and for a new trial, and from the judgment entered by the court pursuant to the verdict, defendants appeal.

Affirmed.

Gerald M. Desmond and Gerald B. Wallace, both of Sacramento, for appellants.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for respondents.

PEEK, Justice.

This is an appeal by defendants doing business under the name of Basich Bros., a partnership, from orders of the trial court denying its motion for judgment notwithstanding the verdict and for a new trial, and from the judgment entered by the court pursuant to the verdict of the jury.

The plaintiffs Don Mullanix and Julian C. Berry, by their joint complaint, alleged that about 3:30 o'clock a. m. on October 26, 1942, a truck, owned by the defendant Ford and under hire to defendant Basich Bros., while being driven by one Zumwalt, who was then in the employ of both Ford and Basich Bros., ran off a street in the city of Chico, jumped the curb, demolished a motor court cabin owned by Berry, and caused serious and permanent injuries to Mullanix, who was asleep in the cabin at the time. By their answers each defendant denied the employment of Zumwalt or that he was acting in the course and scope of any employment for either defendant.

Appellants rely mainly upon four points in urging a reversal of the orders and judgment of the trial court:

(1) That the court erred in the admission of certain testimony (a) by police officers who talked with Zumwalt shortly after the accident and (b) by foremen for both Ford and Basich Bros. in relation to the operation and control of the truck at the time of the accident; (2) that the court erred in refusing to give certain instructions proposed by Basich Bros.; (3) that prejudicial error, which was not cured by the admonition of the court, resulted from plaintiffs' counsel injecting into the case the question of liability insurance, and that the verdict of the jury against Basich Bros. alone and in favor of defendant Ford was the result of such error; and (4) that the amount of the verdict was excessive and also the result of passion and prejudice on the part of the jury against the defendant Basich Bros.

[1] An examination of the record discloses that all parties apparently concede the driver Zumwalt to have been negligent. It, therefore, would appear that appellants' first charge that the testimony of police officers Hughes and Swift was hearsay is without merit. Particularly is this true in view of the testimony of Zumwalt himself to the same effect.

The testimony involved in the remaining portion of appellants' first contention is as follows:

James Roberts, the foreman for defendant Ford, was called as a witness for plaintiffs and permitted to testify over appellants' objection that at the request of one Gerald Stahl (foreman for Basich Bros.) Zumwalt was sent with the truck from the city of Marysville to the Vina Airport near the city of Chico where appellants were engaged in construction work for the United States government. Roberts further testified that this was done with the understanding that Zumwalt's wages would be paid by Basich Bros. from the time he left Marysville for the airport until his return with the truck to Marysville at the conclusion of the work. On cross-examination counsel for defendant Ford elicited from Roberts testimony, without objection from appellants, that Stahl previously had been employed by Ford; that he left such employment and entered the employ of Basich Bros. as foreman; that about ten days prior to the accident Stahl came to Marysville in his capacity as foreman for appellants in an attempt to get trucks for the construction work at the airport; that he knew all of the drivers personally, as they had worked under both him and Roberts; that he named those whom he wanted (including Zumwalt) to be sent with trucks to the airport; that when he asked Stahl who would pay the drivers Stahl replied that Basich Bros. were carrying the payroll and would pay the drivers starting with their departure from Marysville and continuing until their return.

It is urged by appellants that the court should have excluded such testimony as hearsay, in that there was no evidence that Stahl was authorized to make any such statement or to otherwise bind Basich Bros. However, the record reveals that prior to the time the testimony in question was introduced the defendants Ford, Zumwalt and a Mr. Estep, office manager for Basich Bros., had already testified. Ford stated he had agreed with a Mr. Wilcox, general superintendent at the airport for Basich Bros., to loan his (Ford's) trucks to the latter at a stipulated sum per hour plus a certain percentage of the profits; that the drivers were to be, and actually were, paid by Basich Bros. from the time they left Marysville; that the drivers were carried by Basich Bros. on its books and were controlled by them until they were finally discharged. Mr. Estep testified as did Ford and Zumwalt that at no time was Ford or any representative of his on the airport job after October 25, the day before the accident; that the drivers were directed and controlled by Stahl, foreman for Basich Bros., and that Stahl was the one who put Zumwalt on the Basich Bros. payroll.

[2, 3] In view of the testimony of Ford, Zumwalt and Estep there was sufficient testimony from sources other than Roberts to support the implied finding of the jury that Zumwalt was in the employ of appellants. In the case of Forrest v. Royal Ins. Co., 1927, 88 Cal.App. 88, 262 P. 820, 821, wherein it was claimed that the trial court committed prejudicial error in the admission of declarations of an employee of the defendant therein, this court stated: "The admission of improper evidence is harmless where the fact thereby sought to be shown is otherwise fully and properly established by evidence which is unobjectionable", citing 2 Cal.Jur. 1020, and McGowan v. Burg Bros., 1922, 59 Cal.App. 219, 210 P. 545. See also Roy v. Salisbury, 1942, 21 Cal.2d 176–187, 130 P.2d 706. In order to justify a reversal of a judgment on the ground of the erroneous admission or rejection of evidence a reviewing court must be of the opinion that from an examination of the entire case, including the evidence questioned, that the error complained of has resulted in a miscarriage of justice. Constitution, art. VI, § 4½; Coleman v. Farwell, 1929, 206 Cal. 740, 276 P. 335.

Appellants' second contention is that the trial court failed to give certain instructions proposed by it; that such instructions should have been given:

"* * * to inform the jury that defendant Zumwalt must have been found acting within the scope of employment by Basich Brothers at the very time of the accident, in order for said Basich Brothers to be liable for his negligence. * * * (Defendants' proposed instruction No. 1.)

"* * * to instruct the jury that merely carrying the driver, defendant Zumwalt, on the payroll of defendants and appellants Basich Brothers, was not sufficient to charge said defendants and appellants with responsibility for said driver's negligent act. * * * (Defendants' proposed instruction No. 2.)

"* * * to place before the jurors the true tests of who was the responsible employer, to-wit: who had the power of control, the hiring, and the right to discharge. * * * (Defendants' proposed instruction No. 3) and

"* * * to inform the jury that if the evidence showed the defendant Ford had the right to hire and discharge the driver and to direct his movements in the operation of the truck, he was a general employer and thereby responsible for the driver's negligent acts." (Defendants' proposed instruction No. 4.)

[4-6] It cannot be denied that each of defendants' said proposed instructions correctly stated the law and that if the court by its refusal to give them had thereby eliminated from consideration by the jury the points therein mentioned, such refusal would have amounted to reversible error. However, a review of the instructions given reveals that the court in an endeavor to include in one instruction all of the law set forth in the four proposed instructions adopted language of its own intended to accomplish the same purpose. It is quite possible that the wording used could have been more direct and less cumbersome; but as this court said in the recent case of Inai v. Ede, 1943, 59 Cal.App.2d 549, 139 P.2d 76, if when the entire charge to the jury is examined in the light of a reasonable and fair construction it reasonably may be said as to the law applicable thereto, that is sufficient to defeat a claim of error predicated upon a defect in a particular instruction. Henderson v. Los Angeles Traction Co., 1907, 150 Cal. 689, 89 P. 976. In accordance with the section of the Constitution previously cited, error of the nature charged by appellants cannot be deemed prejudicial. The burden cast upon the party claiming error is not only to show it, but also to show that such error is sufficiently prejudicial to justify a reversal. Coleman v. Farwell, supra. It is also well established that a reviewing court should adopt the construction and effect of an instruction which will support rather than defeat the judgment if it is reasonably susceptible of such interpretation. Reuter v. Hill, 1933, 136 Cal.App. 67, 28 P.2d 390. The instruction given by the court being susceptible of such interpretation, we therefore conclude that appellants' second contention is without merit.

The record shows in regard to appellants' third contention that on June 26, 1942, the defendants Ford and Basich Bros. entered into a written contract whereby Ford as a subcontractor agreed to perform certain trucking for Basich Bros. The contract was introduced in evidence without objection during the examination of Ford under section 2055 of the Code of Civil Procedure. Plaintiffs' counsel then read the agreement to the jury. Paragraph "G" thereof reads: "Second party [Ford] understands that hereunder he is required to furnish every type of insurance required by the original contract and/or specifications, including compensation, public liability, property damage and all others that may be required under the terms of the original contract had between the first party and the U. S. Engineers." Ford testified that upon completion of the written subcontract in September, 1942, he moved his men and equipment to Marysville for work at Camp Beale; that while his men and equipment were still at Camp Beale and prior to the date of the accident he made a new oral agreement by which his trucks were rented and his drivers were loaned to Basich Bros. for further work at the Vina Airport. Counsel for plaintiffs then inquired into the similarity or difference between the written subcontract and the later oral agreement, as follows:

"Q. While you had this contract [referring to the prior written and completed contract] did you pay all of your employees? A. Yes sir. * * *

"Q. And material and everything else? A. Yes sir.

"Q. Did you direct the work of your drivers? A. Yes sir.

"Q. And were you up on the Vina job at that time? A. Yes sir.

"Q. And all of these truck drivers, including Mr. Zumwalt, did you give them instructions or Mr. Roberts, your foreman? A. Both Mr. Roberts and myself gave instructions.

"Q. After you made this oral agreement that you told the jury you were hiring out

the trucks for $2.44 an hour, did you have anything to do with the payroll? A. No.

"Q. Did you carry compensation insurance? A. No sir, I carried no insurance, not even on the trucks.

"Q. Did you pay any Social Security Insurance? A. No sir.

"Q. You had nothing whatever to do with the men working on the trucks? A. No sir."

[7] The record discloses no objection was made to any of these questions nor was a motion made to strike the answers; therefore they will not be considered for the first time on appeal. It is well established that for a party to take advantage of alleged error in the admission of improper testimony, it is necessary that he object to its admission when it is offered. Kershaw v. Tilbury, 1932, 214 Cal. 679, 8 P.2d 109; Balkwill v. City of Stockton, 1942, 50 Cal.App.2d 661, 123 P.2d 596; 11 So.Cal.Law.Rev. 413.

[8, 9] Even if timely objection had been made to the testimony now attacked, it properly should have been admitted. The admissibility of testimony depends on whether or not it tends to prove some issue in the case. The question at issue herein involved the relationship of master and servant. Such testimony therefore was relevant and material and defendants could not have had it excluded upon the ground that it tended to prejudice appellants' case because it tended to show that the partnership carried insurance. The general rule is stated as follows in 56 A.L.R. p. 1433: "If the existence of the relation of master and servant is an issue in an action for damages for personal injuries by one claiming to be an employee of defendant, it is competent for the plaintiff to show that the defendant carries indemnity insurance on his employees, including the plaintiff, as that evidence is relevant to the issue of respondeat superior."

The first reference to liability insurance was made during the cross-examination of the witness Ford by appellants' counsel. After the accident in question Ford, while in Southern California, was invited to the office of the insurance carrier for appellants in Los Angeles for the purpose of making a statement concerning the accident and the relation between the driver of the truck and defendants. The statement was written in longhand by a representative of the insurance carrier and Ford signed it. During the trial Ford gave testimony at variance with information contained in his signed statement, and appellants' counsel sought to impeach him as follows:

"Q. And do you remember giving that statement? A. Yes.

"Q. And it was given in Los Angeles at your home, or your place of business? A. It was given up town at the *insurance company.* * * *

"Q. Why would you sign this statement in which you say, that during the month of October, 1942, 'I was operating a fleet of trucks near Chico, California, and contracting with Basich Bros. to haul sand and gravel to the Vina Airport, about fifteen miles from Chico.' Why would you make that statement if the fact was that you had simply loaned drivers to Basich and rented trucks to them. Can you explain that to the jury? A. Yes, I can, I believe. I told the story as near as possible of what happened at the Chico Airport to the *representative of this insurance company that made these papers out,* and he put it down in such a manner as to appear that I was contracting, rather than renting."

Upon re-direct examination plaintiffs' counsel questioned the witness and the following occurred:

"Q. Mr. Ford, who do you say took this statement, or in whose handwriting is this statement? A. I don't know the gentleman's name.

"Q. Who was he? A. Basich Bros. insurance company.

"Q. Did you write one single word in that statement? A. No sir, nothing except my name."

[10] Again it does not appear that any objection was made to said statements nor does it appear that any motion was made to strike the answers nor was any request made that the jury be admonished to disregard the references to insurance. We have already said herein that under such circumstances a reviewing court will not consider the objection when made for the first time on appeal. Furthermore, as appellants first used the signed statement in an effort to impeach Ford's testimony and then put the statement in evidence, it was not improper for opposing counsel on redirect examination to question Ford about the circumstances under which the statement was written and signed in the inter-

est of the party who procured the statement. The rule is thus stated in 70 C.J. p. 709, § 858: "Where a witness in an action for injuries is cross-examined as to a written statement which he had made, it is not improper for the witness to be asked in whose behalf the one who procured the statement was acting and elicit the fact that he was acting for an insurance company, and similarly, after cross-examination has shown that the witness made a statement to some one, it is not improper to ask to whom the statement was made and elicit the answer that it was made to an insurance man. It is proper on re-direct examination to bring out the circumstances surrounding a transaction or occurrence, or the making of a statement brought out on cross-examination." See Booth v. Coldiron, 1936, 55 Ohio App. 144, 9 N.E.2d 161; Long v. Crystal Refrigerator Co., 1938, 134 Neb. 44, 277 N.W. 830.

In support of appellants' next contention it is charged that counsel for plaintiffs argued to the jury that appellants should be held liable as they were insured and that counsel for defendant Ford took advantage of such argument by stating to the jury that if they were to find against Ford he personally would have to meet the judgment.

An examination of the record in regard to this issue discloses that from the outset of his argument to the jury counsel for plaintiffs sought judgment against both defendants, stating: "* * * the only fair and just thing in this case, is to hold both of them responsible." Each of defendants' counsel, however, while admitting Zumwalt was the employee of one or the other, disclaimed all responsibility for his negligent acts and endeavored to place such responsibility upon the other. Ford's counsel stated that although plaintiffs' counsel might feel it fair to hold both defendants he felt that it would be decidedly "unfair"; that Zumwalt was "not in the employ of Ford"; that from all the circumstances it was an "inescapable conclusion that Basich Bros, and Basich Bros. alone, were employing Zumwalt * * *," and in reiteration of a previous statement, said: "If a verdict is rendered in this case and there is a judgment against him, then he has got the worry of having to do it all over again and all the other proceedings, and all the work and expenses incidental to that are. * * *" At that point he was interrupted by counsel for Basich Bros. who stated to the court: "I do not think that is proper argument. * * *" The Court: "No, I don't think so." Counsel for Basich Bros. likewise admitted the negligence of Zumwalt, and added: "I will state very frankly that I think he [Mullanix] is entitled to a verdict;" that the liability for plaintiffs' injuries and damages "rests with Mr. Ford and not with Basich Bros."

Plaintiffs' counsel in rebuttal argued:

"I don't say, 'don't you think it is fair to find them both liable, because you believe Basich Bros. liable. Absolutely not, and I say to you frankly that I would myself, if I were going to leave one of them out of the case, *as far as liability is concerned,* I would leave Ford out and retain the Basich Bros., *because the evidence is conclusive against Basich Bros.,* and it is a question of fact as far as Ford is concerned. * * * *I still think the evidence is sufficient to hold Ford also;* * * * he (Ford) equally along with Basich Bros., was an employer and that he equally, with Basich Bros., should be held liable. * * *"

"Now, on the face of that record, and when the court instructs you that it is for you to determine from the facts and circumstances, whether at the time and place in question, Mr. Zumwalt was in the employ of Basich Bros., your answer obviously must be, yes, because if you don't do that, Members of the Jury, *I fear that a judgment in this plaintiff's behalf would not be worth the paper it is written on, and I say this honestly and fairly.*"

Counsel for appellants then stated to the court: "If your Honor please, we object to the making of that statement, and charge it as misconduct, and very prejudicial to the rights of the defendant in this case, whom I represent."

The court turned to plaintiffs' counsel and said:

"You have no right to refer to the responsibility or financial ability of the defendants.

"Mr. Goldstein: I don't say that."

"Mr. Desmond: You said the judgment would not be worth the paper it was written on, unless the Basich Bros. are held in this case.

"Mr. Goldstein: That is not what I meant.

"Mr. Desmond: I would like to have the jury instructed to ignore that statement.

"The Court: The jury will be instructed to disregard the statement."

"Mr. Goldstein: It is an error on my part, and it is a question of liability and not anything else.

"The Court: Proceed.

"Mr. Goldstein, continuing: * * * I would not ask you for a verdict against *both of the defendants,* unless the evidence sustained it, and the circumstances warranted it, and the evidence supported it * * * *I say as between Ford and Basich Bros., the evidence is overwhelming and conclusive, beyond any peradventure of a doubt, that the man was in the employ of Basich Bros.*"

The foregoing concludes the argument of all three attorneys in which the alleged objectionable matter was mentioned and has been italicized (1) to show the endeavors of each defendant to shift the responsibility to the other; (2) that plaintiffs did not attempt to obtain a judgment solely against Basich Bros.; and (3) that the attacked language of plaintiffs' counsel was reasonably susceptible of the meaning attributed to it by him, i. e., that it was merely that the liability of Basich Bros. was inescapable.

[11] The numerous cases cited by appellants in support of its contention do not appear to be in point with the facts presented in the present controversy. In each of the cases so cited the question of insurance arose either directly or indirectly through the activities of plaintiff's counsel therein. However, even if such were true of the facts here, a reversal would not necessarily follow unless a contrary holding would have "the effect of preventing the complaining party from having a fair trial. Robinson v. Western States Gas, etc., Co. [1920], 184 Cal. 401, 194 P. 39. In other words, in order to justify a reversal, such misconduct, in our opinion, must constitute such an irregularity in the proceedings or conduct of the court, jury or adverse party as to materially affect the substantial rights of the party aggrieved." Schlenker v. Egloff, 1933, 133 Cal.App. 393, 399, 24 P.2d 224, 226.

[12, 13] The record herein further discloses that a motion for a new trial was made by appellants and denied; that among the grounds urged in said motion were "irregularity in the proceedings of the court by which the defendants were prevented from having a fair trial" and "irregularity in the proceedings of the adverse party, plaintiffs and their counsel, and by co-defendant Ford and his counsel by which the defendants were prevented from having a fair trial." Ordinarily where proceedings are attacked as being irregular and plaintiff is charged with misconduct for improperly injecting insurance into the case "the denial by the trial court of a motion for a new trial made on that ground will be deemed a determination by it of good faith on the part of counsel and that defendants were not prejudiced." Hatfield v. Levy Bros., 1941, 18 Cal.2d 798, 814, 117 P.2d 841, 849; Levens v. Stocco, 1935, 5 Cal.App.2d 693, 43 P.2d 357. Although a denial of such a motion is not binding upon this court, it is entitled to great weight upon appeal in which complaint is made of such alleged misconduct. It was also held in Ashley v. Rivera, 1934, 220 Cal. 75, 79, 29 P.2d 199, 201, that "the question of reversible error growing out of the admission of evidence of this character [insurance] must always be resolved upon the peculiar facts of the individual case."

[14-17] In light of the previously quoted decisions, i. e., that each case depends upon its own peculiar facts; that there will not be a reversal where defendant has invited the error, that seasonable objections must be made and the court requested to admonish the jury to disregard the reference to insurance; that the denial of the motion for new trial is an implied finding that no prejudice resulted to appellant, and that the trial court is better able to determine whether the conduct of counsel was done in good or bad faith, we are unable to justify any interference with the determination of the jury and the trial court.

Lastly, appellants contend that the amount of the verdict shows that the passion and prejudice of the jurors was aroused against appellants by reason of the question of insurance being brought to the attention of the jury.

In Lahti v. McMenamin, 1928, 204 Cal. 415, 422, 268 P. 644, 646, the Supreme Court had before it a question not wholly unlike that which is now before this court, and passing upon such issue stated: "We are not disposed to dispute defendant's contention that juries are on occasions so influenced, and the rules of evidence are so framed to exclude any direct evidence of such matters. But, when the fact that de-

fendant carried insurance is properly brought to the knowledge of the jury, either by the evidence on the part of the defendant, or indirectly in connection with proof of some material fact in the case, we know of no rule of law that empowers any court to set aside the jury's verdict upon the assumption that such evidence might have influenced the jury in rendering a verdict which was excessive in amount. If the verdict of the jury is excessive, then it should be set aside by the court, no matter what may have prompted the jury in the rendition thereof. On the other hand, if the verdict is not excessive, as we have held to be the case in this action, then it should be sustained, notwithstanding the fact that there is evidence in the record which might have tended to influence the jury in allowing excessive damages. The fact that the verdict is not excessive is conclusive proof that the jury were not improperly influenced by such evidence."

In Bach v. C. Swanston & Son, 1930, 105 Cal.App. 72, 83, 286 P. 1097, 1101, this court said: "It has been decided a number of times by the Supreme and Appellate Courts that upon appeal the decision of the trial court and jury cannot be set aside on the ground that the damages are excessive, unless the verdict is so outrageously excessive as to suggest at the first blush passion, prejudice, or corruption on the part of the jury. Lahti v. McMenamin, 204 Cal. 415, 268 P. 644; Reneau v. Hirsch, 88 Cal.App. 1, 262 P. 1100."

[18] The medical testimony in the present case shows respondent Mullanix to be permanently injured and incapacitated; he suffered back, spine and brain injuries; he was 31 years old at the time of the accident, was married and has three children; he was a lumber jack earning an average of $300 a month, and his life expectancy was 34.63 years. The jury awarded him $38,000, of which $8,053.65 was special damages. In view of such facts and circumstances we cannot say the verdict was so outrageously excessive as to suggest passion, prejudice or corruption on the part of the jury.

The judgments and orders are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

25 Cal.2d 721

JAMES v. MARINSHIP CORPORATION et al.

S. F. 17015

Supreme Court of California.

Dec. 30, 1944.

Rehearing Denied Jan. 25, 1945.

1. Torts ⇐10

A labor union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor.

2. Injunction ⇐101(1)

The object of concerted labor activity must be proper and it must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief.

3. Constitutional law ⇐90

A state cannot deprive labor unions of the right of free speech through peaceful picketing, but a state has the power to protect against abuses of the right.

4. Constitutional law ⇐90
Courts ⇐394(1)
Trade unions ⇐2

A state may impose limitations upon picketing or other concerted action by labor organization if the end sought is not permissible under state law and public policy, but such limitations are subject to review by United States Supreme Court and will be annulled if they unreasonably interfere with labor's right to publicize the facts of a labor dispute.

5. Contracts ⇐116(1)
Torts ⇐10

A closed shop agreement is valid, and a labor union may use economic pressure to enforce a demand therefor even though the employees in the picketed shop do not belong to the union and have no dispute with their employer.

6. Contracts ⇐116(1)

An arbitrarily closed or partially closed labor union is incompatible with a closed shop agreement with employer, and, where a union has obtained a monopoly of the supply of labor by means of a closed shop agreement and other forms of collective labor action, the union occupies a quasi public position and has certain corresponding obligations.

7. Master and servant ⇐15(1)

The National Labor Relations Act does not give labor unions a right to maintain a closed or partially closed membership together with a closed shop agreement with employer engaged in business affecting interstate commerce. National Labor Relations Act §§ 1–16, 9(a), 29 U.S.C.A. §§ 151–166, 159(a).

8. Trade unions ⇐4

The right of a labor union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union affords the union an effective remedy against persons who have interests inimical to union and who seek to destroy it from within.

9. Trade unions ⇐4

Where negroes were excluded from membership in labor union which had a closed shop agreement with employer and in order to work negroes were required to join negro auxiliary, if union imposed unreasonable and discriminatory restrictions on negroes not placed on members of union and if the auxiliary did not afford its members privileges and protection substantially equal to that afforded to members of union, compelling the negroes to join the auxiliary, upon penalty of discharge, would be equivalent to a complete denial of union membership.

10. Trade unions ⇐4

Where a union may not directly exclude certain workers, it may not do so indirectly by prescribing intolerable or unfair conditions of membership for such persons.

11. Trade unions ⇐4

Where negroes were excluded from membership in union which had closed shop agreement with employer and negroes were required to join negro auxiliary in order to work but the regular union controlled all affairs of auxiliary, the auxiliary was without a grievance committee and was not allowed a business agent but was required to seek representation through business agent of regular union, members of auxiliary were dispatched to employment only through agency of regular union and could not obtain promotion without approval of regular union, and the regular union had a permanent status which the negro auxiliary did not have, the evidence sustained determination that membership offered to negroes was discriminatory and unequal.

12. Civil rights ⇐3

Where negroes were excluded from membership in union which had closed shop agreement with employer and negroes were required to join negro auxiliary in order to work but the regular union controlled all affairs of auxiliary, the auxiliary was without a grievance committee and was not allowed a business agent but was required to seek representation through business agent of regular union, members of auxiliary were dispatched to employment only through agency of regular union and could not obtain promotion without approval of regular union, and the regular union had a permanent status which the negro auxiliary did not have, the discriminatory practices against negro workers were contrary to public policy of United States and the State of California. U.S.C.A.Const. Amends. 5, 14, 15.

13. Constitutional law ⇐215

The constitutional provisions against racial discrimination apply to state action rather than to private action but they evidence a definite national policy against discrimination because of race or color. U.S. C.A.Const. Amends. 5, 14, 15.

14. Civil rights ⇐3

A statute is not necessary to enforce public policy against racial discrimination where a private right, such as right to membership in labor organization having closed shop contract with employer rather than public action, is involved.

15. Civil rights ⇐3

Where a labor union has attained a monopoly of the labor supply through closed shop agreements with employer, the union, like a public service business, may not unreasonably discriminate against negro workers for the sole reason that they are colored persons.

16. Injunction ⇐99

Use of economic pressure by a labor union that does not admit negroes, to compel discharge of negro employees, may be enjoined.

17. Injunction ⇐192

Where labor union, which had closed shop agreement with employer but which excluded negroes from membership, had been enjoined from discriminating against negroes, the employer, which had full knowledge of controversy between the union and negro employees, and employer's action in complying with union's demand to discharge a particular employee because not a member in good standing, had indirectly assisted union in carrying out its discrimination against negroes, the employer's conduct could be enjoined to make effective the injunction against the union.

18. Master and servant ⇐30(1)

Where employer had closed shop agreement with labor union which excluded negroes from membership, the employer was not to be subjected to penalty for its enforcement of the closed shop agreement.

19. Master and servant ⇐30(1)

Ordinarily, in absence of judicial proceeding, employer in enforcing closed shop agreement need not look behind notice from labor union that a particular employee is not a member in good standing.

20. Injunction ⇐114(3)

The fact that local labor union's discriminatory conduct against negro employees of employer with which union had closed shop agreement might have been committed in accordance with regulations of parent association that might have been beyond jurisdiction of court did not deprive court of power to prevent the continuance of the wrongful acts by those agents or affiliates that were within jurisdiction of court.

21. Principal and agent ⇐159(2)

An agent is liable for his own act, regardless of whether the principal is liable or amenable to judicial action.

22. Master and servant ⇐15(42)

The National Labor Relations Act, giving the National Labor Relations Board exclusive power to issue order to prevent any person from engaging in any unfair labor practice affecting commerce, embraces only unfair labor practices committed by employers and does not give the board jurisdiction to prevent act of employees or members of labor union. National Labor Relations Act §§ 8, 9, 10(a), 29 U.S.C.A. §§ 158, 159, 160(a).

23. Master and servant ⇐15(1)

Where dispute, involved in action to enjoin enforcement of closed shop agreement between employer engaged in shipbuilding industry and labor union which excluded negroes from membership, was essentially between members of the labor union and certain individual workers, and

employer was made a party solely to render effective any order issued with respect to the union defendant, state court was not without jurisdiction on theory that the National Labor Relations Board had exclusive jurisdiction over labor disputes affecting interstate commerce. National Labor Relations Act §§ 8, 9, 10(a), 29 U.S.C.A. §§ 158, 159, 160(a).

24. Master and servant ⇐15(1)

The National Labor Relations Act does not deprive state court of power to prevent unlawful conduct by labor union where such conduct is not authorized or protected by the act. National Labor Relations Act §§ 8, 9, 10(a), 29 U.S.C.A., §§ 158, 159, 160(a).

25. War ⇐4

Exercise of jurisdiction by state court, in action to enjoin enforcement of closed shop agreement between employer engaged in shipbuilding industry and labor union which excluded negroes from membership and discriminated against negro employees, would not violate the War Labor Disputes Act or invade jurisdiction given thereby to the National War Labor Board, especially where the board had not assumed jurisdiction. War Labor Disputes Act § 7(a) (1), 50 U.S.C.A.Appendix, § 1507(a) (1).

26. Injunction ⇐99

Where the Fair Employment Practice Committee was an advisory body created by executive order under wartime powers of President and it was not intended that the committee should supplant ordinary remedies afforded by courts, the remedy afforded by the committee was not such a complete and adequate administrative remedy as would preclude injunction restraining enforcement of closed shop agreement between employer engaged in shipbuilding industry and labor union which excluded negroes from membership and discriminated against negro employees.

27. Contracts ⇐116(1)
Trade unions ⇐4

A labor union may not maintain both a closed shop contract with employer and an arbitrarily closed or partially closed union, but negroes must be admitted to membership under the same terms and conditions applicable to non-negroes unless the union and employer refrain from enforcing the closed shop agreement against them.

28. Injunction ⇐211

Order directing labor union having closed shop agreement with employer to admit a negro employee as a member, when read as a whole, properly allowed the union and employer the alternative of refraining from enforcing closed shop agreement against negro employee.

29. Injunction ⇐211

Injunction against enforcement of closed shop agreement between employer and labor union which excluded negro employees from membership was not so broad as to give negroes any greater right to membership than that extended to other persons.

In Bank.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Joseph James, on his own behalf and on behalf of others similarly situated against Marinship Corporation and others, for an injunction restraining defendants from discharging, or causing the discharge of, plaintiff and other negroes because they were not members of a labor union with which their employer had a closed shop agreement. From an order awarding a preliminary injunction, the defendants appeal.

Affirmed.

Thelen, Marrin, Johnson & Bridges, Charles J. Janigian, and George M. Naus, all of San Francisco, for appellants.

Joseph A. Padway and Herbert S. Thatcher, both of Washington, D. C., amici curiae on behalf of appellants.

Andersen & Resner, George R. Andersen, and Herbert Resner, all of San Francisco, and Thurgood Marshall, of New York City, for respondent.

Katz, Gallagher & Margolis, of Los Angeles, Ben Margolis and John T. McTernan, both of San Francisco, Arthur Garfield Hays, Osmond K. Fraenkel, Nathan Greene, Stanley Fleischman, and Theodora Stuart, all of New York City, Wayne M. Collins, of San Francisco, Herbert Ganahl and Thomas L. Griffith, Jr., both of Los Angeles, Morris M. Grupp, of San Francisco, Carey McWilliams and Loren Miller, both of Los Angeles, George G. Olshausen, of San Francisco, Clarence E. Rust, of Oakland, and Clore Warne and A. L.

Wirin, both of Los Angeles, amici curiae on behalf of respondent.

GIBSON, Chief Justice.

This is an appeal from an order of the Superior Court in Marin County awarding a preliminary injunction which, among other things, restrained defendants from discharging or causing the discharge of plaintiff and other Negro employees because they are not members of a labor union with which their employer has a closed shop agreement, but which will not grant Negroes full membership privileges. The basic question presented is whether a closed shop may be enforced by a labor union together with an arbitrarily closed or partially closed union membership.

Plaintiff, Joseph James, is a citizen of the United States, a resident of California, a member of the Negro race, and an employee of defendant Marinship Corporation. He brought this action on his own behalf and on behalf of approximately 1,000 other Negro workers similarly situated. The Negroes are skilled craftsmen in the shipbuilding trade, most of whom have been employed by Marinship for periods in excess of one year.

Defendant Marinship is a Nevada corporation which operates yards for the construction of ships at Sausalito in Marin County. The shipyards are owned by the United States and are operated by Marinship under contracts containing provisions that Marinship will not discriminate against any worker because of race, color, creed, or national origin.

The defendant International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America (hereinafter called the International Brotherhood) is an international labor union and an unincorporated association. Local Union No. 6 of the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America (hereinafter called Local No. 6) is a local union chartered by and affiliated with the International Brotherhood and does business in California. Certain officials of both the International Brotherhood and Local No. 6 are also named as defendants.

There is a written contract or "Master Agreement" in effect between Marinship and the International Brotherhood containing a provision for a closed shop. Under this agreement the International Brotherhood "dispatches" workers for employment at Marinship through the medium and agency of Local No. 6, and workers cannot be employed there in any craft over which the International Brotherhood claims jurisdiction unless they are members in good standing in a local union or auxiliary of the International Brotherhood.

Defendant unions do not admit Negroes to membership. In 1937, the establishment of separate Negro local lodges was authorized by the International Brotherhood, and by-laws therefor were adopted, effective as of January 1, 1938. For some time the unions dispatched Negro workers to employment without imposing any condition of union affiliation. Auxiliary A-41, one of such Negro lodges, was chartered on August 14, 1943, and defendants insisted that plaintiff and other Negro workers must join this local, pay initiation fees and dues, and remain members thereof in good standing in order to obtain work clearances for employment at Marinship. Upon their refusal to do so, the defendant unions threatened to cause their discharge, and defendant Marinship gave notice that it would discharge them within forty-eight hours unless they complied with the demand and obtained the necessary work clearances.

Plaintiff thereupon brought the present action, setting forth the foregoing facts and further alleging, in substance, that Auxiliary A-41 was not a bona fide union local and did not offer equal privileges and benefits of union membership, but instead was used as a means of discriminating against Negro workers; that they were willing to become members of Local No. 6 on equal terms with other members; that the threatened action by Marinship would constitute a breach of the anti-discrimination provisions in Marinship's contracts with the Maritime Commission; and that it would be contrary to law and public policy and harmful to the war effort. Plaintiff finally alleges that the Negroes will suffer irreparable damage, that there is no speedy or adequate remedy at law, and that injunctive relief is necessary to prevent a multiplicity of suits.

Upon the verified complaint, the trial court issued a temporary restraining order and an order to show cause why a preliminary injunction should not issue pending trial. Thereafter, Marinship Corporation, Local No. 6 and the officers of Local No. 6, who were named as defendants, filed demurrers upon the grounds, among others, that the trial court had no jurisdiction of

the subject of the action and that the complaint did not state facts sufficient to constitute a cause of action. The record does not disclose that any pleadings were filed by the International Brotherhood or the officers thereof who were named as defendants or that they were served with process. Affidavits in opposition to issuance of a preliminary injunction were filed by William E. Walter, international secretary-treasurer of the International Brotherhood, by E. Medley, president of Local No. 6, and by Robert Digges, administrative manager of Marinship.

It is asserted in the Medley affidavit, among other things, that Local No. 6 does not supervise the affairs of Auxiliary A-41 except as provided in the By-laws Governing Auxiliary Lodges; that business agents of Local No. 6 act impartially and with equal zeal for members of both locals; that there has been no discrimination with respect to employment opportunities; that many Negroes have advanced from the rank of helpers to that of trainees and journeymen and that some have become leadermen; and that Marinship and Local No. 6 have, whenever possible, assisted Negroes to advance.

The affidavit of Marinship states that in 1941 the "Master Agreement" was executed by the management of practically every shipyard on the Pacific Coast and by the Metal Trades Department of the American Federation of Labor and by a number of unions affiliated with said department, including the defendant International Brotherhood; that under the contract no worker, regardless of race or color, can obtain, or continue in, employment unless he obtains a clearance card from the appropriate union; that Marinship does not look behind a notice from the union that an employee is no longer in good standing with the union; that the company is aware of a controversy between the union and the Negro employees, but since the controversy involves the internal affairs of the union it has refrained from taking a position one way or the other; that it has received notices from the union that certain Negroes are not members in good standing, which notices it has accepted at face value; and that it "has performed its obligations under the union shop clause of the Master Agreement in the case of the Negroes as it has in the case of white men." The affidavit further states that Negroes employed by Marinship "work under the terms of the Master Agreement and are paid the same wages, work the same hours, and are employed under the same working conditions as all other workers, irrespective of race, creed, color or national origin."

On February 17, 1944, the trial court issued a preliminary injunction which restrained Local No. 6, its officers and agents, and Marinship Corporation, but did not restrain the International Brotherhood or its officials. The order recites that the actions of the union in discriminating against and segregating Negroes into auxiliary unions are contrary to the public policy of the State of California and that the closed shop provision of the Master Agreement "is void as applied to the plaintiffs in this case, and others similarly situated." It restrained *Local No. 6 and its officers and agents* (1) from compelling the Negroes to join or pay initiation fees, dues, or other moneys to Auxiliary A-41 or other subsidiary or auxiliary union or organization of the International Brotherhood; (2) from compelling, inducing, or requesting Marinship to discharge or refuse to employ the Negroes because of their refusal to become or remain members or pay dues; (3) from preventing employment at Marinship of the Negroes because of their nonmembership or refusal to pay dues; (4) from "refusing to admit into membership in said Local 6 on the same terms and conditions as white persons, or refusing to accept tendered initiation fees and dues to said Local 6 from, plaintiff and other Negro workers similarly situated"; (5) from refusing to give work clearances to Negroes who fail to join or pay dues; and (6) from attempting to enforce the By-laws Governing Auxiliary Lodges of the International Brotherhood. The order restrained *Marinship Corporation* from discharging or refusing to employ the Negroes because they did not have work clearances from or were not members of the International Brotherhood, Local No. 6, thereof, or Auxiliary A-41, but provided that if the Negroes were accepted into full membership and upon the same terms and upon an equal basis with white persons they should be required to obtain and present work clearances to Marinship from Local No. 6.

[1, 2] It should be recognized at the outset that a union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor. See, for

example, Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 155, 143 P.2d 20, 150 A.L.R. 916; McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165. It is equally well settled that the object of concerted labor activity must be proper and that it must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief. See McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d, supra, at pages 319, 331, 106 P.2d 373; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d, supra, at pages 395, 399–401, 106 P.2d 414; Fortenbury v. Superior Court, 16 Cal.2d, supra, at page 409, 106 P.2d 411; Magill Bros. v. Building Service, etc., Union, 20 Cal.2d 506, 127 P.2d 542; Burlington Transp. Co. v. Hathaway, Iowa, 12 N.W.2d 167, 149 A.L.R. 1238; Markham & Callow, Inc. v. International Woodworkers, 170 Or. 517, 135 P.2d 727; Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 48 N. E.2d 1; Retail Clerks' Union v. Wisconsin Emp. Rel. Board, 242 Wis. 21, 6 N.W.2d 698, 149 A.L.R. 452; Wisconsin Employment Relations Board v. Milk & Ice Cream D. & D. E. Union, 238 Wis. 379, 299 N.W. 31, certiorari denied 316 U.S. 668, 62 S.Ct. 1035, 86 L.Ed. 1744; Opera on Tour v. Weber, 285 N.Y. 348, 34 N.E.2d 349, 136 A.L.R. 267, certiorari denied 314 U.S. 716, 62 S.Ct. 477, 86 L.Ed. 570; Restatement, Torts, §§ 775, 784 et seq.; 31 Am.Jur. 934-5, 948-9; (1943) 41 Mich.L.Rev. 1143–1164; 90 U. of Pa.L.Rev. 227, 209.)

[3, 4] Although recent decisions in the United States Supreme Court hold that a state cannot deprive labor unions of the right of free speech through peaceful picketing (see Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; Cafeteria Employees Union v. Angelos, 1943, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58), these decisions do not deny a state the power to protect against abuses of the right. In two recent cases the court upheld the state's power to limit peaceful picketing both as to place and as to the economic relationship of the industry picketed (Allen Bradley Local No. 1111 v. Wisconsin E. R. Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154; Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143), and in Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200, a state court injunction restraining peaceful picketing was sustained where there was danger of continued violence. In Dorchy v. Kansas, 272 U.S. 306 at page 311, 47 S.Ct. 86 at page 87, 71 L.Ed. 248, Mr. Justice Brandeis, speaking for the court, stated: "But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose." The Dorchy case has never been overruled and it has been cited with approval in two of the free speech decisions. Thornhill v. Alabama, supra, 310 U.S. 88, at pages 103, 104, 60 S.Ct. at pages 744, 745, 84 L.Ed. 1093; Carpenters & Joiners Union v. Ritter's Cafe, supra, 315 U.S. 722, at page 725, 62 S.Ct. at page 808, 86 L.Ed. 1143. Also in Senn v. Tile Layers Protective Union, 301 U.S. 468, at page 481, 57 S.Ct. 857, at page 863, 81 L.Ed. 1229, the leading case associating picketing with the right of free speech, the court, while affirming the action of a state court in refusing to enjoin picketing to compel Senn to stop working with his own hands, stated: "Whether it was wise for the state to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it." Thus a state may impose limitations upon picketing or other concerted action if the "end sought" is not permissible under state law and public policy, though any such limitations are subject to review by the United States Supreme Court, and will be annulled if they unreasonably interfere with labor's right to publicize the facts of a labor dispute.

[5] The fundamental question in this case is whether a closed union coupled with a closed shop is a legitimate objective of organized labor. The defendants contend in effect that a union may, for any arbitrary reason whatsoever, entirely close its membership to otherwise qualified persons and at the same time may, by enforcing a closed shop contract, demand union membership as a condition to the right to work. To support this contention they argue, first, that a closed shop is lawful in California,

and, second, that private, voluntary associations such as labor unions have always had the right to limit membership to persons mutually acceptable. The first proposition, the legality of a closed shop agreement in California, is conceded by plaintiff, and this court has held that a union may use economic pressure to enforce a demand therefor even though the employees in the picketed shop do not belong to the union and have no dispute with their employer. McKay v. Retail Auto. S. L. Union No. 1067, supra, 16 Cal.2d 311, 106 P.2d 373; Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403; C. S. Smith Metropolitan Market Co. v. Lyons, supra, 16 Cal.2d 389, 106 P.2d 414; cf. J. F. Parkinson Co. v. Building Trades Council, supra, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165. It does not follow, however, that a union may maintain both a closed shop agreement or other form of labor monopoly together with a closed or partially closed membership. We have found no case in this state that supports such a right and there is no decision of the United States Supreme Court that compels its recognition as a proper labor objective. The case of Greenwood v. Building Trades Council, 71 Cal.App. 159, 233 P. 823, cited by defendants, involved a dispute between rival local unions, one of which sought to compel its reinstatement as member of a building trades council, an organization composed of a number of local unions. The court refused to compel reinstatement of the excluded local and, further, refused to restrain the building trades council from calling strikes in shops employing members of such local. The decision on its facts does not involve the right of any individual to become a member of either the building trades council or its member locals, and there is nothing to indicate that any individual applicants were denied membership by such locals.

[6] In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living. See Newman, The Closed Union and the Right to Work (1943), 43 Col.L.Rev. 42, 44; Northrup, Organized Labor and the Negro (1944), 238–239; Chaffee, The Internal Affairs of Associations (1930), 43 Harv.L. Rev. 993, 1021–1023; Mintz, Trade Union Abuses (1932), 6 St. John's L.Rev. 272, 274–276; (1941) 40 Mich.L.Rev. 310.

In Wilson v. Newspaper & Mail Deliverers' Union, 1938, 123 N.J.Eq. 347, 197 A. 720, plaintiff's employer entered into a contract with the defendant union for a closed shop. Plaintiff and other nonunion employees applied for union membership but were rejected. Thereafter the union notified the employer that it was breaking its contract by hiring plaintiff. The court, in issuing an injunction, held that the union could either restrict its membership at pleasure or contract with employers that all work shall be given to its members, but that it could not do both. At page 722 of 197 A. the court said that: "* * * monopolistic, closed shop contracts of an exclusive, restricted-membership union, are counter to our policy; the restriction of membership extends the effect of such contracts beyond the reasonable protection of the members." The court also said that the union had created a monopoly of employment, and that a "monopoly raises duties which may be enforced against the possessors of the monopoly. This has been recognized from the earliest times. The rule that one who pursued a common calling was obliged to serve all comers on reasonable terms, seems to have been based on the fact that innkeepers, carriers, farriers, and the like, were few, and each had a virtual monopoly in his neighborhood. 17 Harv.Law R. 156. A monopoly is under a common-law duty to charge only reasonable rates. * * * The question presented in the instant case is not one of prices or of serving the public but one of employment * * *. However, the principle is the same; the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. The nature of the monopoly determines the nature of the duty. Everyone must be left free to pursue his lawful calling; that is fundamental. It seems to me necessarily to follow that the union must either surrender its monopoly or else admit to membership all qualified persons

* * *. Otherwise such persons are, by the act of the union, deprived of the right to earn a livelihood."

In Dorrington v. Manning, 1939, 135 Pa. Super. 194, 4 A.2d 886, the defendant union secured a closed shop agreement and, at about the same time, rejected membership applications of plaintiffs, employees in the shop. Thereafter the union caused the discharge of plaintiffs by calling a strike. The trial court enjoined the union from preventing plaintiffs' reinstatement as employees, and upon appeal the order was affirmed, the court holding that "defendants' conduct, with no apparent lawful purpose, constituted a malicious and unlawful interference with plaintiffs' employment." At page 892 of 4 A.2d. In Carroll v. Local No. 269, 1943, 133 N.J.Eq. 144, 31 A.2d 223, 225, the court said: "It has been held in this state that although a monopoly of labor opportunity is a permissible objective and realization of a union, unions obtaining such monopolies must be democratic and admit to their membership all those reasonably qualified for their trade. * * * Otherwise such persons by the act of the union would be deprived of their constitutional right to earn a livelihood. A voluntary union should be one in which a law-abiding individual of good moral character, possessing the essential qualification of his trade, can enter upon compliance with rules and by-laws reasonably appropriate for the stability and usefulness of the association. Autocracy is no less inimical to our American ideals if practiced by many rather than by one. Since 1890 we have regarded labor unions as voluntary associations. Let them in reality continue to be such. If the union can force a closed shop upon all, or almost all, of the employers of an industry or area, the right to employment will depend upon union membership; and if union membership be refused the workman, he is more totally excluded from the opportunity to labor than he was before union recognition."

The Restatement, Torts, section 810, states: "Workers who in concert procure the dismissal of an employee because he is not a member of a labor union satisfactory to the workers are * * * liable to the employee if, but only if, he desires to be a member of the labor union but membership is not open to him on reasonable terms." Many other authorities have disapproved a closed shop coupled with an arbitrarily closed union. See Schwab v. Moving Picture Mach. Operators Local No. 159, 1941, 165 Or. 602, 109 P.2d 600; Lucke v. Clothing Cutters' & T. Assembly No. 7507, K. of L., 77 Md. 396, 26 A. 505, 19 L.R.A. 408, 39 Am.St.Rep. 421; Wills v. Local No. 106, 26 Ohio N.P.,N.S., 435; Shinsky v. O'Neil, 232 Mass. 99, 121 N.E. 790, 792; Brown v. Lehman, 1940, 141 Pa.Super. 467, 15 A.2d 513, 517; 1 Teller, Labor Disputes and Collective Bargaining (1940), § 99, pp. 284, 285; Newman, The Closed Union and the Right to Work (1943), 43 Col.L.Rev. 42; Despres, The Collective Agreement for the Union Shop (1939), 7 U. of Chicago L.Rev. 24, 34, 35; Fraenkel, One Hundred and Fifty Years of the Bill of Rights (1939), 23 Minn.L.Rev. 718, 767; Witmer, Collective Labor Agreements (1938), 48 Yale L.J. 195, 219; (1941) 40 Mich.L.Rev. 310; (1940) 49 Yale L.J. 754, 760.

In Walter v. McCarvel, 1941, 309 Mass. 260, 34 N.E.2d 677, an action was dismissed where plaintiff sought to enjoin the defendant union from attempting to enforce a closed shop provision or, in the alternative, to require the union to admit plaintiff to membership, the court holding that these facts alone were not sufficient to show a plan by the union to obtain a monopoly over the labor market. In the present case, however, it is clear that the International Brotherhood, together with its locals, does have a monopoly by virtue of its "Master Agreement" signed by practically every Pacific Coast shipyard. We need not determine at this time, therefore, whether or not a court can properly prohibit a union's efforts to enforce discriminatory or arbitrary rules for admission if the union does not hold a labor monopoly in the locality. It should be noted, however, that some states, by statute, have declared all labor unions to be affected with a public interest and thus subject to regulation. Ala.Gen.Acts 1943, p. 252, Code 1940, Tit. 26, § 376 et seq.; Laws of Florida 1943, c. 21968, p. 565, F.S.A. § 481.01 et seq.; Texas Gen. Laws 1943, p. 180, Vernon's Ann.Civ.St. art. 5154a et seq.; see, also, tit. 43 P.S.Pa. § 211.6(1) (c); and Laws of Wis.1939, ch. 57, § 111.06(1) (c), restricting closed shop agreements where a union unreasonably refuses to admit workers already employed at the time the agreement was made. In New York it is a misdemeanor for *any* labor organization to deny membership or equal treatment to any person because of race, color or creed. N.Y.Civ. Rights Law, Consol.Laws, c. 6, § 43, Laws 1940, c. 9, § 1; (1940) 53 Harv.L.Rev.

1215; cf. Laws of Kan.1941, c. 265; tit. 43, P.S.Pa. § 211.3(f). The New York statute has been held constitutional and applicable to an association of railway postal clerks employed in the "United States Railway Mail Service." Railway Mail Ass'n v. Corsi, 1944, 293 N.Y. 315, 56 N.E.2d 721.

Some courts have held that state legislation is necessary in order to announce a public policy restricting a union's right to arbitrarily exclude individuals from membership although as a result thereof excluded persons are unable to find employment in their chosen trade. See, for example, Miller v. Ruehl, 166 Misc. 479, 2 N.Y.S.2d 394; Murphy v. Higgins, 12 N.Y.S.2d 913. As said hereinbefore, however, other authorities have indicated that the courts, without statutory aid, may restrain such conduct by a union on the ground that it is tortious and contrary to public policy. Further, as said in 4 Restatement, Torts, page 136, comment to section 794: "The expression of public policy is not confined to legislation and criminal law; in passing upon the propriety of an object [of concerted labor action], public policy otherwise defined is an important factor. If the object is an act against which the law has definitely set its face, it is not a proper object of concerted action."

[7] Although the shipbuilding industry may affect interstate commerce and therefore may be subject to the provisions of the National Labor Relations Act, 49 Stats. 449, 29 U.S.C.A. §§ 151–166, there is nothing in the act that gives the defendant unions a right to maintain a closed or partially closed membership together with a closed shop agreement. To the contrary, a reasonable interpretation of the statute, together with its underlying policy, would seem to require that unions chosen to represent the employees must be open to all who wish to join. Section 9(a) of the act, 49 Stats. 453, 29 U.S.C.A. § 159(a), provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit * * *." It is difficult to see how a union can fairly represent *all* the employees of a bargaining unit unless it is willing to admit all to membership, giving them the opportunity to vote for union leaders and to participate in determining union policies. Although no case so construing the National Labor Relations Act has been found, the National Labor Relations Board has declared: "We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race. Such bargaining might have consequences at variance with the purposes of the Act. If such a representative should enter into a contract requiring membership in the union as a condition of employment, the contract, if legal, might have the effect of subjecting those in the excluded group, who are properly part of the bargaining unit, to loss of employment solely on the basis of an arbitrary and discriminatory denial to them of the privilege of union membership. In these circumstances, the validity under the proviso of section 8(3) of the act of such a contract would be open to serious question." Matter of Bethlehem-Alameda Shipyard Inc., Cases Nos. R.5693-4, 53 N.L.R.B. 999, 1016. To this may be added the observation of a congressional committee: "A few trade unions exclude qualified persons from membership by high initiation fees or other devices. This policy is condemned by the most important unions and is prohibited by their rules. The evidence presented to the commission shows clearly that the policy of exclusion is antisocial and monopolistic and should be given up by those unions which practice it." 1 Comm. on Industrial Relations, Final Report, Sen.Doc.No. 415, 64th Cong., 1st Sess. (1916) 116.

The United States Supreme Court has recently held that a union designated as bargaining agent by a majority of a craft or class of employees under the Railway Labor Act has a duty to exercise fairly, impartially, and without discrimination because of race, the powers conferred upon it by the act. Steele v. Louisville & Nashville, R. R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187. The court held, specifically, that in collective bargaining and in making contracts, the statute required the union to represent Negroes, who were not eligible to union membership, without hostility and in good faith. The provisions of the Railway Labor Act and the National Labor Relations Act, insofar as pertinent here, are very similar. Cf. 45 U.S.C.A. § 151 et seq., with 29 U.S.C.A.

§ 151 et seq. Although the court pointed out in the Steele case [323 U.S. 204, 65 S. Ct. 233] that the statute did "not deny to such a bargaining labor organization the right to determine eligibility to its membership," the right of the union to exclude persons because of race was not passed upon.

[8] Defendants argue that a union should not be compelled to admit all persons to membership, because some of such persons may have interests inimical to the union and may destroy it from within. The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union (Brown v. Lehman, 1940, 141 Pa. Super. 467, 15 A.2d 513, supra; see Rest. Torts, comment b to § 810) affords it an effective remedy against such persons.

[9-11] We come now to the question whether the present record discloses such discrimination against Negroes as to bring the case within the scope of the rules discussed above. It is admitted that Negroes are excluded from membership in the union, that is, they cannot become members of Local No. 6. In order to work, however, they must join the Negro auxiliary, thereby accepting and consenting to be bound by the "By-Laws Governing Auxiliary Lodges." The defendants argue that this is merely segregation of members and not a denial of membership. But if the union imposes unreasonable and discriminatory restrictions upon Negroes not placed upon members of Local No. 6, and if the auxiliary does not afford its members privileges and protection substantially equal to that afforded to the members of Local No. 6, then to compel the Negroes to join the auxiliary, upon penalty of discharge, is the equivalent of a complete denial of union membership. If a union may not directly exclude certain workers, it may not do so indirectly by prescribing intolerable or unfair conditions of membership for such persons. See Cameron v. International Alliance of Theatrical Stage Employees, 1935, 118 N.J.Eq. 11, 176 A. 692, at page 701, 97 A.L.R. 594, where the court, in holding that an arbitrary classification of union members was contrary to public policy, said: "It is true that the juniors were not obliged to accept the status thus accorded them by the union, but it is equally true that membership in such a body, whatever its form, cannot be conditioned upon the surrender of the member's individual constitutional rights when that would not subserve the public interest. And there is, unquestionably, the suggestion of coercion here. Nonmembership would impose a penalty, however lawful, that the juniors were seeking to avoid." Upon an examination of the record it becomes readily apparent that the membership offered to Negroes is discriminatory and unequal.

First, as alleged in the complaint, Local No. 6 "controls, manages and supervises all of the affairs and business of Auxiliary A-41." Non-Negro locals are expressly declared in the by-laws to be the "supervising" lodges. The auxiliary, however, has no voice nor vote in the affairs of Local No. 6. The Negroes are thus deprived of the right to participate in the determination of vital union policies and, as alleged, the auxiliary has no "authority or autonomy with respect to its own affairs."

Second, the auxiliary is not allowed a business agent to act for its members, but must seek representation through the business agents of Local No. 6. It is also without a grievance committee to redress complaints with its employers, although under the by-laws it may have a representative on the committee of the supervising lodge. Thus, although the white workers may choose those whom they wish to represent them, the Negroes are denied the right. Contrary to the ordinary principles of the law of agency, the auxiliary does not have the undivided loyalty of its representatives, and were grievances arise in which whites and Negroes have different interests, it is clear that the Negroes will not be adequately represented and the opportunity for discrimination is obvious. It is asserted by defendants that the business agents or grievance committee chosen by Local No. 6 will act for the Negroes and does act for them without favoritism. This is vigorously denied by plaintiff, but, in any event, is entirely beside the point. The important fact is that the Negroes have no right to compel them to act. Defendant union further seeks to justify the inequality upon the ground that Negroes are a minority group. While it is true that a minority may properly be outvoted, minority members are nevertheless entitled to vote and participate in the affairs of the whole group, and certainly they cannot be forced into a nonparticipating, isolated unit. It is urged by defendants that at the present time Negroes are employed under the same hours, wages and other working conditions as non-Negro employees. But one of the

vital purposes of a labor union is to maintain the *continuance* of favorable conditions,—to assure some security as to future employment practices; and, under the union regulations discussed above, the auxiliary is deprived of the customary union machinery essential to watch over and check at the outset future grievances and unequal changes in working conditions fostered by either the employer or the members of the non-Negro local. This is a serious and present discrimination against Negroes, certain to become an even greater handicap when temporary war employment ceases and shipyard jobs become more scarce. Moreover, the important issue between plaintiff and the defendant union is that of discrimination against him as a *union member*. As said in Cameron v. International Alliance of Theatrical Stage Employees, 1935, supra, 118 N.J.Eq. 11, 176 A. 692, at page 701, 97 A.L.R. 594, (holding void and contrary to public policy a union membership contract which arbitrarily discriminated between "junior" and "senior" members): "And it does not matter that, at the moment, the junior members have not, in fact, suffered an impairment of earning power by reason of the enforcement of this contract. If it tends to the public injury, it should be annulled without regard to whether public injury had in fact resulted."

Third, the members of Auxiliary A-41 are dispatched to employment only through the agency of Local No. 6, and cannot obtain a change of classification of their work, that is, promotions from helper (beginner) to journeyman (skilled craftsman) without the approval of the non-Negro local. The colored local thus has no right to control the job status of its own members, and the white workers are assured first chance at the better, more highly paid work.

Fourth, the regular union has a permanent status which the Negro local has not. It appears from the "By-laws Governing Auxiliary Lodges" that auxiliaries may be dissolved, apparently at will, by the International Brotherhood. In the case of non-Negro locals, however, it is provided that the International Brotherhood may revoke the charter of a lodge "which shall have been proven guilty of violation of this Constitution." Thus, although no such power is given over non-Negro locals, the International Brotherhood may at any time dissolve the Negro auxiliaries, destroying their right to employment together with any rights attained through past union membership. As plaintiff points out, this will place Negroes at a great disadvantage with respect to security of employment should shipyard jobs become scarce. Also, upon dissolution, all funds of the auxiliary (accumulated from fees, dues, and "taxes") must be turned in to the International Brotherhood.

The foregoing illustrations drawn from the complaint and the union rules clearly establish substantial discrimination against Negro workers who accept membership in the auxiliary local. Since they are denied union membership on terms of equality with other workers, the case is the same as if they were wholly denied the privilege of membership.

[12] The discriminatory practices involved in this case are, moreover, contrary to the public policy of the United States and this state. The United States Constitution has long prohibited governmental action discriminating against persons because of race or color. 5th, 14th, and 15th Amendments. It has recently been held that these provisions prohibit a political party from denying Negroes the right to vote in primary elections where, under state law, the political party is acting as an agency of the state in conducting the elections. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110. And in Steele v. Louisville & Nashville R. R. Co., supra, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, the court held that the Railway Labor Act clothed the bargaining representative selected by employees with a power which, like that of the Legislature, is subject to limitations, and that, therefore, such representative could not be permitted to discriminate against a minority group of employees because of race.

[13, 14] Although the constitutional provisions have been said to apply to state action rather than to private action, they nevertheless evidence a definite national policy against discrimination because of race or color. Defendants contend that "individual invasion of individual rights" can be prohibited only by a statute of the state, and they point out that California statutes forbidding racial discrimination by private persons relate only to certain specifically enumerated businesses such as inns, restaurants, and the like, but not to labor unions. Civ.Code, §§ 51, 52. It has been said, however, that such statutes, to the extent that they embrace public service businesses, are merely declaratory of the common law. See

10 Am.Jur. 913-914; Ferguson v. Gies, 82 Mich. 358, 46 N.W. 718, 720, 9 L.R.A. 589, 21 Am.St.Rep. 576; cf. People v. King, 110 N.Y. 418, 18 N.E. 245, 248, 1 L.R.A. 293, 6 Am.St.Rep. 389. It was well established at common law that innkeepers and common carriers were under a duty to furnish accommodations to all persons, in absence of some reasonable ground (see 52 L.R.A. [N.Y.] 740; 43 Am.Jur. 586-587), and if colored persons are furnished separate accommodations they must be equally safe, commodious and comfortable. See Chicago & Northwestern R. R. Co. v. Williams, 55 Ill. 185, 189, 8 Am.Rep. 641; Chiles v. Chesapeake & O. Ry. Co., 125 Ky. 299, 101 S.W. 386, 387, 388, 11 L.R.A.,N.S., 268, affirmed 218 U.S. 71, 30 S.Ct. 667, 54 L.Ed. 936; People v. King, 18 N.E., supra, at page 248, 1 L.R.A. 293, 6 Am.St.Rep. 389; 14 C.J.S., Civil Rights, § 11, pp. 1170, 1171; cf. Pleasants v. North Beach & M. R. R. Co., 34 Cal. 586. The analogy of the public service cases not only demonstrates a public policy against racial discrimination but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved.

[15, 16] Where, as here, a labor union has attained a monopoly of the labor supply through closed shop agreements, such a union, like a public service business, may not unreasonably discriminate against Negro workers for the sole reason that they are colored persons. Use of economic pressure, by a union that does not admit Negroes, to compel the discharge of Negro employees may be enjoined. Wills v. Local 106, 26 Ohio N.P.,N.S., 435, supra. In the Wills case the court said at page 438 of 26 Ohio N.P.,N.S.: "The ideal of all union efforts is and must be the improvement of the social and economic condition of those who work * * *. This boycott does not appeal to this court of equity as conforming to this standard. In its last analysis it is a case of white men opposing colored men."

In addition to these persuasive analogies, we have an express statement of national policy in Executive Order No. 9346 of the President of the United States, issued on May 27, 1943. This order declares that it is the policy of the United States to encourage full participation in the war effort of all persons regardless of race, creed, color, or national origin, that there should be no discrimination in the employment of any person in war industries because of such, and that it is the duty of all employers and all labor organizations to eliminate discrimination in regard to terms and conditions of employment or union membership because of race, creed, color, or national origin.

Defendants cite Teague v. Brotherhood of Locomotive Firemen & Enginemen, 6 Cir., 127 F.2d 53, and James v. International Brotherhood of Boilermakers, D.C., 54 F.Supp. 94. The Teague case, however, is directly in conflict with Steele v. Louisville & Nashville R. R. Co., supra, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, and Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, supra, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187, and is, in effect, overruled thereby. James v. International Brotherhood of Boilermakers, supra, did not discuss the problems considered herein and, further, relied upon the Teague case. Defendants refer to certain language in National Federation of Railway Workers v. National Mediation Board, 71 App.D.C. 266, 110 F.2d 529, certiorari denied, 310 U.S. 628, 60 S.Ct. 975, 84 L.Ed. 1399, but this was rested upon the authority of Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680, which has since been expressly overruled in Smith v. Allwright, supra, 321 U.S. 649, 64 S.Ct. 757, at page 766, 88 L.Ed. 987, 151 A.L.R. 1110.

We have also considered the point advanced by plaintiff that the practice of the defendant union in demanding full payment of so-called union dues from the Negro workers as a condition to their obtaining employment, without giving them in return the full benefits of union membership, is a violation of the federal "kickback" act. 40 U.S.C.A. § 276b; see United States v. Laudani, 320 U.S. 543, 64 S.Ct. 315, 88 L.Ed. 300, 149 A.L.R. 492. Since the judgment below may be affirmed on other sufficient grounds, we find it unnecessary to decide this question.

[17-19] Defendant Marinship contends that it should not have been enjoined at all, urging that because of the National Labor Relations Act it is bound to enforce the closed shop agreement and may not look behind a notice from the union that a particular employee is not a member in good standing. Marinship, however, has full knowledge of the controversy between the union and the Negro employees, and its action in complying with the union's demands has at least indirectly assisted the union in

carrying out its discrimination against plaintiff. As in any other case where a third person knowingly assists in the commission of a prohibited act, Marinship's conduct may be enjoined in order to make effective the injunction against Local No. 6, the principal defendant herein. Marinship is not, of course, to be subjected to any penalty for its enforcement of the closed shop agreement. The order does not require Marinship to interfere with the administration of internal affairs of the union, and ordinarily, in absence of judicial proceedings, it need not look behind the notice from the union that a particular employee is not a member in good standing. The employer is protected by the defense of operation of law in any union charge of violation of the closed shop agreement.

[20, 21] Equally unavailing is the contention of the union that the action should not proceed because it involves the validity of by-laws and other regulations of the International Brotherhood, which apparently has not been served with process and against which the injunction is not directed. The trial court, however, did not purport to annul any rules of the International Brotherhood,—it simply enjoined certain conduct by Local No. 6 and the other defendants who are within the jurisdiction. The fact that such conduct might have been committed in accordance with the regulations of an association that may be beyond the jurisdiction of the court cannot deprive the court of power to prevent the continuance of wrongful acts by those agents or affiliates that are within the jurisdiction. The effect of defendants' argument is that a person may escape liability for a wrongful act on the ground that he acted under direction of an absent principal. The true rule is, of course, that the agent is liable for his own act, regardless of whether the principal is liable or amenable to judicial action.

[22, 23] Defendants contend that a state court has no jurisdiction over a labor controversy in the shipbuilding industry and cannot enjoin enforcement of the closed shop agreement because, they say, shipbuilding affects interstate commerce and exclusive jurisdiction over labor disputes arising therein lies in the National Labor Relations Board. They urge that under the National Labor Relations Act the board is empowered to issue "cease and desist" orders and that the power is exclusive. Section 160(a) of 29 U.S.C.A. provides, in part: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (*listed in section 158*) affecting commerce. This power shall be exclusive * * *." (Italics added.) Section 158, however, embraces only such unfair labor practices as are committed *by employers*. There is no reference to acts of employees or members of labor unions, and the board is not given jurisdiction to prevent such acts. See 2 Teller, Labor Disputes and Collective Bargaining (1940) 695. The dispute involved in this case is essentially between the members of a labor union and certain individual workers. The employer is made a party solely in order to render effective any order issued with respect to the union defendants, and there is no charge that the employer has committed an "unfair labor practice" within the meaning of section 158. The board is also given jurisdiction to certify the representatives of the employees selected for purposes of collective bargaining and to investigate any controversy with respect to who are the proper representatives (29 U.S.C.A. § 159), but it is not disputed in this case that Local No. 6 is the bargaining agent authorized by the employees to enter into collective agreements with Marinship.

[24] The federal act does not deprive a state of power to prevent unlawful conduct by labor unions where, as here, such conduct is not authorized or protected by the act. In Allen-Bradley Local No. 1111 v. Wisconsin E. R. Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154, it was held that a state could properly prevent mass picketing and picketing of employees' homes even though the employer involved was subject to the federal act, the court saying, at page 749 of 315 U.S., at page 825 of 62 S.Ct., 86 L.Ed. 1154: "Congress has not made such employee and union conduct as is involved in this case subject to regulation by the federal Board," and, 315 U.S. at page 750, 62 S.Ct. at page 826, 86 L.Ed. 1154: "Congress designedly left open an area for state control." (See, also, Christoffel v. Wisconsin Employment R. Board, 243 Wis. 332, 10 N.W.2d 197, certiorari denied, 320 U.S. 776, 64 S.Ct. 90, 88 L.Ed. 466.

[25] There is no merit to defendants' contention that exercise of jurisdiction by a state court would violate the War Labor Disputes Act or invade the jurisdiction given thereby to the National War Labor Board. Section 1507(a) (1) of 50 U.S.C.A. Appendix, 57 Stats. 166, provides that the

War Labor Board may conduct a hearing whenever "the United States Conciliation Service * * * certifies that a labor dispute exists which may lead to substantial interference with the war effort * * *. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war effort, the Board may take such action on its own motion." There is nothing in the record to show that either the Conciliation Service or the board has determined that this controversy may lead to substantial interference with the war effort. Further, there is nothing in the War Labor Disputes Act which would prevent a state from enjoining wrongful conduct although such conduct might lead to interruption of the war effort, at least in cases over which the War Labor Board has not assumed jurisdiction.

[26] Defendants contend that plaintiff has failed to exhaust an available administrative remedy provided by Executive Order No. 9346 of the President of the United States creating the Fair Employment Practice Committee and authorizing it to "receive and investigate complaints of discrimination forbidden by this Order * * * and take appropriate steps to obtain elimination of such discrimination." The remedy afforded by the Fair Employment Practice Committee, however, is not such a complete and adequate administrative remedy as is contemplated by the rule invoked. A recent bulletin issued by the committee entitled "FEPC: How it Operates" clearly sets forth the limited nature of its authority. (Reported in 14 L.R.R. 724, August 7, 1944.) The parties are entitled to no hearings, and hearings are held "only after the members of the Committee have agreed upon such action. * * * The Committee may request the party charged to present material, but it has no power to subpoena witnesses or records." It apparently has no direct means of enforcing its orders: "Should the Committee's directives be defied, such violation can be referred to the proper contracting agency. * * * Ultimately noncompliance is certified to the President of the United States. The Committee can also bring such cases of noncompliance to the attention of the Chairman of the War Manpower Commission." Thus the committee is an advisory body created by an executive order under the wartime powers of the President, and it was not intended that this committee should supplant the ordinary remedies afforded by the courts.

[27, 28] Defendants urge that Local No. 6 should not have been directly ordered to admit plaintiff as a member. In accordance with the principles discussed above, the union may not maintain *both* a closed shop and an arbitrarily closed or partially closed union. Negroes must be admitted to membership under the same terms and conditions applicable to non-Negroes unless the union and the employer refrain from enforcing the closed shop agreement against them. See Wilson v. Newspaper & Mail Deliverers' Union, 123 N.J.Eq. 347, 197 A. 720, supra. The order of the trial court, when read as a whole, may be interpreted as allowing this alternative. Under the circumstances of this case, it is unnecessary to determine whether or not the union, in absence of a closed shop agreement, would be required to open its doors to all qualified employees.

[29] The injunction, contrary to defendants' contention, is not so broad as to give Negroes any greater right to membership than that extended to other persons; it was clearly intended to do no more than eliminate discrimination upon the basis of race and color alone.

There is no necessity to require plaintiff and the other Negroes to pay union dues into court to be impounded pending the outcome of the action.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

25 Cal.2d 746

BAUTISTA et al. v. JONES et al.

L. A. 18437.

Supreme Court of California.

Dec. 30, 1944.

Rehearing Denied Jan. 29, 1945.

1. Contracts ⇐116(1)
Torts ⇐10

A labor union cannot maintain an arbitrarily closed union and a closed shop agreement with employer, and it cannot use economic pressure to compel discharge of worker for lack of union membership when it arbitrarily excludes them from membership.

2. Injunction ⇐101(1)

If the object of a labor union is reasonably related to the legitimate interests of labor, and the means employed are proper, the union cannot be enjoined from using concerted action to enforce its demands.

3. Constitutional law ⇐88, 275(1)

The right to work, either in employment or independent business, is fundamental and enjoys the protection of the personal liberty guarantee of the Fourteenth Amendment and of State Constitution. Const.Cal. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14.

4. Constitutional law ⇐88, 275(1)

The right to work, either in employment or independent business, is not absolute, but it is safeguarded from legislative action which discriminates against a person or class of persons in respect of opportunities to obtain work or enter into business and it is also protected in some degree against arbitrary action by private organizations including employers and labor unions. Const.Cal. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14.

5. Constitutional law ⇐88, 275(1)

The right to work is subject to legislative restrictions such as statutory limitations on working hours, minimum wage, age limits for employment, licensing acts, safety regulations, and the like. Const.Cal. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14.

6. Constitutional law ⇐88, 275(1)

The right to work is subject to peaceful, economic pressure by labor organizations, seeking legitimate ends, such as conditions of work, collective rather than individual bargaining, seniority privileges, and other methods of advancement and the union or closed shop.

7. Torts ⇐10

The businessman-worker operating in an industry or field in which he competes with organized workmen may be subject to the same means of persuasion as any other workman to join the union and conform to conditions regulating union labor.

8. Torts ⇐12

The businessmen-workers, operating without aid of employees, constitute a minority group, whose activities are not fundamentally inimical to public interest or to the special interests of organized labor and the elimination of such persons from economic life is not a legitimate object of union activity, and any union which exerts economic pressure to obtain discharge of businessman-worker as such, and at the same time excludes him from union membership on that ground alone, transcends the bounds of legitimate union activity.

9. Contracts ⇐116(1)
Trade unions ⇐4

A union of milk-wagon drivers may impose reasonable requirements for membership, and, if regulations adopted are proper, independent peddler-distributor of milk must comply therewith or relinquish his favored position in order to avoid union pressure, but, if the peddler meets the conditions imposed, the union must accept him for membership or give up its demand for a closed shop.

10. Injunction ⇐101(1)

Where milk-wagon drivers' union had union shop contracts with milk wholesalers, but union excluded from membership independent peddler-distributors who operated without employees, purchased milk products from wholesalers, and made distribution to retail dealers, the union was properly enjoined from coercing or preventing the wholesalers from supplying the peddler-distributors with milk and milk products. Const.Cal. art. 1, §§ 1, 13; U.S.C.A.Const. Amend. 14.

11. Injunction ⇐189, 210

Where milk-wagon drivers' union, which had union shop contract with milk wholesalers, excluded independent peddler-distributors from membership, injunction restraining union from preventing independent peddler-distributors from obtaining

milk in any manner or by any means was not objectionable as being too broad, but was directed to condition existing at the time of the decree and, if relationship of parties was altered in such a manner as to justify modification or vacation of decree, an application could be made therefor.

SCHAUER, CARTER, and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Javier Bautista and others against Paul Jones and others to enjoin defendants from coercing or preventing milk companies from supplying plaintiffs with milk or milk products. From an order awarding a permanent injunction, the defendants appeal.

Affirmed.

Prior opinion of District Court of Appeal 131 P.2d 579.

V. P. Lucas, of Los Angeles, for appellants.

Ben Van Tress and James R. Jaffray, both of Los Angeles, for respondents.

GIBSON, Chief Justice.

Plaintiffs brought this action to enjoin defendants from coercing or preventing milk companies from supplying plaintiffs with milk or milk products. By stipulation the case was submitted on the pleadings and affidavits filed by the parties. Defendants have appealed from an order of the trial court awarding a permanent injunction.

Plaintiffs, Bautista and Macias, residents of California, were jointly engaged in the business of distributing milk and milk products to retail dealers in Los Angeles County for the past seven or eight years. They purchased their milk and milk products from brokers or wholesalers and distributed it in automobile trucks which they owned and operated themselves. They employed no other persons and had no need for employees. They invested considerable sums of money for equipment and built up a business and a good will, realizing substantial yearly profits.

The defendant Milk Drivers and Dairy Employees Union, Local 93, is an unincorporated labor organization. It admits to membership "milk-wagon drivers, helpers and workers generally who are citizens of the United States." Defendant Paul Jones is the business agent and secretary-treasurer of Local No. 93. The union has "union shop" contracts with about ninety-five per cent of the milk brokers in Los Angeles County, and, according to the affidavit of the secretary-treasurer of the union, the companies signing the agreement have agreed that they will employ only union members in good standing. Thus, in practically the entire locality no one but union members may work *as employees*. The agreement also provides that the employers will not sell dairy products to any distributor unless he observes the same conditions of employment required of the employers.

The defendant union, having so organized the milk industry, proposed to plaintiffs that they employ members of Local No. 93 to drive their trucks. Plaintiffs declined to do so, but thereupon filed applications for admission to union membership. The applications were rejected by the union *"on the ground that plaintiffs were independent peddler distributors."* No other ground of rejection was mentioned.

Thereafter the union sent to each of the milk brokers with whom it had contracts the following communication: "Dear Sir: For some time Local Union #93 has been confronted with the problem of the independent peddler distributors who have been from time to time taking business from the legitimate wage earners who are members of Local #93. At a regular meeting of Local #93 on October 23rd, there were a number of applications for membership filed by the independent peddler distributors which were discussed at some length by the members present at that meeting, after which they were rejected. The officers of Local #93 were instructed to see that the employers who held agreements with Local #93 comply with Paragraph 22 of our agreement on or before November 30, 1941. As these men are not members of the Union and the membership does not see fit to admit them to Union membership, it seems there is only one way left, and that is to discontinue selling to these independent peddler distributors. Hoping you will cooperate in cleaning up this matter, Very truly yours, Paul D. Jones, Sec'y Treas."

The trial court found that by the above notice and by oral statements the union demanded that the brokers cease delivering

milk or milk products to plaintiffs, among other independent distributors, and that the brokers understood the notice to mean that if they continued to supply plaintiffs, the union would "apply economic pressure to enforce such request and demand by means of strike, picketing and boycott."

The court further found: "That the purpose of said Local No. 93 and its agents was to prevent the plaintiffs from obtaining any milk or milk products with which to carry on their independent business of milk distributing to their retail customers, and *thereby to compel plaintiffs to employ as drivers of their trucks members of said Local No. 93, and to discontinue driving their own trucks and doing their own work of conducting their business with their own hands.*" (Italics added.)

The brokers complied with the demands of the union, and plaintiffs, thus prevented from obtaining any milk or milk products, were compelled to discontinue their business. They brought this action for injunctive relief.

The trial court, concluding that the purpose of the union was unlawful and not reasonably related to legitimate activities of labor organizations, permanently enjoined the union and its agents and members from preventing plaintiffs from obtaining milk or milk products and from coercing brokers to refrain from selling such to plaintiffs. Defendants Local No. 93 and Paul Jones have appealed from the judgment, contending that the activities of the union, as found by the trial court, were not unlawful.

[1, 2] The case of James v. Marinship Corp., Cal.Sup., 155 P.2d 329, furnishes the starting point for the consideration of the special problems presented herein. We held in that case that a union cannot maintain an arbitrarily closed union and a closed shop, and that therefore it cannot use economic pressure to compel the discharge of workers for lack of union membership when it arbitrarily excludes them from membership. But we also reaffirmed the well-established rule that if the object of a union is reasonably related to the legitimate interests of labor, and the means employed are proper, the union cannot be enjoined from using concerted action to enforce its demands.

[3-6] The right to work, either in employment or independent business, is fundamental and, no doubt, enjoys the protection of the personal liberty guarantee of the Fourteenth Amendment to the federal Constitution, as well as the more specific provisions of our state Constitution. Cal. Const. art. I, §§ 1, 13; see Suckow v. Alderson, 182 Cal. 247, 187 P. 965; Angelopulos v. Bottorff, 76 Cal.App. 621, 245 P. 447. But this right, like others equally fundamental, is not absolute. It is safeguarded from legislative action which discriminates against a person or class of persons in respect of opportunities to obtain work or enter into business (Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220; Abe v. Fish & Game Commission, 9 Cal.App.2d 300, 49 P.2d 608); and it is also protected in some degree against arbitrary action by private organizations, including employers and labor unions. James v. Marinship Corp., supra. But it is subject to many legislative restrictions familiar to all, such as statutory limitations on working hours, minimum wages, age limits for employment, licensing acts, safety regulations, and a host of others. It is equally subject to peaceful, economic pressure by labor organizations seeking legitimate ends, such as conditions of work, collective rather than individual bargaining, seniority privileges and other methods of advancement, and the union or closed shop. See McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414; Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855.

[7] The businessman-worker operating in an industry or field in which he competes with organized workmen may likewise be subjected to the same means of persuasion as any other workman to join the union and conform to the conditions regulating union labor. Directly in point is the decision of Cafeteria Employees Union v. Angelos, 1943, 320 U.S. 293, 64 S. Ct. 126, 88 L.Ed. 58. In that case plaintiffs owned and operated a cafeteria as partners, without aid of any employees. The defendant labor union picketed the cafeteria "in an attempt to organize it." A New York court granted an injunction on the ground that there was no "labor dispute" within the meaning of the New York anti-injunction act. The United States Supreme Court reversed the judgment, stating page 127 of 64 S.Ct.: "But,

as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition * * * so small as to contain only an employer and those directly employed by him.' American Federation of Labor v. Swing, 312 U.S. at page 326, 61 S.Ct. [568], 85 L.Ed. 855. * * *" Cf. Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178.

Some employers have sought to evade the obligations imposed by social security and similar legislation, enacted for the benefit and protection of employees, by inducing employees to sever their employment relationship and become independent distributors. The "peddler distributor system" and its asserted evils are described in Bakery & P. Drivers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178, supra, wherein the peddlers refused to join the union or to conform to its rules, such as a six-day week. It was held that the union's peaceful picketing could not be enjoined. In Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 143 P.2d 20, 150 A.L.R. 916, the union published an article calling attention to the asserted violation of an agreement by the dairy owners through the hiring of nonunion drivers, some of whom had been union members and were persuaded to become independent contractors. It was held that the union had a right to publish the facts concerning the existence of a bona fide labor controversy, and a judgment for damages for libel was reversed. And although the court was divided on the result all members were in agreement that the decisions of the United States Supreme Court established the general proposition that the peddler distributor system, if deliberately introduced for the purpose of injuring the legitimate interests of organized labor, or if it operates with this effect, may be met with *appropriate* concerted action by the unions.

The instant case, however, is entirely distinguishable from those cases, in two vital respects: First, it is not a case of attempted introduction of the peddler system by employers as a means of lowering the union's conditions of work, since both plaintiffs entered the business on their own initiative many years ago. Second, it is not a case of the peddler distributor attempting to compete with union workers on unequal terms, either for his own interests or those of the employer. The two plaintiffs sought to join the union, but were refused admission on the sole ground that they were "peddlers." The threat to picket, boycott, and strike was then made to prevent plaintiffs from continuing as businessmen-workers. Thus the question before us does not relate to the right of the union to take measures reasonably necessary to protect its members from unequal or unfair competition but, instead, to the asserted right to make the possible evils of a *system* the basis for complete deprivation of the opportunity of particular individuals to work.

In dealing with a question of such gravity we must take notice of the far-reaching effect of any such decision as the union urges upon us. Milk is only one commodity distributed by retail delivery, and not all businessmen-workers are engaged in the retail distribution of commodities. The union's position would have an identical effect on the laundry and dry-cleaning driver, the barber and the plumber, the watchmaker and the groceryman, the service station operator, and the farmer. In a word, all businessmen-workers operating without the aid of employees will be affected by the result of this case, and a decision which dooms them to extinction at the hands of powerfully organized labor unions cannot be lightly made. Ironically, one of the goals toward which workingmen strive, namely, the greater security and opportunity of an independent business, is the subject of attack by the very group which may, in many instances, profit by it. Nor can the elimination of the small independent farmer from our economic life be contemplated without the most serious misgivings.

[8] We think the true answer to this question will be found in the realization that the businessmen-workers constitute a minority group, whose activities are not fundamentally inimical to the public interest or to the special interest of organized labor, and who therefore are entitled to the same treatment as any other minority group. The elimination of such persons from our economic life is no more a legitimate object of union activity than would be the elimination of Negroes; and any union which exerts economic pressure to obtain the discharge of the businessman-worker as such, and at the same time excludes him from union membership on that

ground alone, transcends the bounds of legitimate union activity. See James v. Marinship Corp., supra.

The case of Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 863, 81 L.Ed. 1229, is not inconsistent with this view. In that case the defendants sought to unionize plaintiff's employees, and to persuade plaintiff Senn to sign an agreement that all work should be done by union tile layers, which would have prevented Senn from doing any further work as a tile layer. The Wisconsin court denied Senn an injunction against peaceful picketing, and the United States Supreme Court, in affirming that judgment, held that it was a matter for the state to determine whether to permit unions to endeavor to induce an employer to agree to refrain from using his hands, and that "Whether it was wise for the state to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it." Thus the Senn case merely determines that there is *no absolute federal constitutional right* of an individual to work with his hands, and it declares that the legitimacy of the objects of union concerted action is a matter of state policy.

It is, of course, improper in this proceeding to consider what means the union may adopt to eliminate the alleged evils of the peddler distributor system. The record shows that nothing of this sort was attempted but, instead, the union flatly refused to accept plaintiffs into membership, and offered no terms upon which they would be permitted to work. This position of the union may be contrasted with numerous instances which our economic history discloses of businessmen-workers, including distributors of retail commodities and service drivers, who are members of labor unions and have worked in harmony with union employees. In the very opinions relied upon by defendants as establishing their right to concerted action against peddler distributors, it appears that efforts were made by the union to induce the peddlers to join or to comply with working hours or other conditions applicable to union members. See Bakery & P. Drivers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178, supra; Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58 supra; Emde v. San Joaquin County, etc., Council, 23 Cal. 2d 146, 143 P.2d 20, 150 A.L.R. 916, supra.

Defendants assert that the inapplicability of social security and workmen's compensation laws gives to the peddler a special bargaining advantage with the employer by permitting him to work for a lower return. This may be true, but the problem thus presented must be solved without entirely eliminating businessmen-workers from the ranks of labor and industry. Insofar as unemployment insurance is concerned, plaintiffs would not come within the provisions of the law even if they were to hire one or two workmen, since the statutes apply only to employers who hire a greater number of employees. Unemployment Insurance Act, Stats.1935, p. 1226 as amended, Deering's Gen.Laws, Act 8780d, § 9; 26 U.S.C.A., Internal Revenue Code, § 1607. If the applicability of unemployment insurance laws were the criterion, then labor would have the right to use its weapons to force the small merchant, the small barber and the corner grocer out of business because, since their trade does not warrant it, they cannot afford to hire enough employees to come within the terms of the statute. If it seems desirable to bring peddlers and others similarly situated within the purview of the laws relating to unemployment insurance and workmen's compensation, proposals to accomplish that end must be addressed to the Legislature or the voters.

[9, 10] The union may, of course, impose reasonable requirements for membership, and if the regulations adopted are proper the peddler must comply therewith or relinquish his favored position in order to avoid union pressure. If the peddler meets the conditions imposed, the union must accept him for membership or give up its demand for a closed shop. The interests of the peddler member may not be identical with the other union men, but the resultant conflicts and inequalities must be overcome if the legitimate objectives of organized labor are to be achieved and the means of attaining them preserved without arbitrarily depriving the small businessman who operates without the aid of employees of the right to work with his hands. The rights involved are too fundamental to be ignored by either group; they cannot be flouted but must be reconciled, regardless of the difficulties which may confront those faced with the task.

[11] Defendants contend that the terms of the injunction are too broad, in that it restrained them from "preventing" plaintiffs from obtaining milk "in any manner or by any means." This language was, of course, directed to conditions existing at the time of the decree. If the relationship of the parties is altered in such a manner as to justify a modification or vacation of the decree, application may be made therefor. See Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 298, 299, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200.

The judgment is affirmed.

SHENK and CURTIS, JJ., concurred.

EDMONDS, Justice (concurring).

Under the law of this state as it has developed in recent years, and particularly since the decision in J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, the intentional interference by union labor with the advantageous economic relations of others is not tortious provided the means used are peaceful and truthful and the object sought to be accomplished has reasonable relevance to labor conditions. And it has been held that the boycott, either primary or secondary, is a form of economic pressure which may be employed to accomplish any lawful purpose. McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411. But in the present case, the trial judge found that the purpose of the union and its agents was neither a lawful one nor was it related to the establishment of better wages, hours, or conditions of employment. I concur in the affirmance of the judgment giving effect to those conclusions because, as I read the record, the evidence compels the findings upon which the injunction was ordered, or taking the position most favorable to the appellants, the decision of the trial court rests upon conflicting evidence which places the determination beyond the reach of an appellate tribunal.

By the decisions of this court, the right of a labor organization to picket an employer or boycott a third person under certain specified conditions has been recognized as an exception to the general principles of tort law. In our present day highly industrialized society, both employers and organized labor invade the respective fields of operation of their competitors. Each group has economic interests, the intentional invasion of which is prima facie tortious and is actionable unless privileged. But because competition is an essential element of private enterprise, this disregard of property rights has been held to be justified when the purpose is reasonably related to the economic interests of the invading group. More particularly, the proposition that a court should not intervene to aid one person in an economic struggle in which another has a substantial interest at stake and is employing lawful means is founded upon a weighing of the benefits obtained against the detriment to society and the person injured.

In applying these rules to cases involving labor controversies, it has become the settled law of this state that organized labor has the constitutional right, as an incident of free speech, to fully publicize the facts of a labor dispute and invite public support of its position. C. S. Smith Met. Market Co. v. Lyons, supra; McKay v. Retail Auto. S. L. Union No. 1067, supra. And in the exercise of its constitutional right of free speech, a union is privileged intentionally to induce others, in their relation with an employer, to apply economic pressure upon him resulting in injury. However, this privilege to interfere with a competitor's valuable and legally protected economic interests is not an absolute one but is qualified and conditional.

The first limitation which has been applied by this court is that a union, in compelling compliance with its demands through the application of economic pressure, induced by publication of the facts and the solicitation of support, is privileged to invade the interests of others only where it employs peaceful and truthful means. Magill Bros. v. Building Service, etc., Union, 20 Cal.2d 506, 127 P.2d 542; Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 696, 123 P.2d 20; C. S. Smith Met. Market Co. v. Lyons, supra; McKay v. Retail Auto. S. L. Union No. 1067, supra; J. F. Parkinson Co. v. Building Trades Council, supra. The second general condition necessary to justify the invasion of economic interest is that the end be lawful. "Any injury to a lawful business * * * is prima facie actionable, but may be de-

fended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare." J. F. Parkinson Co. v. Building Trades Council, supra [154 Cal. 581, 98 P. 1036]. The purpose of labor must be reasonably relevant to legitimate labor conditions and the labor controversy one in which the union has "a substantial" and a "direct and obvious" interest. The activity of the workers, it has been said, must "benefit them directly" or "enhance their bargaining power"; for example, the concerted action must have the direct effect of and be reasonably relevant to "the attainment of higher wages, shorter hours of labor or better working conditions."

Considering the situation of the parties in the present case, the appellant union, in accordance with the general purpose of organized labor, has a direct and substantial interest in obtaining maximum wages minimum hours, and better working conditions, and, in maintaining such advantageous labor conditions, once achieved, the workers may obtain closed shop contracts or devise any other means reasonably adapted to securing an advantageous bargaining position. On the other hand, a person has the right to own and control his own business, work in that business with his own hands, refuse to employ workers for whom he has no need, and to procure the merchandise or products without which the business could not operate. It is these conflicting economic interests which must be weighed in determining the respective rights of the parties.

By an affidavit of Jones, its business agent, the union stated in particular the basis for its position that the boycott against the respondents was for a lawful purpose. According to this affidavit the reasons for refusing to admit Bautista and Macias, and other persons termed "independent peddler distributors," to membership are economic and not personal, political, or national. Jones declared that companies engaged in industries where commodities sold at retail are delivered by automotive transportation have fostered and encouraged a form of retail delivery "variously known as 'independent peddlers,' 'independent distributors,' and 'venders,' that said companies in distributing their products have encouraged this form of distributing and delivery for various economic reasons; among others, it eliminates the responsibility of the company for the payment of the Old Age and Un-employment Insurance tax and it eliminates the necessity of paying or carrying employers liability insurance and evades the responsibility imposed by the workmen's compensation, insurance and safety acts and further evades liability under the master and servant law; that as the result of the growth and development of this system of 'independent peddler distributors' many union wage earners are deprived of the benefits of the social security laws, workmen's compensation laws, and various other beneficial legislation enacted for the benefit and progress and social welfare of the people of the State of California * * * these so-called 'independent peddler distributors' work long hours in excess of the hours fixed by the union for their membership and the said 'venders', otherwise fail to observe the reasonable rules and regulations established by the union for the betterment of working conditions. * * *"

It may be conceded that the dissatisfaction of organized labor with a system of distributing milk products which avoids minimum wages and hours, workmen's compensation and social security benefits is a legitimate matter of labor dispute. Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 155, 143 P.2d 20, 150 A. L.R. 916. But no such plan is shown in the present case. Here we have two men who were, in effect, retail merchants carrying on their business by their own efforts. The union does not claim that Bautista and Macias are now or have ever been directly or indirectly connected with the milk brokers from whom they were purchasing milk products at the time the boycott was instituted; on the contrary, it affirmatively appears that for some seven or eight years the respondents have carried on a milk distributing business, buying dairy products from various brokers. Nor is there any showing that either Challenge Creamery and Butter Association nor Associated Dairies, against whom the boycott was directed, has fostered or encouraged the sale of its products by independent vendors; indeed there is no evidence that these companies sold to such vendors other than Bautista and Macias.

This is a very different situation from that shown in the Emde case where it appeared without contradiction that the dairy, notwithstanding a contract with the union providing for the employment of

its members exclusively as truck drivers, decided to change the method of operation and negotiated with the men then in its employ to distribute milk to the same customers under an agreement providing for compensation upon a percentage basis. By establishing the new arrangement for the delivery of its products, the dairy escaped compliance with the conditions imposed by union labor as to wages and working conditions. However, unless one subscribes to the broad proposition that a retail merchant having no direct connection with the wholesaler from which he buys his goods, nor carrying on business by any subterfuge, must employ members of organized labor regardless of his need for them, then no lawful purpose has been shown in the present case.

True, organized labor, as a matter which is within the proper concern of every citizen, has an interest in the working conditions of all persons who are engaged in business and industry. Also, every proprietor of a business who performs some of the same tasks as those of his employees, even within the usual hours of a business day, takes from those within the employee group part of the work which could be done by them. But the legitimate interest of a labor union is to secure reasonable wages and working conditions for those who, as employees, contribute their energy and skill to the industrial life of the community. A requirement that the proprietor of a business must restrict his working hours and conditions to the standards set by a union has no reasonable relevance to advantageous labor conditions unless organized labor is to have a monopoly on all useful work with no right of the owner to do more than provide the capital by which wages may be assured.

For these reasons the trial court was fully justified in finding that the purpose of the union and its agents "was not reasonably connected with any controversy which affects workers in the milk industry generally, or any workers employed by plaintiffs, nor was it reasonably related to employment or collective bargaining; that such purpose was essentially selfish and unreasonable and outside of and repugnant to the legitimate purposes and activities of labor unions in respect to improving the workers' condition as such; that such purpose and the results thereof subserved no public interest and was not for public welfare." There is substantial evidence to the effect that the boycott was instituted solely because Bautista and Macias were not American citizens, in addition to that relating to the conflicting economic interests which were required to be weighed in determining the respective rights of the parties.

The appellants rely not only upon the decisions of this court by which it was held that organized labor, under specified conditions, is privileged to apply economic pressure upon employers but assert that the conclusions of the Supreme Court of the United States compel a reversal of the judgment in the present controversy. They call particular attention to Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58, and Bakery & P. Drivers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178, supra, in which the court struck down, as an abridgement of free speech, broad injunctions granted by New York courts prohibiting picketing of any nature against persons having no employees upon the ground that no "labor dispute" was involved within the meaning of the state statute.

Mr. Justice Brandeis, by dictum in Senn v. Tile Layers Protective Union, 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229, for the first time suggested that the right of labor to picket peacefully was an incident of free speech under the Fourteenth Amendment to the federal Constitution. Senn's complaint charged that the unions had picketed his place of business and also had sent letters to architects and contractors requesting them not to patronize him because he was conducting a nonunion shop and threatening to picket them if they did so. Through counsel the unions agreed that they would not send any other communications of that kind nor would they resort to picketing. Most significantly, the United States Supreme Court emphasized in its statement of the facts of the case that the trial judge treated this agreement as disposing of the claim for relief on account of the boycott. For that reason, it was said, the union's acts in regard to a boycott were not material.

Considering the facts upon which the case was decided, it appears that Senn, the proprietor of a small business, and also his employees, declined to join the tile layers' union. When he refused to sign a contract which barred him from working at his trade with his employees the union peacefully picketed the place of business. De-

nied an injunction under a Wisconsin statute allowing labor to use that form of economic pressure, upon certiorari to the Supreme Court he contended that the statute abridged his right under the Fourteenth Amendment to the United States Constitution to work under conditions of his own choice. In affirming the judgment, Mr. Justice Brandeis, speaking for the court, observed: "The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution. * * * Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. * * * The picketing was peaceful. The publicity did not involve a misrepresentation of fact. * * * The end sought by the unions is not unconstitutional." This conclusion was based upon the finding that the union had legitimate interests to protect and that Senn's action was in conflict with those interests. Succinctly summarizing the basis for the decision, it was held: "The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands—so to endeavor although none of his employees is a member of a union. Whether it was wise for the state to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it."

Unlike the present case, Senn was an employer and the union peacefully picketed his place of business after abandoning its secondary boycott. But there is a more fundamental distinction between the situation of Senn and that of Bautista and Macias in the present case, for the United States Supreme Court merely decided that the Wisconsin Labor Code violated no constitutional principle because the Fourteenth Amendment does not guarantee the right of injunction against peaceful picketing. In this connection, the court held that it was not concerned with the wisdom of the public policy of Wisconsin. The Senn case therefore is not authority for the proposition that an injunction prohibiting the application of economic pressure against a person carrying on a business entirely by his own efforts violates constitutional guarantees of free speech. On the contrary, the decision is consistent with the California cases which restrict organized labor's privilege intentionally to injure its competitors. More particularly, the federal court held that this privilege did not stem from the provisions of the Wisconsin Labor Code, declaring: "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

Nor are Carlson v. California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104, and Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 743, 84 L.Ed. 1093, determinative of the present controversy. These cases concerned an Alabama statute and a county ordinance of California, respectively. Each enactment, which prohibited picketing in any form, was challenged as a denial of the right of free speech under the Fourteenth Amendment to the Constitution. The court held both statutes unconstitutional. In the Thornhill case, the court pointed out that the legislation against picketing "leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute." The court pointed out that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution," and condemned the Alabama law because "whatever the means used to publicize the facts of a labor dispute, * * * all such activity without exception is within the inclusive prohibition of the statute * * *." But the court recognized, in general terms, that a state was not required to permit picketing under all circumstances. In the Carlson case [310 U.S. 106, 60 S.Ct. 749] because of the "sweeping and inexact" terms of the ordinance, it was held to be violative of constitutional rights.

Picketing was again justified upon the ground of the guarantee of free speech in the case of American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 570, 85 L.Ed. 855. In that case, the state court enjoined the union from peacefully picketing a beauty parlor in an endeavor to unionize it upon the ground that the proprietor had no dispute with his employees and none of the members of the picketing union had ever been employed by Swing. In re-

versing the decree, the Supreme Court declared: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing a circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." But neither of these decisions presents any constitutional obstacle to the injunction against the appellant union in this case, for they stand only for the proposition that organized labor has the constitutional right, as an incident of free speech, to peacefully picket employers, including those with whom the union membership had no prior employment relation. And, it should be noted, the court employed general language in announcing the rule. Certainly, the court did not declare, and according to subsequent decisions it did not hold, that the rule announced was not without exceptions, whereunder state courts might properly enjoin "even peaceful picketing." Bakery & P. Drivers Local v. Wohl, supra [315 U.S. 769, 62 S.Ct. 819].

In Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S.Ct. 552, 554, 85 L.Ed. 836, 132 A.L.R. 1200, a general limitation was placed upon the doctrine of the Thornhill and Carlson cases. The court was there concerned with "acts * * * in themselves peaceful" but "enmeshed with contemporaneously violent conduct." In holding that the state court violated no constitutional principle, by enjoining the union from all picketing, Mr. Justice Frankfurter declared: "But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution. * * * The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. * * * But these liberties [freedom of speech and press] will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence." Although the decision, by necessity, was placed upon the ground of the constitutional guarantee of free speech, the same result would be reached by applying the rule long recognized in this state, that picketing conducted with violence is an unlawful means for exerting economic pressure. By the Meadowmoor decision, the Supreme Court plainly declared that, in enjoining what this court has said was unlawful picketing (Steiner v. Long Beach Local No. 128, supra; Magill Bros. v. Building Service, etc., Union, supra), there is no violation of the federal Constitution. Moreover, implicit in the decision of Allen-Bradley Local No. 1111 v. Wisconsin Employment Relation Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154, is the further limitation that a state may reasonably restrict the place where picketing is carried on, for there the state court had enjoined, among other things, picketing in front of an employee's home.

Concurrently with the Allen-Bradley case, the court again sustained the right of a state to regulate labor disputes. In Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 808, 86 L.Ed. 1143, because Ritter engaged an independent contractor, who did not employ union labor, to build a structure, the carpenters' union peacefully picketed his cafe, located a mile and one-half from the place of the construction work. The union also induced Ritter's cafeteria employees, with whom he had no labor dispute, to strike. The picketing was enjoined under the Texas antitrust law. In sustaining the power of the state court to do so, Mr. Justice Frankfurter, speaking for the court, said:

"The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well-being of the community. Society has therefore been compelled to throw its weight into the contest. The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest. And every intervention of government in this struggle has in some respect abridged the freedom of action of one or the other or both.

"The task of mediating between these competing interests has, until recently, been left largely to judicial lawmaking and not to legislation. * * * The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. * * *

"But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. * * *

"Texas has undertaken to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the disputants. The state has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another. * * *

"It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. * * *

"In forbidding such conscription of neutrals in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states."

Conforming to the doctrine of these decisions is the case of Bakery & P. Drivers Local v. Wohl, supra, wherein the trial court enjoined peaceful "secondary picketing" for the sole reason that no "labor dispute" was involved, within the meaning of the New York statutes. Upon appeal, the ruling was affirmed without written opinion. In this connection, the Supreme Court called attention to the fact that in each of these cases, "So far as we can ascertain from the opinions delivered by the state courts * * *, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes * * *." In condemning the manner in which the courts enjoined peaceful picketing, the Supreme Court declared that "one need not be in a 'labor dispute' as defined by state law to have the right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." Although conceding, in the Wohl case, that "A state is not required to tolerate in all places and all circumstances even peaceful picketing," New York's attitude was assailed because "there are no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive * * *." In the Wohl case, apparently in response to the assertion that the Court of Appeals of New York subsequently disclosed its basis for affirming the decree of the trial court, the Supreme Court observed: "The respondents say that the basis for the decision below was revealed in a subsequent opinion of the Court of Appeals, where it was said with regard to the present case that 'we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week.' Opera on Tour v. Weber, 285 N.Y. 348, 357, 34 N.E.2d 349, 353, 136 A.L.R. 267, [writ of] certiorari denied [in] 314 U.S. 615, 62 S.Ct. 96, 86 L.Ed. [495]. But this lacks the deliberateness and formality of a certification, and was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered." From this it may be concluded that if the basis for the decision in the Wohl case had been clearly stated by the New York appellate court, the United States Supreme Court might well have reached a different conclusion.

In Opera on Tour v. Weber, supra [285 N.Y. 348, 34 N.E.2d 351], because an employer refused to hire musicians to take the place of mechanical music, although no dispute existed between plaintiff and such employees, the musicians' union "ordered and coerced" members of the stagehands' union "to leave the employ of the plaintiff, causing ruin of the plaintiff's business." The musicians' union was en-

joined from inducing the members of the stagehands' union from striking, upon the ground that their conduct amounted to an unlawful secondary boycott, instigated for an unlawful purpose. In affirming the judgment, the Court of Appeals made clear the fact that it did not consider that the boycott had "any reasonable connection with wages, hours of employment, health, safety, the right of collective bargaining, or any other condition of employment * * *." Upon certiorari to the Supreme Court of the United States, the court denied the petition because "It does not appear from the record that the federal question presented by the petition was necessarily decided by the Court of Appeals." Opera on Tour v. Weber, supra; rehearing denied, 314 U.S. 716, 62 S.Ct. 477, 86 L.Ed. 570. The implication, justified from the denial, by the Supreme Court, of certiorari in that case compels the conclusion that the remedy invoked by Bautista and Macias violates no federal constitutional guarantee.

And it should also be noted that the issue in the present case is vastly different from the one determined by the Wohl decision in that the Supreme Court was there limited to deciding whether picketing could be enjoined for lack of a "labor dispute." The facts of the two cases are so different as to present other grounds for distinction. Although Wohl was engaged, much the same as Bautista, as an independent distributor of bakery products, he was part of a system fostered and encouraged by bakers in New York City. As stated by Mr. Justice Jackson, within five years, due to the passage of the social security and unemployment compensation laws, the number of independents increased from an insignificant number to more than 500. And, during the eighteen months preceding Wohl's suit, employers had been forcing great numbers of union drivers, under the threat of dismissal, to quit the employment relation and continue thereafter in an independent capacity.

No such facts were shown in the present case. To the contrary, Bautista and his associate had been engaged independently in distributing milk for some seven years and it does not appear that either ever had been employed as a milk truck driver. Nor does it appear here that, as in the Wohl case, there were "the aggressive inroads of this kind of competition upon the employment and living standards of" union members.

In Cafeteria Employees Union v. Angelos supra, the union peacefully picketed a small cafe which was operated by several copartners with no employees. The New York Court of Appeals affirmed a decree enjoining the union on the ground that there was no "labor dispute" within the meaning of the statutes. In reversing the New York court, the Supreme Court, citing the Swing and Wohl cases, declared that workers may "state their case and to appeal for public support in an orderly and peaceful manner regardless of the area of immunity as defined by state policy." [320 U.S. 293, 64 S.Ct. 127.] But it should be noted, the economic pressure applied by the union was picketing, and not a secondary boycott.

Certainly the decisions of the Supreme Court do not compel this court to permit a union to seek an unlawful objective, having no reasonable relation to working conditions or bargaining power. All that the Supreme Court has decided is that peaceful picketing, being an incident of freedom of speech guaranteed under the Fourteenth Amendment, cannot be blanketly enjoined by state courts, or arbitrarily prohibited or limited under all circumstances by legislative definition. Moreover, the Angelos case concerns different, although related, principles. A secondary boycott involves much more than persuasion, for it consists of the threat that economic pressure will be applied upon the third person, having no dispute with either of the principals to the controversy, unless he joins in the attack upon the one from whom union labor is endeavoring to obtain certain action deemed desirable.

SCHAUER, Justice (dissenting).

I dissent. In this suit the trial court, sitting without a jury, rendered judgment in favor of plaintiffs whereby it was "Ordered, Adjudged and Decreed that the defendant Milk Drivers and Dairy Employees Union, Local No. 93, and the agents, employees and members of said Union, and the said defendant Paul Jones, be and they are hereby permanently restrained and enjoined from preventing plaintiffs from obtaining milk or milk products from brokers or those who supply and sell such milk and milk products, and from coercing milk brokers from selling to plaintiffs and supplying plaintiffs with such milk and milk products in any manner or by any means. * * *" Defendants con-

tend that they have neither done nor threatened to do any act which would entitle plaintiffs to the injunctive relief so granted. I am of the opinion that defendants' position is well taken.

The material facts are not in dispute. As found by the trial court upon the pleadings and affidavit evidence, they are as follows: For some seven or eight years prior to the commencement (on December 31, 1941) of this suit plaintiffs had been jointly engaged in the business of distributing milk and milk products in Los Angeles County to retail dealers. Plaintiffs performed all of their own labor, purchasing their milk and milk products from brokers or wholesalers and making delivery to the retail customers in two automotive trucks which plaintiffs owned and individually operated. The appealing defendants are a labor organization known as the Milk Drivers and Dairy Employees Union, Local No. 93, and Paul Jones, its secretary-treasurer. The union membership consists of milk-wagon drivers and helpers and workers generally who are engaged in the milk and dairy business and in the handling of by-products of milk.

Defendant union had entered into union shop contracts with about ninety-five per cent of the milk brokers and wholesalers in Los Angeles County whose business was the selling of milk and milk products to distributors, among whom were plaintiffs. Paragraph 22 of the union shop contracts reads as follows: "Employer agrees that it will not sell dairy products at its platform to any person, firm or corporation licensed by the California Department of Agriculture as a milk distributor unless such distributor observes and causes its employees to observe the same conditions of employment as those observed by employer."

Prior to October 23, 1941, the union proposed to plaintiffs that the latter employ members of the union to drive plaintiffs' trucks. Plaintiffs declined, preferring to continue driving their own trucks, but did apply for admission to membership in defendant union. On October 23, 1941, plaintiffs' applications were rejected by the union on the ground that "plaintiffs were independent peddler distributors," and on November 21, 1941, the union sent to each of the milk brokers and wholesalers with whom it had contracts, a letter reading (aside from the date and salutation) as follows:

"For some time Local Union #93 has been confronted with the problem of the independent peddler distributors who have been from time to time taking business from the legitimate wage earners who are members of Local #93.

"At a regular meeting of Local #93 on October 23rd, there were a number of applications for membership filed by the independent peddler distributors which were discussed at some length by the members present at that meeting, after which they were rejected.

"The officers of Local #93 were instructed to see that the employers who held agreements with Local #93 comply with Paragraph 22 of our agreement on or before November 30, 1941.

"As these men are not members of the Union and the membership does not see fit to admit them to Union membership, it seems there is only one way left, and that is to discontinue selling to these independent peddler distributors.

"Hoping you will cooperate in cleaning up this matter.

"Very truly yours.

"Paul D. Jones, Sec'y Treas."

The trial court found further:

"That by the said notice and by oral suggestions and statements said Local No. 93 and its officers required and demanded of said brokers that they cease to deliver any milk or milk products to the plaintiffs, among other independent distributors; that the said brokers understood said notice to mean that in the event they continued to supply milk and milk products to the plaintiffs, the said Local No. 93 would apply economic pressure to enforce such request and demand by means of strike, picketing and boycott.

"That as a direct result of said notice and communications all the brokers in Los Angeles County complied with the request and demand of said notice, and after December 14, 1941 refused to sell or furnish or deliver to plaintiffs any milk or milk products, and that since that date the plaintiffs have been prevented from securing any milk or milk products and have been compelled to discontinue their business, to their great and irreparable damage.

"That the purpose of said Local No. 93 and its agents was to prevent the plaintiffs from obtaining any milk or milk products with which to carry on their independent

business of milk distributing to their retail customers, and thereby to compel plaintiffs to employ as drivers of their trucks members of said Local No. 93, and to discontinue driving their own trucks and doing their own work of conducting their business with their own hands.

"That said purpose was not related to the establishment of better wages, hours or conditions of employment in plaintiffs' business, as the plaintiffs had no employees and had no need for any employees; that the real purpose of defendant Local No. 93 and its agents was not reasonably connected with any controversy which affects workers in the milk industry generally, or any workers employed by plaintiffs, nor was it reasonably related to employment or collective bargaining; that such purpose was essentially selfish and unreasonable and outside of and repugnant to the legitimate purposes and activities of labor unions in respect to improving the workers' condition as such; that such purpose and the results thereof subserved no public interest and was not for public welfare.

"That unless restrained by the Court the defendant Union Local No. 93 and its officers and agents will continue by peaceful persuasion and through economic coercion to deprive plaintiffs of their right to purchase milk and milk products from the milk distributing brokers in Los Angeles County, and thereby deprive plaintiffs of their right to work as independent milk distributors for a living for themselves and their families."

Nevertheless, the right of the union to peacefully induce, or endeavor to persuade, other persons to cease doing business with plaintiffs unless plaintiffs complied with not unlawful union demands, has been decisively established by decisions of both this court and the Supreme Court of the United States. See Emde v. San Joaquin County, etc., Council (1943), 23 Cal.2d 146, 155, 143 P.2d 20, 150 A.L.R. 916; American Federation of Labor v. Swing (1941), 312 U.S. 321, 325, 61 S.Ct. 568, 570, 85 L.Ed. 855, 857; Bakery & Pastry Drivers Local v. Wohl, (1942), 315 U.S. 769, 774, 775, 62 S.Ct. 816, 818, 819, 86 L.Ed. 1178, 1183; Cafeteria Employees Union v. Angelos (1943), 320 U.S. 293, 64 S.Ct. 126, 127, 88 L.Ed. 58.

The so-called finding that the purpose of defendants was "outside of and repugnant to the legitimate purposes and activities of labor unions in respect to improving the workers' condition as such; that such purpose and the results thereof subserved no public interest and was not for public welfare," is at least in part a conclusion of law rather than of fact. In the Emde case, supra (decided since this case was tried), this court expressly held (23 Cal. 2d at page 155, 143 P.2d at page 25, 150 A.L.R. 916) that "it may not be denied that * * * the dissatisfaction of organized labor with a system of distributing milk products which avoids minimum wages and hours, workmen's compensation and social security benefits, is a legitimate matter of labor dispute. [Citations.] Therefore, the union, and those directly interested in and connected with the labor cause, had the right to urge the public and, of course, the members of organized labor, to refrain from buying the dairy's products unless the dairy abandoned the system of distribution which it had undertaken and rehired union drivers in accordance with the terms of the existing contract, whether or not the employer-employee relation then existed between the members of the union and the dairy. [Citations.]"

And in Bakery & P. Drivers Local v. Wohl (1942), 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178, supra, the Supreme Court of the United States held that to enjoin a labor union from peacefully picketing independent or "peddler" distributors of bakery products, who performed all their own work and had no employees, for the purpose of securing employment for union members, was to unconstitutionally infringe upon the right of free speech guaranteed by the federal Constitution. The same principle was reaffirmed in Cafeteria Employees Union v. Angelos, 1943, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58, supra.

The opinion of Mr. Chief Justice GIBSON, although recognizing that (155 P.2d 345) "The right to work, either in employment or independent business * * * is subject to many legislative restrictions familiar to all, such as *statutory* [italics added] limitations on working hours, minimum wages, age limits for employment, licensing acts, safety regulations, and a host of others. [And] to peaceful, economic pressure by labor organizations seeking legitimate ends, such as conditions of work, collective rather than individual bargaining, seniority privileges and other methods of advancement, and the union or closed shop," attempts to justify the injunction on the claim that

plaintiffs are being completely deprived (page 347 of 155 P.2d) of an inalienable right to work for themselves and earn a living. Actually the plaintiffs are the operators of an independent business and are simply being subjected to the vicissitous competition of free enterprise. Obviously plaintiffs are not deprived of the right to work or earn their living merely because in conducting their particular business they are faced with the practical alternative of employing union labor, of choosing another business in which to engage, or of continuing in the same line of work but in the employee status of union workers, rather than as independent peddlers. The situation of plaintiffs here is manifestly distinguishable from that of the Negro plaintiff and his coworkers of the same race in James v. Marinship Corporation, 1944, supra. In that case the Negro workers were arbitrarily excluded from full union membership because of their color—an inherent attribute which they are powerless to alter, even should they wish to do so, and one which bears no reasonable relevancy to maintenance or advancement of the interests of labor generally—while here plaintiffs were denied union membership on the sole ground that they "were independent peddler distributors," i.e., were engaged in a type of activity which justifiably may be considered by labor as a whole as inimical to its own economic interests. There is no claim and no suggestion that if plaintiffs had ceased their independent peddling of milk and applied for union membership on the same basis as other members they would not have been admitted and accorded opportunities for both employment and a voice in union affairs equal to those of other members. The union was not arbitrarily or flatly closed to plaintiffs as was done in the James case and in certain other cases therein cited (such as Wilson v. Newspaper & Mail Deliverers' Union (1938), 123 N.J.Eq. 347, 197 A. 720; Dorrington v. Manning (1939), 135 Pa.Super. 194, 4 A.2d 886; Carroll v. Local No. 269 (1943), 133 N.J.Eq. 144, 31 A.2d 223, 225, and Cameron v. International Alliance of Theatrical Stage Employees (1935), 118 N.J. Eq. 11, 176 A. 692, 701, 97 A.L.R. 594), and certainly it is not for this court to assume to determine the wisdom, either with respect to union labor or with respect to the public as a whole, of the policy here adopted by the union of refusing membership to independent businessmen-workers, or to base its decision in this case upon such a determination. Such businessmen, even if they should prefer as did plaintiffs here to perform their own work so far as able, are at least in the status of capitalist-employers, and therefore the accepted and traditional opponents of labor as a whole, and we cannot justifiably pronounce that unions must either admit to membership such opponents or else refrain from taking economic measures against them.

In the James case it is stated (at page 338 of 155 P.2d) that: "Defendants argue that a union should not be compelled to admit all persons to membership, because some of such persons may have interests inimical to the union and may destroy it from within. The right of the union to reject or expel persons who refuse to abide by any reasonable regulation or lawful policy adopted by the union (Brown v. Lehman, 1940, 141 Pa.Super. 467, 15 A.2d 513, supra; see Rest. Torts, comment b to § 810) affords it an effective remedy against such persons." The general proposition that a union may reject or expel persons who refuse to abide by any *reasonable regulation* or *lawful policy* adopted by the union may be conceded. Again, however, it is not for this court to determine that a union regulation or policy that its members must be, or potentially occupy the status of, employees and not independent businessmen is either unreasonable or unlawful. Nor would the authorities relied upon in the above quotation from the James case support such a determination. Brown v. Lehman had to do with the expulsion of a union member for nonpayment of dues, and comment b to section 810 of the Restatement of Torts reads, in its entirety, as follows: "If the union is open to the employee on reasonable terms and he refuses to be a member of it, no cause of action accrues to him from the loss of his job. Whether the terms are reasonable is a question of fact in each case. They may be unreasonable because they require him to pay an initiation fee which is unduly high in proportion to earnings in the industry, or because the initiation fee is unreasonably higher for him than for others. On the other hand, it is not unreasonable for a labor union to set standards of proficiency for its members and to require applicants for membership to conform to these standards. *Nor is it*

unreasonable for it to refuse to retain as a member one who engages in activities antagonistic to it or is a member of a rival organization. Again, it is not unreasonable for the union to distribute available work among its members when it is scarce or to provide that the senior members of the union have a preference in taking jobs as they appear." (Italics added.) None of the depicted "unreasonable" situations exists here.

The opinion of Chief Justice GIBSON (at page 346 of 155 P.2d) asserts that "the decisions of the United States Supreme Court establish the general proposition that the peddler distributor system, *if* [italics added] deliberately introduced for the purpose of injuring the legitimate interests of organized labor, or if it operates with this effect, may be met with *appropriate* concerted action by the unions," and then attempts to distinguish the instant case on the grounds that "First, it is not a case of attempted introduction of the peddler system by employers as a means of lowering the union's conditions of work, since both plaintiffs entered the business on their own initiative many years ago. Second, it is not a case of the peddler distributor attempting to compete with union workers on unequal terms, either for his own interests or those of the employer. The two plaintiffs sought to join the union, but were refused admission on the sole ground that they were 'peddlers.'" No such limited propositions, general or otherwise, are pronounced by the mentioned decisions. In each of them it was decided merely that upon its particular facts labor had done nothing unlawful and might not be enjoined from continuing its picketing, publishing, etc. And, again, it is not the province of this court to declare that the action taken by the union here was not "appropriate." Also, as discussed above, the fact, stated in Chief Justice GIBSON'S opinion, that the denial of union membership to plaintiffs was on the sole ground that they were "peddlers" patently left the door open to them to join if they would assume the same status as other members, namely, that of employees. It seems obvious that the plaintiffs here, by insisting upon continuing their activities as peddlers, were actually competing with union workers on unequal terms and under conditions which the union not unjustifiably considered to be obnoxious to its legitimate objects.

Nor does it appear that, as suggested by Chief Justice GIBSON'S opinion (at page 346 of 155 P.2d), a decision contrary to that reached by such decision will "doom to extinction" all "businessmen-workers," including barbers, plumbers, farmers, etc. Such an aim has been neither expressed nor manifested by the unions. The facts involved here, as to character of vocation, are basically different from those of the examples mentioned. A barber and a plumber engage primarily in selling their own personal skilled services; a farmer engages primarily in raising products from his land and selling them. But these plaintiffs are primarily conducting a business, buying and selling goods for a profit. If and when a program of the type suggested by the Chief Justice becomes apparent, it may and should be fully dealt with by the legislative arm of the government—not piecemeal by the courts. If, in the absence of such legislation, a case should arise presenting a problem of that type the occasion will be sufficient unto itself for consideration and determination of the powers and duties of the court in the premises. Moreover, the fact that, as also noted in the opinion of Chief Justice Gibson, the suggested program, if pursued, would place an additional hazard in the path of those union members who may hope to ultimately become independent businessmen, raises primarily a problem of internal union policy, or of outside legislative action; and this court may not with propriety paternally advise unions concerning the policies we may consider might be most advantageous to certain of their members. It would be only in the event of a clear showing of unlawful invasion of private rights or public policy that the courts should interfere.

Chief Justice GIBSON'S opinion next declares (at page 347 of 155 P.2d) that although it "may be true [that] the inapplicability of social security and workmen's compensation laws gives to the peddler a special bargaining advantage with the *employer* [italics added] by permitting him to work for a lower return. * * * the problem thus presented must be solved without entirely eliminating businessmen-workers from the ranks of labor and industry. Insofar as unemployment insurance is concerned, plaintiffs would not come within the provisions of the law even if they were to hire one or two workmen, since the statutes apply only to employers

who hire a greater number of employees. [Citations.] If the applicability of unemployment insurance laws were the criterion, then labor would have the right to use its weapons to force the small merchant, the small barber and the corner grocer out of business because, since their trade does not warrant it, they cannot afford to hire enough employees to come within the terms of the statute. If it seems desirable to bring peddlers and others similarly situated within the purview of the laws relating to unemployment insurance and workmen's compensation, proposals to accomplish that end must be addressed to the Legislature or the voters. The union may, of course, impose reasonable requirements for membership, and if the regulations adopted are proper the peddler must comply therewith or relinquish his favored position in order to avoid union pressure. If the peddler meets the conditions imposed, the union must accept him for membership or give up its demand for a closed shop. The interests of the peddler member may not be identical with the other union men, but the resultant conflicts and inequalities must be overcome if the legitimate objectives of organized labor are to be achieved and the means of attaining them preserved without arbitrarily depriving the small business man who operates without the aid of employees of the right to work with his hands."

First, it may be noted that even though unemployment insurance does not apply to employers with less than four employees (Deering's Gen.Laws, 1937, p. 4125, Act 8780d, § 9), every individual who pays salary to even a single worker within the covered employments of the Federal Insurance Contribution Act (26 U.S.C.A. Int.Rev. Code, §§ 1400, 1410), more popularly known as the Old Age Insurance or Pension Law, is required (as also is the employee by means of withholding by the employer) to contribute to the fund provided by such act a sum now fixed at one per cent of the salary paid. And workmen's compensation insurance, also, applies to those having only one employee. (Cal.Lab. Code, div. IV, St.1937, p. 265 et seq. as amended.)

Second, it may not properly be said that a "peddler," otherwise termed an "independent businessman-worker," has an "employer." He is ordinarily free to secure his merchandise from such sources as he may deem most advantageous to himself and to dispose of it where, when, to whom, and at such profit to himself as his good business sense dictates. I am at a loss to understand what "reasonable requirements" a union could adopt to the end that "conflicts and inequalities be overcome" as between "peddlers" and employee union members. Is the union to require of peddlers who seek admission to its rolls that they charge higher prices (thus attempting to enter the price-fixing field), and with their anticipated increased profits purchase for themselves accident insurance, a retirement annuity, and (if available) unemployment insurance (thus to some degree paralleling the advantages of social security and workmen's compensation)? Or is it to charge higher dues from peddler members and undertake to itself furnish for them such benefits? A fertile imagination given free play could offer legion suggestions in this field, but by what standard is the union to determine their "reasonableness"? Would not a peddler or independent business man of whom such requirements were made by the union complain, as did the plaintiff and his coworkers in the James case, that he was being discriminated against by the union in not being accorded membership on the same basis as other members? I think that Chief Justice Gibson suggests the answer to these problems and the thought which should control our decision in this case, in the following language: "If it seems desirable to bring peddlers and others similarly situated within the purview of the laws relating to social security and workmen's compensation, proposals to accomplish that end must be addressed to the Legislature or the voters." It seems to me that the whole problem presented by this case is one for legislative control, if any, and I fear that the decision set forth in the opinion of Chief Justice Gibson will tend more toward confusion and litigation than otherwise in the meantime.

Still another problem is apparent. If the unions are to be forced to admit to membership independent businessmen, or else refrain from effectively interfering with the latter's businesses, then the path will be open for the breaking down of the higher wage scale and other advantages for working men which the unions have succeeded in gaining in recent years. During the present war era jobs are plentiful. However, if during periods of less widespread employment, unemployed union

members wish to enter the peddler field (or if pressure is brought on employed members to force them to enter it, as was done in the Emde case), by what means could the union, if it is prohibited from expelling them, or else from shutting off their markets or their sources of supply, effectively prevent producers or wholesalers from dealing with such peddlers, and from thus in turn forcing other union members out of employment and into the peddler field with its uncertain and hazardous income levels and its lack of the social benefits enjoyed by regularly employed workers?

Furthermore, for this court to hold that the unions must admit peddlers or independent businessmen (or else take no economic measures against them) without requiring that they give up their independent position or make such other changes in their methods of doing business as the union may reasonably demand, would tacitly amount to holding that although a union may peacefully strive to secure a closed shop, it must, if successful, accept as members the employees of such closed shop *at whatever salary or other working conditions such employees may be satisfied to accept,* regardless of union standards. Such an explicit holding would, of course, never be suggested.

A further reason for not requiring that unions must as an alternative to invoking economic sanctions against peddlers admit them to membership, lies in the universally accepted and understood purpose and *raison d'etre* of labor unions: the maintenance and enhancement of favorable conditions (including, of course, wages) for working men as a class. That purpose may also be clearly discerned in the efforts of labor to unionize nonunion shops, even where no dispute exists between employer and employees. (See Rest. Torts, comment c to § 788.) In truth, it may be said that to each of its members a union owes the duty of exerting its best efforts to improve his economic position. But such efforts have in the past been confined at least primarily to the betterment of working conditions of laboring men who were in the status of employees—not of those who operated independent businesses, with or without employees. By Chief Justice GIBSON'S opinion this court will impose upon unions the anomalous choice of permitting peddlers to operate their businesses as they wish and thus endanger many benefits to working men which labor has secured only after long and arduous struggles, or else to admit to membership these same peddlers, and then as a duty owing to them as members, *attempt to improve their lot.* The interests of labor on the one hand and of independent businessmen—be they called peddlers, businessmen-workers, or by any other appellation—on the other, are conflicting and are not to be solved by decree of this court that they must unite in a joint union.

As declared by this court, speaking through Mr. Justice Edmonds, in C. S. Smith Met. Market Co. v. Lyons (1940), 16 Cal.2d 389, 403, 404, [106 P.2d 414, 422]: "The fear that they [labor unions] have grown so strong as to endanger vital civil liberties and disrupt the functioning of our economic system is an argument exclusively for the consideration of the legislature. Upon this point Mr. Justice Brandeis aptly stated in one of his dissenting opinions: 'Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.' (Duplex Printing Press Co. v. Deering, 1921, 254 U.S. 443, 488, 41 S.Ct. 172, 184, 65 L.Ed. 349, 16 A.L.R. 196.)"

So far as concerns the methods used by defendants here in their efforts to maintain employment at union standards for members of the union, there appears to be no real distinction between such methods and those commonly used by other peaceful and honest businessmen who seek in a free market to take business away from their competitors.

In Katz v. Kapper (1935), 7 Cal.App.2d 1, 44 P.2d 1060, the District Court of Appeal had before it a question as to the sufficiency of a complaint to state a cause of action for unfair competition. The complaint alleged, among other things, that (see page 3 of 7 Cal.App.2d, at page 1061 of 44 P.2d) "the defendants [fish dealers] maliciously called meetings of the customers of plaintiff, threatened them that they would be driven out of business and ruined if they continued to purchase fish from plaintiff, but promised that if they purchased fish from defendants, they would be given substantial reductions in price, so that they could successfully compete with plaintiff and drive him out of business; that if said customers continued to buy from plaintiff, the defendants would open a retail store and would sell fish to the customers of plaintiff's customers at such low prices that plaintiff's customers would be driven out of business." There were further allegations to the effect that defendants opened a store, advertised and sold fish at very low prices, at an actual loss to themselves, and deprived plaintiff of part of his business. The court declared (at page 4 of 7 Cal.App.2d, at page 1061 of 44 P.2d): "In deciding whether the conduct of defendants alleged in the complaint is actionable, it is necessary to apply certain well-settled rules relating to competition in business. These may be generally stated as follows: 'Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader is left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, or the procurement of the violation of contractual relations. If disturbance or loss comes as the result of competition, or the exercise of like rights by others, as where a merchant undersells or oversells his neighbor, it is damnum absque injuria.' 15 R.C.L., p. 73, and cases cited. * * * [At page 6 of 7 Cal.App.2d, at page 1062 of 44 P.2d] The fact that the methods used were ruthless, or unfair, in a moral sense, does not stamp them as illegal. It has never been regarded as the duty or province of the courts to regulate practices in the business world beyond the point of applying legal or equitable remedies in cases involving acts of oppression or deceit which are unlawful. Any extension of this jurisdiction must come through legislative action." I am neither approving nor disapproving the holding in the Katz case, but so long as the theory of free enterprise there defined is applied to activities of capital it should equally be applied to those of labor. I am not suggesting that competitive activities of labor organizations may not be subject to reasonable control but I am definitely opposed to the application of a double standard which would deny to organizations of one character activities which it condones in the other.

Defendants here are the competitors of plaintiffs in that the defendants are seeking to secure employment for members of the union to do the very work which plaintiffs are now doing, or, in another aspect of the matter, to gain as customers for members of organized labor those persons who now are customers of independent businessmen. However costly some of the attributes of free enterprise may be, it is established in this state that "Competitive freedom * * * is of sufficient importance to justify one competitor in inducing a third party to forsake another competitor if no contractual relationship exists between the latter two." Imperial Ice Co. v. Rossier, 1941, 18 Cal.2d 33, 36, 112 P.2d 631, 633, and cases there cited. No claim is made by plaintiffs that defendants here induced any customers of the plaintiffs to breach any contract with them or induced any of the milk brokers to breach a contract between plaintiffs and such brokers, and it was for the brokers to determine whether or not they wished to accede to defendants' peaceful request that they cease selling to plaintiffs. The weapons of labor—strikes, picketing, and boycotts—are means of persuasion—moral and economic—and action induced thereby or in contemplation of the possibility thereof is voluntary. See Matson Terminals, Inc. v. California Employment Com'n (1944), 24 Cal.2d 695, 703, 151 P.2d 202; Bodinson Mfg. Co. v. California Employment Com'n, 1941, 17 Cal.2d 321, 327, 328, 109 P.2d 935.

This case exposes the institution of free enterprise to the test for democratic fairness in its operation and administration. If it is lawful, in the interests of free enterprise, for capital organizations to wield their economic power to gain customers from competitors or to seek to gain control of sources of supply of items of mer-

chandise, even though the practical result may be to force a competitor out of the particular business or to preclude him from handling a certain item, then it should be equally lawful for a labor organization to wield its power to a similar end. That which is considered merely smart business when done by an organization of capital should not give rise to injunctive relief when proposed by an organization of labor. Admittedly the purpose in each case is a selfish one in the sense that each is seeking to promote the welfare of its own members. Certainly there may be a public interest in both cases and the state may prescribe reasonable limitations beyond which the personal interests of the organized groups may not trespass on the public interest and perhaps not on the private interests of each other. But the mere fact that the purpose is selfish does not make it unlawful. In the case of McKay v. Retail Auto. S. L. Union No. 1067, (1940), 16 Cal.2d 311, 323, 106 P.2d 373, in discussing the case of J. F. Parkinson Co. v. Building Trades Council (1908), supra, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, this court declared: "The ultimate motive for their activities was self interest—'to secure employment on more favorable terms for themselves', and in pursuit of that purpose they could lawfully attempt 'to secure employment by the plaintiff * * *, to the exclusion of those not associated with them.'" [16 Cal.2d 311, 106 P.2d 380.] Hence, as to the case at bar, it must rest with the legislative rather than with the judicial branch of government to establish limits which are narrower in compass than the fundamental law itself ordains.

It is argued here, for plaintiffs, that this is not a controversy between an employer and an employee and hence that it is not a legitimate labor controversy. It is a strange and unnatural concept which would limit organized labor to working only in the fields of employers. If organized labor cannot direct its weapons against unorganized workers and non-employer businessmen as well as against employers it will, indeed, be shackled. Such shackles, if they are to be forged at all, should be wrought by the Legislature and not by the courts. If in the Emde case it was true, as declared for this court by Mr. Justice Edmonds (at page 155 of 23 Cal.2d, at page 25 of 143 P.2d, 150 A.L.R. 916), that "it may not be denied that * * * the dissatisfaction of organized labor with a system of distributing milk products which avoids minimum wages and hours, workmen's compensation and social security benefits, is a legitimate matter of labor dispute," then that declaration is equally true here. Certainly the fact that plaintiffs in this case had been engaging for several years—instead of for a few weeks only, as in the Emde case—in "a system of distributing milk products which avoids minimum wages and hours, workmen's compensation and social security benefits," should not be expected to lessen organized labor's interest in stopping that system or plaintiffs' participation in it. Even if we regard the plaintiffs as workers it is just as much in the interest of organized labor to have the principle of the Emde case recognized and respected by workers—and to seek to persuade them to that end—as it is to have such principle accepted by employers.

If organized labor may lawfully picket or boycott an employer because he employs nonunion labor then it may equally lawfully picket or boycott the nonunion worker. In the absence of a valid statute proscribing such practice, if a secondary boycott is lawful in one case it is in the other. That the boycott, either primary or secondary, is a form of economic persuasion which may be employed to accomplish any lawful purpose is firmly established. McKay v. Retail Auto. S. L. Union No. 1067 (1940), supra, 16 Cal.2d 311, 319, 106 P.2d 373; C. S. Smith Met. Market Co. v. Lyons (1940), supra, 16 Cal.2d 389, 395, 106 P.2d 414; Fortenbury v. Superior Court (1940), 16 Cal.2d 405, 409, 106 P.2d 411.

One of the arguments advanced for the plaintiffs places the right to operate a private business without employees above the right to operate a similar business with employees. I perceive no reasonable ground for making such distinction. If the business of milk distributing is operated with employees, it is admitted (as it must be because of such decisions as Senn v. Tile Layers Protective Union (1937), 301 U.S. 468, 480, 481, 57 S.Ct. 857, 863, 81 L.Ed. 1229, 1237; American Fed. of Labor v. Swing (1941), supra, 312 U.S. 321 [61 S.Ct. 568, 85 L.Ed. 855]; Emde v. San Joaquin County etc. Council (1943), supra, 23 Cal.2d 146, 143 P.2d 20, 150 A.L.R. 916) that the hours and conditions of work, etc., of those actually distributing the milk as employees are a legitimate subject of

labor interest and action. Indeed, in the Emde case Mr. Justice Edmonds says specifically that (at page 155 of 23 Cal.2d, at page 25 of 143 P.2d, 150 A.L.R. 916) "the union, and those directly interested in and connected with the labor cause [including in the cited case certain other labor organizations, certain of their officers, and a newspaper], had the right to urge the public *and of course, the members of organized labor,* to refrain from buying the dairy's products unless the dairy abandoned the system of distribution which it had undertaken and rehired union drivers in accordance with the terms of the existing contract, *whether or not the employer-employee relation then existed between the members of the union and the dairy.*" (Italics added.) Surely the interest of organized labor in enforcing the above quoted proposition extends to and against nonemployer businessmen and workers in the industry who are not members of the labor organization just as much as to an employer, the public generally, and members of the union. And if the quoted proposition is sound when applied to the *rehiring* of union workers it should be equally sound in application to inducing *original* hiring. The "term 'labor dispute' is a broad one, and, in the absence of statutory definition, may be properly applied to any controversy 'which is reasonably related to employment and to the purposes of collective bargaining'." McKay v. Retail Auto. S. L. Union No. 1067, 1940, supra, 16 Cal.2d 311, 324, 106 P.2d 373, 380. A labor organization which contented itself with protecting existing contracts only and which did not seek the establishment of new contracts or the extension of employment for its members would hardly measure up to the scope and standard of action commonly exhibited by labor unions. If the extension of such contracts and the seeking of further employment are lawful and if the means used to attain those purposes are otherwise lawful, then the pressure designed to attain the desired ends can be applied to the nonemployer businessman and to the nonconforming worker just as well as to an employer.

I have endeavored to make it clear that we do not here have before us any question as to the right of the union to arbitrarily refuse membership to the plaintiffs on a basis of equality with its other members or any request by the union for equitable relief in which the question of its refusal of membership might be pertinent as touching on its right to invoke equity. It is not contended by plaintiffs that they sought employment as employees, or membership in the union in the status of employees. They are, and insist upon continuing to be, independent businessmen. They sought membership in the union not to conform to, or to support, its objects and program, but solely to further their own interests as independent businessmen in competition with the interests and objects of the union.

As declared by this court in the McKay case (supra, 16 Cal.2d 311, 320, 106 P.2d 373, 378), "It is a fundamental principle that the drastic sanctions of equity may not be invoked without a detailed showing of specific facts justifying such relief." The defendants here were competing with plaintiffs for the milk distributing business, seeking to get for the defendant union's members as employees the business which plaintiffs were doing as independent peddlers. "And competition for work being an entirely lawful activity, whether the competing groups be unions or unions and individuals, a court of equity may not interfere by restraining the use of any lawful form of concerted action used in the struggle." McKay v. Retail Auto. S. L. Union No. 1067 (1940), supra, 16 Cal.2d at page 322, 106 P.2d at page 379.

From what has been said it is apparent that the defendants neither sought an unlawful end nor used unlawful means. They had the right to compete with plaintiffs in a free market for employment in the milk distributing business and they had the right to use the pressure of possible boycott to aid their cause. In my opinion the judgment granting the injunctive relief sought by plaintiffs should be reversed.

CARTER and TRAYNOR, JJ., concurred.

Rehearing denied; CARTER, TRAYNOR, and SCHAUER, JJ., dissenting.

67 Cal.App.2d 798

GLESBY v. LERNER et al.

Civ. 14647.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1945.

1. Sales ⇐441(1)

Evidence that the seller of a machine operated it until three days after the sale, when it was dismantled by the buyers and re-assembled elsewhere, and that it would not work until completely overhauled, supported a judgment for the seller in an action for the price, wherein the buyers counterclaimed for breach of warranty.

2. Appeal and error ⇐1010(1)

There being substantial evidence to support it, a reviewing court has no alternative but to affirm the judgment.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Edward Glesby, doing business as Reliable Milling Company, against M. H. Lerner, and M. H. Lerner, doing business as Riverside Grain & Milling Company, for the price of a machine sold by plaintiff to defendants, who counterclaimed for breach of warranty, etc. From a judgment for plaintiff on his complaint and against defendants on their counterclaim, defendants appeal.

Affirmed.

Sarau & Thompson, of Riverside, for appellants.

Nathan E. Gillin, of Hollywood, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff and defendants were engaged in the business of milling and selling poultry feed. Plaintiff's place of business was in Los Angeles County; defendants' place of business in Riverside County. The plaintiff was going out of business in 1942; defendants were advised of it, and the parties negotiated a sale by plaintiff to the defendants of a pellet machine. A pellet machine transforms mash or bran, or like substances, into small, hard pellets which are fed to poultry.

Subsequent to the sale defendants dismantled the machine, shipped it to Riverside County and reassembled it there.

Defendants refused to pay for the machine, and plaintiff brought this action.

In defendants' answer three causes of counterclaim are set up. The correctness of the judgment is not questioned as to any counterclaim except the third. This counterclaim alleges warranty and breach thereof by the plaintiff in the sale of the machine.

After three days of testimony, the trial court found for the plaintiff on his complaint and against the defendants on their counterclaim, and judgment followed accordingly. From this judgment defendants have appealed.

[1] A review of the transcript discloses that there is substantial evidence to support the finding of the trial court upon all of the issues. Plaintiff and defendants all went to look at the machine. Some of its working parts were enclosed within a metal housing, which was not opened. Defendants testified to statements of plaintiff which would constitute a warranty, and that when the machine was reassembled in Riverside County it would not work and had to be completely overhauled.

The plaintiff denied making any statements constituting a warranty; he said that he told the defendants the machine was in good condition, but, like all other machines of its kind, it would have to be overhauled frequently, and defendants would have trouble with it.

A year or two before the sale plaintiff had the machine overhauled, and it was then in good running condition. Witnesses testified that it was operated by the plaintiff until three days after the sale, when it was taken down and shipped away by the defendants. From this testimony the inference may have been drawn not only that there was no warranty, but also that the reason this machine would not work when reassembled was because of its removal.

[2] There being substantial evidence to support it, a reviewing court has no alternative but to affirm the judgment.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

TYRA v. BOARD OF POLICE AND FIRE PENSION COM'RS OF CITY OF LONG BEACH et al. *

Civ. 14353.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1945.

, Rehearing Granted Feb. 19, 1945.

1. Limitation of actions ⇐95(1)

A petition for mandamus, filed more than three years after fireman's injury to compel pension board to award him a pension under city charter providing for pension if disability of fireman is such "as to render necessary his retirement from active service", was not barred by three-year statute of limitations, where petition alleged that within three-year period fireman had been advised by physician that fireman's injuries were temporary. Code Civ.Proc. § 338, subd. 1.

2. Limitation of actions ⇐58(2)

That city as self-insurer under workmen's compensation and safety laws voluntarily paid injured fireman compensation a week after the accident did not establish that his injuries were such "as to render necessary his retirement" within city charter providing for pension to fireman whose disability is such as to render necessary his retirement from active service, in determining whether fireman's cause of action not commenced within three years after date of injury was barred by limitations. Code Civ.Proc. § 338, subd. 1; St.1917, p. 831.

3. Workmen's compensation ⇐1764

The finding of Industrial Accident Commission, more than five years after accident, that city fireman's injuries "eventually resulted in a permanent disability of 100 per cent" did not establish when the injuries became "such as to render necessary his retirement" in determining whether petition to compel award of pension under charter providing for pension to fireman whose disability is such as to render necessary his retirement, was barred by three-year statute of limitations. Code Civ.Proc. § 338, subd. 1; St.1917, p. 831.

4. Municipal corporations ⇐200

Under city charter providing for pension to fireman whose disability is such "as to render necessary his retirement from active service" and providing that any pension granted for disability or sickness or "the result thereof" should cease when disability or sickness or "the result therefrom" ceases, it was not necessary that injuries which fireman received should be of such character at time they were received by him, but fireman would be entitled to retirement on pension if he became so disabled as result of such injuries.

5. Pensions ⇐1

Pension statutes must be liberally construed in favor of beneficiaries.

6. Municipal corporations ⇐200

An injured city fireman did not waive his right to a pension because he accepted workmen's compensation, but if fireman was entitled to pension under city charter it would be such an amount as would, when added to amount allowable under compensation and insurance acts, equal one-half of the amount of salary attached to his position at time of retirement order. St. 1917, p. 831.

7. Municipal corporations ⇐200

A construction of city charter which would create inequality against fireman who had been paid workman's compensation voluntarily with regard to receipt of pension provided by the charter should be avoided if possible, since pension system was intended to operate equally and fairly.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Mandamus proceeding by Joseph W. Tyra against the Board of Police and Fire Pension Commissioners of the City of Long Beach and others to compel defendants to retire the plaintiff from active service in the Fire Department, and to award him a pension under provisions of the charter of the City of Long Beach. From a judgment of dismissal, the plaintiff appeals.

Reversed.

Kenneth Sperry, of Long Beach, for appellant.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for respondents.

* Subsequent opinion 162 P.2d 35.

FOX, Justice pro tem.

By his petition for a writ of mandate the petitioner sought to compel the respondent, Board of Police and Fire Commissioners, to retire him from active service in the fire department and to award him a pension under the provisions of subdivision 3 of section 187 of the Long Beach City Charter, upon the ground that he had sustained injuries while acting in the course of his employment as a fireman, as a result of which he became permanently and totally disabled from and after February, 1940. The trial court sustained an objection to the introduction of any evidence for the reason that the petition did not state facts sufficient to constitute a cause of action. The objection was based on the grounds that it appeared from the face of the petition: (1) That the relief ought was barred by the provision of subsection 1 of section 338, Code of Civil Procedure, and (2) that petitioner had accepted the benefits of the Workmen's Compensation and Safety Act, St.1917, p. 831, and was therefore not entitled to a pension under the provisions of the Charter of the City of Long Beach. This is an appeal from the ensuing judgment of dismissal.

In his petition, which was filed August 26, 1942, petitioner alleged that he was employed by the respondent city as a regular member of its fire department on September 1, 1929, and that he had been and was employed as a regular member of said department up to and including February 8, 1937; that on the last mentioned date, while engaged in discharging his duties as a fireman, he "fell from a stepladder which broke under him and thereby sustained an injury to his back; that at first said injury did not appear to be particularly serious, although it did incapacitate petitioner from performing several of the duties required of him as a fireman, and necessitated a temporary cessation of his regular duties as a fireman; that at the said time the Defendant City was permissibly self insured pursuant to the provisions of the Workmen's Compensation and Safety Laws of the State of California and commencing as of February 16, 1937, the Defendant City voluntarily paid to Petitioner compensation pursuant to said Workmen's Compensation Act at the rate of $25.00 per week for a period of approximately 240 weeks up to the month of September, 1941." It is further alleged that, on or about March 4, 1942, in a proceeding before the Industrial Accident Commission wherein petitioner was applicant and respondent city was defendant, said commission duly and regularly rendered an award and finding of fact wherein it was adjudged that applicant sustained injuries arising out of the aforesaid accident which "eventually resulted in a permanent disability of 100%" entitling applicant to receive in addition to the aforesaid $25 per week for 240 weeks from February 16, 1937 (which period ended prior to said commission's finding and award), the further sum of $15.38 per week for the balance of his life, together with any and all medical attention made necessary by said injuries. Petitioner also alleged: "That throughout the period from February 8, 1937, to date Petitioner has been treated by doctors and surgeons provided for him by the Defendant City of Long Beach and in the month of October, 1939, underwent an operation to his back at their suggestion which said operation was performed with a view to relieving the lingering effects of said injuries and in the month of February, 1940, Petitioner was for the first time advised by his attending physicians that his disability was of a permanent nature and that he would never again be able to resume his duties as a fireman; that prior to said month of February, 1940, Petitioner was of the opinion and had been advised by his said attending physicians that his injuries were of a temporary nature and that he would be able to resume his duties within a short time."

The pertinent portion of the aforesaid Charter provision reads as follows: "Whenever any member of the Police or Fire Department shall become physically disabled or by reason of bodily injuries received in, or by reason of sickness caused by the discharge of duties of such person in such department, or shall become so physically or mentally disabled as a result of such injury or sickness as to render necessary his retirement from active service, the commission shall order and direct that such person be retired from further service in such department; and thereafter such person so retired shall, during his lifetime, be paid from said pension fund a yearly pension equal to one-half (½) of the amount of the salary attached to the rank or position held by him in such department at the date of such retirement order." It is then provided that "any pen-

sion granted to any member of the Police or Fire Department for disability or sickness, or the result thereof * * * shall cease when the disability or sickness, or the result therefrom, ceases, and such person shall * * * be restored to active duty in such department * * *."

[1-3] Under the quoted provisions of the Charter it was not necessary for petitioner to be or to become *permanently* disabled in order to be eligible for retirement. His disability, however, must be such "as *to render necessary* his retirement from active service." (Italics added.) Measured by this test the petition fails to show on its face that the relief sought by petitioner was barred by the statute of limitations which is three years in this case. Code Civ.Proc., sec. 338, subd. 1. He alleged "that *at first* said injury did not appear to be particularly serious, although it did incapacitate petitioner from performing *several* of the duties required of him as a fireman, and necessitated a *temporary* cessation of his regular duties as a fireman." (Italics added.) He further alleged "that prior to said month of February, 1940, Petitioner was of the opinion and had been advised by his said attending physicians that his injuries were of a temporary nature and that he would be able to resume his duties within a short time." These allegations certainly do not indicate that his disability was, prior to February, 1940, such "as to render necessary his retirement from active service." On the contrary, the clear implication is that he was able to perform certain of his duties. The injuries, according to his allegation, necessitated only "a temporary cessation of his regular duties" and in his opinion and that of his attending physicians were "of a temporary nature." The fact that the city as a self-insurer under the Workmen's Compensation and Safety Laws voluntarily paid petitioner compensation thereunder, starting a week after the accident, does not establish that his injuries were such "as to render necessary his retirement." Nor does the finding of the Industrial Accident Commission, more than five years after the accident happened (and less than 6 months prior to the filing of the petition herein), that the injuries suffered by petitioner "eventually resulted in a permanent disability of 100%" establish when his injuries became "such as to render necessary his retirement." It was not alleged in the petition that petitioner's injuries developed to be such "as to render necessary his retirement" prior to February, 1940, and it therefore did not appear on the face of the petition that the cause of action accrued more than three years prior to the filing of the petition.

[4] Under the quoted provisions of the City Charter it was not necessary that the injuries which petitioner received should be of such a character *at the time they were received* by him "as to render necessary his retirement." He would be entitled to retirement if he became so disabled *as a result* of such injuries. This idea is emphasized in the provision for restoration to duty for it is there provided that "any pension granted to any member of the Police or Fire Department for disability or sickness, or *the result thereof* * * * shall cease when the disability or sickness, or *the result therefrom,* ceases * * *." (Italics added.)

On a retrial it will be a question of fact for the court to determine from the evidence when petitioner's condition became "such as to render necessary his retirement from active service." We express no opinion as to what proof would be sufficient to establish that fact and thereby fix the date when the statute of limitations commenced to run. That question is not before us.

[5] Respondents' contention that petitioner waived his right to a pension because he had accepted Workmen's Compensation is not well founded. The argument is based on the language in section 188 of the Long Beach City Charter which we have italicized below. That section reads as follows: "This provision is intended to be in lieu of and take the place, in so far as it applies, of the Workmen's Compensation, Insurance and Safety Act of 1917, of the State of California, and amendments heretofore or hereafter to be adopted, and *any person who would be entitled to a pension under the provisions of this amendment and who applies for a pension hereunder shall be deemed to have waived all provisions under the Workmen's Compensation, Insurance and Safety Act of 1917;* but should it be decided by the Supreme Court of the State of California that the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917 cannot be waived, payments that may have been made hereunder shall be credited on the amounts allowed under said

Act, and all pensions granted hereunder for causes included within the purview of said Workmen's Compensation, Insurance and Safety Act shall become null and void except as to such an amount as will, when added to the amount allowable under said Workmen's Compensation, Insurance and Safety Act, equal the total monthly pension herein provided for." (Italics added.) This italicized provision, however, does not cover the situation here presented. It is the converse of our problem. This provision does not say that the acceptance of Workmen's Compensation benefits shall be deemed a waiver of pension rights, nor can it be so construed. The rule is clear that pension statutes are to be liberally construed in favor of those to whom rights are granted, and that such rights may not be taken away by strained construction. Casserly v. City of Oakland, 1932, 215 Cal. 600, 12 P.2d 425; Dillard v. City of Los Angeles, 1942, 20 Cal.2d 599, 127 P.2d 917, 128 P.2d 537.

[6] It should be pointed out, in the event petitioner should prevail on a retrial, that under the foregoing Charter provisions the amount which he will be entitled to receive as a pension will be "such an amount as will, when added to the amount allowable under said Workmen's Compensation, Insurance and Safety Act, equal" one-half of the amount of the salary attached to the position "held by him in such department at the date of such retirement order." We conceive this to be the clear intent of section 188 of the City Charter. These provisions would apply directly should it be decided by the Supreme Court that the right to Workmen's Compensation cannot be waived and should such compensation be awarded to an employee. The case is no different in principle where the city has paid Workmen's Compensation voluntarily and has thereby waived the condition that the Supreme Court should have decided that the right to such compensation cannot be waived.

[7] A construction which would create inequality against one who had been paid compensation voluntarily would lead to an absurd result and is therefore to be avoided if possible. Foster v. Pension Board, 1937, 23 Cal.App.2d 550, 73 P.2d 631. The pension system was intended to operate equally and fairly. If, therefore, petitioner is awarded a pension there should be credited thereon the amounts he has received and will receive as Workmen's Compensation from the date of his retirement.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



67 Cal.App.2d 728

CHAPLIN v. SULLIVAN.

Civ. 7051.

Sac. 5648.

District Court of Appeal, Third District, California.

Jan. 30, 1945.

Rehearing Denied Feb. 24, 1945.

Hearing Denied March 29, 1945.

1. Appeal and error ⇐1051(3)

In quiet title action against assignee of purchaser under real estate contract, brought by vendor's grantee who obtained title subject to rights of purchaser, admitting statement of installments due under the contract, which statement was received by defendant from vendor's administrator, was not prejudicial where plaintiff admitted that the statement had been received and that defendant had paid the balance there shown to be due.

2. Payment ⇐65(4)

The presumption arises from the receipt for later installments due under a real estate contract, that the earlier installments had been paid. Code Civ.Proc. § 1963, subd. 10.

3. Evidence ⇐378(1, 4)

The statutory presumption of identity of person arising from identity of name and other evidence respecting handwriting and identity was sufficient proof that letter admitted in evidence was signed and sent by the person who had purported to sign it. Code Civ.Proc. § 1963, subd. 25.

4. Appeal and error ⇐1051(3)

Admitting in evidence over objection a letter the contents of which appellant referred to in his brief was not prejudicial.

5. Appeal and error ⇐1051(3)

Admitting certain letters in evidence over objection as to sufficiency of identification was not prejudicial where appellant conceded the existence of the facts related therein and that the writer of the letters was the person claimed. Code Civ.Proc. § 1963, subd. 25.

6. Evidence ⇐378(1)

Under proper circumstances the authenticity or genuineness of a letter may be established by indirect or circumstantial evidence, without resort to proof of handwriting or typewriting. Code Civ.Proc. § 1963, subd. 25.

7. Evidence ⇐378(1)

To establish genuineness or authenticity of a letter, reliance may be placed on the fact that the letter states facts which could only be known to or relate to the purported writer. Code Civ.Proc. § 1963, subd. 25.

8. Appeal and error ⇐992

Trial court's supportable finding that letters offered in evidence were authentic was binding on appellate court. Code Civ. Proc. § 1963, subd. 25.

9. Vendor and purchaser ⇐219

Evidence sustained finding that purchaser's assignee, who continued to pay installments due on real estate contract to vendor's administrator, had no knowledge or notice that plaintiff was the owner of the real estate contract by virtue of a deed from vendor, so as to permit plaintiff to have title to the property quieted in him on ground that purchaser's assignee was in default.

10. Vendor and purchaser ⇐212

Where plaintiff, who took title to land subject to a contract between grantor and another for sale of a portion thereof, failed to assert his rights under the contract for a long time and permitted purchaser's assignee to make installment payments to vendor's administrator in good faith, plaintiff waived his right to declare a default. Civ.Code, §§ 3527, 3543.

11. Quieting title ⇐10(1)

In a suit to quiet title, plaintiff must rely upon the strength of his own title and not upon the weakness of that of his adversary.

12. Vendor and purchaser ⇐212

Where a party who takes title to land subject to a contract with another for the sale of a portion thereof fails to show that he has been vigilant in effecting a forfeiture for alleged default and suffers the vendee to make payments to another in apparent good faith, he cannot call upon a court of equity to aid him. Civ.Code, §§ 3527, 3543.

13. Contracts ⇐318, 322(1)

Forfeitures are not favored, and the burden of proving facts creating a forfeiture rests upon the one alleging such facts.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Willis G. Chaplin against Barbara Sullivan and another to quiet title. From an adverse judgment, plaintiff appeals.

Affirmed.

Ernest Clewe and Peters, Millington & Clewe, all of Oroville, for appellant.

Hubert I. Townshend, of Oroville, for respondents.

ADAMS, Presiding Justice.

Plaintiff brought this action to quiet title to a quarter section of land in Butte County. Defendant Barbara Sullivan appeared, and defendant Webster defaulted. No other defendants were served with process, and the action was dismissed as to them. Mrs. Sullivan, in her answer, claimed an interest in the property described, alleging that on August 23, 1934, while it was owned by Dora B. Webster, the latter entered into a contract to sell 40 acres of said land to J. N. McFate, and that on April 16, 1936, McFate assigned his rights in the contract to this defendant. She further alleged that after making the said contract with McFate, Dora B. Webster died, Edward F. Webster was appointed administrator of her estate by a probate court in Missouri, on May 8, 1935, that said administrator made demand upon her for payment of installments due under the contract, and that she paid them to him up to the time of the filing of this action, since which time she had withheld payments, not knowing to whom to pay them, but that she was ready, able and willing

to pay the balance due to the party entitled thereto.

At the trial of the action it was stipulated that the only issues of fact that need be determined by the court were what moneys had been paid on the contract by or on behalf of McFate, or by or on behalf of defendant Sullivan, to such person and in such manner as did or do constitute in law a discharge pro tanto of the obligation in said contract, and what sum remained owing to plaintiff as the successor in interest of Dora B. Webster.

At the conclusion of the trial the court made findings in favor of defendant Sullivan, as to the 40 acre tract, gave judgment to plaintiff quieting his title to the remainder of the quarter section, and provided, pursuant to stipulation of the parties, that defendant Sullivan should have sixty days within which to pay to plaintiff all payments accruing under the contract from October 22, 1938, to February 26, 1940, on her failure so to do plaintiff to become entitled to a decree quieting his title, and on her making said payments the action to be dismissed as to her in so far as the same pertains to the 40 acre tract in controversy.

Motion for a new trial was denied and plaintiff has appealed from the portion of the judgment in favor of defendant Sullivan.

Appellant in his brief concedes the following to be facts in the case. Dora B. Webster, the wife of Edward F. Webster, a resident of Missouri, was the owner of the entire tract. On August 23, 1934, Mrs. Webster entered into a contract with McFate to sell to him the 40 acres in controversy for $2000, payable in six monthly installments of $30 each, and 91 monthly installments of $20 each, without interest prior to maturity, the contract providing that the vendee should pay all taxes, liens and assessments, pay for insurance on improvements and assign the policy to the vendor. Said contract also provided that in the event of the failure of the vendee to make the payments provided for for a period of one month from the date same became due, all moneys previously paid should become forfeited and the contract should terminate without further notice unless extended by the vendor. Immediate possession of the property was given to the vendee. Mrs. Webster conveyed the entire quarter section to plaintiff, subject to the contract of sale to McFate, by deed dated March 9, 1935, recorded April 25, 1935. On April 16, 1936, McFate assigned his contract to Mrs. Sullivan, said assignment being recorded July 16, 1936. On April 15, 1935, Mrs. Webster died and her husband was appointed administrator of her estate by a Missouri court. On April 15, 1936, Mrs. Sullivan mailed to Webster a cashier's check for $280, the amount of installments called for by the contract from March, 1935, to April, 1936, inclusive, and thereafter paid to Webster the sums falling due up to October 22, 1938, but made no payments to plaintiff.

At the trial plaintiff stipulated that the copy of the contract be deemed in evidence, introduced his deed from Mrs. Webster, and rested. He produced no evidence that plaintiff had ever notified either McFate or defendant Sullivan of his deed from Mrs. Webster, or that he had ever notified either to make payments under the contract to him, or that he had not received payment of installments as they became due. The trial court found that the installments and other payments were paid in full to October 22, 1938, that defendant was entitled to credit therefor toward the satisfaction of payments under the contract, and that no default existed at the time of the commencement of the action; that defendant Sullivan had no information putting her on notice that payments on the contract should be made to plaintiff, that Webster advised Mrs. Sullivan that payments should be made to him (Webster), and that no demand or notice that payments be made to plaintiff was made until about the time of the commencement of the action; that plaintiff stood by knowing that payments were being made to Webster, and failed to assert a forfeiture under the contract or to advise defendant that he was the owner of the property and claimed the right to receive payments; that plaintiff having failed to assert his rights over a long course of time has elected to recognize the payments due under said contract made up to and including October 22, 1938, as valid toward satisfying the terms of the contract and has waived his right to declare that such payments so made to and including October 22, 1938, are or constitute a default.

Appellant contends that these findings are not supported by competent evidence, and that the trial court committed reversible error in admitting certain exhibits offered by defendant. We shall consider the latter contention first.

[1, 2] Defendant's Exhibit "B" purports to be a statement of installment payments due under the contract as of April 20, 1936. Defendant testified that it came from Webster and that she paid the amount therein shown to be due. Appellant admitted that defendant had received this statement but objected to it as immaterial because Webster had no right to receive the payments. Inasmuch as appellant concedes in his brief that defendant paid this balance of $280, being the amount of the installments called for by the contract from March, 1935, to April, 1936, inclusive, we cannot see how the introduction of the statement in any way prejudiced appellant. He argues that it was offered as evidence that all installments maturing prior to March 1, 1935, had been paid, and that it does not constitute proof of such fact. But there was no evidence that such prior installments were not paid, and, regardless of the document, from the receipt for later installments the presumption arises that the earlier ones had been paid. Sec. 1963, subd. 10, Code Civ.Proc.

[3] Defendant's Exhibit "C" purports to be a letter from Webster to McFate dated April 20, 1935, advising of Mrs. Webster's death and informing McFate that all further business should be transacted with Webster. It acknowledged receipt of $20 for February payment, and enclosed a newspaper clipping regarding Mrs. Webster's death. Appellant objected to the introduction of this letter on the ground that it was incompetent, irrelevant and immaterial, that there was no "identification of the fact that it was actually written by Mr. Webster himself, and is hearsay so far as plaintiff in this action is concerned." Mrs. Sullivan testified that McFate had given her this letter among others in regard to the property; also that she herself had had correspondence with Webster and knew his signature from the signature on letters she had received and the endorsement on checks which she had sent him. This letter (and others subsequently offered) was admitted subject to motion to strike, but no such motion was thereafter made. In view of the testimony of Mrs. Sullivan that she knew Webster's signature, and the presumption of identity of person arising from identity of name (sec. 1963, subd. 25, Code Civ.Proc.), and in view of appellant's concession in his brief that Edward F. Webster was the husband of Dora B. Webster and was appointed administrator of her estate, and in view of the contents of the letter itself in relation to other offered in evidence, we think that there was sufficient proof that the letter was signed and sent by Webster. Also, since appellant also relies upon a copy of a letter dated September 7, 1935, to McFate, signed Edward F. Webster (Plaintiff's Ex. 2), which he introduced without proof that the original of same was signed by Webster or mailed to or received by McFate, he is in no position to contend that he was prejudiced by the admission of said Exhibit "C".

[4] Defendant's Exhibit "D", a letter dated May 9, 1935, purporting to be written to McFate and signed by Webster, was accompanied by a clipping from a Kansas City newspaper containing a notice of the death of Mrs. Webster. It made reference to a copy of a letter from a Miss Collier which the writer stated he had received from McFate, and then stated "any attempts by Miss Collier or Mr. Chaplin to interfere in the matter of Mrs. Webster's estate will be met with prosecution." It is sufficient to say that in view of Mrs. Sullivan's testimony as to her knowledge of Webster's signature, and, in particular, the fact that appellant in his brief relies upon the reference in this letter to Chaplin as constituting notice to defendant that Chaplin was the owner of the premises, the admission of same was not prejudicial to appellant, and he is in no position to contend that it was.

Defendant's Exhibit "E" was a letter from Webster to McFate, also dated May 9, 1935, and was accompanied by a newspaper clipping containing legal notice of the issuance to Edward F. Webster of letters of administration of the estate of Dora B. Webster. It stated: "I trust that this will make it clear to you where and to whom any future moneys are to be paid"; also, "I desire to continue Mrs. Webster's agreement with you. * * * As to future payment, I have no desire to crowd you, and will leave to you the fulfillment of the terms of the contract." Exhibits "F" and "G" were letters to Mrs. Sullivan signed by Webster, acknowledging receipt of installment payments of $20 each for January, February, March and April, 1937.

[5-7] Inasmuch as appellant concedes that Webster was appointed administrator of his wife's estate, and that defendant paid to Webster the sums falling due up to

October 22, 1938, even if it were assumed that these letters were erroneously admitted as being without sufficient identification, no injury to appellant has resulted therefrom. Furthermore, it is said in 9 A.L.R. 984, that the authorities generally concede that under proper facts and circumstances the authenticity or genuineness of a letter may be established by indirect or circumstantial evidence, without resort to proof of handwriting or typewriting. Among other things upon which reliance may be placed is that a letter states facts which could only be known to or relate to the purported writer.

In Maynard v. Bailey, 85 W.Va. 679, 102 S.E. 480, 481, 9 A.L.R. 981, the court said that the genuineness of a letter may be shown in more than one way; that "like any other material fact, the authenticity * * * of a letter may be established by circumstantial evidence. If its tenor, subject-matter, and the parties between whom it purports to have passed make it fairly fit into an admitted or proved course of correspondence and constitute an evident connecting link or part thereof, these circumstances justify its admission." (With citations.)

In Fayette Liquor Co. v. Jones, 75 W. Va. 119, 83 S.E. 726, it was held that letters received in a continuous course, not in the handwriting of an alleged illiterate sender, but relating to matters in suit and so consistent with truthful relation thereto as to make it improbable that anyone could have forged them, may be admitted so that the jury may, from their contents, determine their genuineness. Also see Union Cent. Life Ins. Co. v. Washburn, 158 Ala. 169, 48 So. 475; Sun Mfg. Co. v. Egbert, 37 Tex.Civ.App. 297, 84 S.W. 667; Fielding v. Iler, 39 Cal.App. 559, 563, 179 P. 519; Lancaster v. Ames, 103 Me. 87, 68 A. 533, 17 L.R.A.,N.S., 229, 125 Am.St.Rep. 286; Chicago, B. & Q. R. Co. v. Roberts, 10 Colo.App. 87, 49 P. 428; Bowker Fertilizer Co. v. Cluskey, 124 Me. 384, 130 A. 209, 210; Leunis Co. v. Singer, 102 N.J.L. 68, 130 A. 457; Locke v. Woodman, Mo. App. 225 S.W. 352; International Harvester Co. v. Campbell, 43 Tex.Civ.App. 421, 96 S.W. 93, 95.

[8] Whether or not these letters were written by Webster presented a question of fact for the trial court and we think that there was sufficient evidence to support its apparent conclusion that they were authentic, which conclusion is binding upon an appellate court.

[9] Coming now to appellant's contention that the evidence is insufficient to sustain the findings of the trial court, he claims that the record discloses that when defendant took her assignment from McFate she had both "actual and legal" notice that plaintiff was the owner of the contract and hence the only person entitled to receive payments; that at any event she was aware that Webster's right to receive them was disputed; that with the slightest effort on her part she would have ascertained that plaintiff was the true party in interest; but that she deliberately chose to make them to Webster who had no right to receive them.

We have carefully read the record in this case and are unable to say that there was insufficient evidence to sustain the court's findings, or that the evidence compels the conclusions of appellant as above set forth. As to defendant's alleged notice, appellant in his brief states that he "has not argued that the recordation [of deed of Mrs. Webster to plaintiff] in and of itself did constitute such notice," but that for other reasons she had both actual and constructive notice. He relies upon the reference to "Mr. Chaplin" in defendant's Exhibit "D", and the letter of Webster to McFate (Plaintiff's Ex. 2) in which Webster said: "I note you have another letter of Willis G. Chaplin, and I would thank you for a copy of it for my files, or if it would save you time, you may forward it to me and I will have it copied and return it to you. Mr. Chaplin and Miss Collier who first induced Mrs. Webster to make a will, which to date has not been made of record and I have asked a citation from the court to require them to file, and who afterward induced her to make a deed to supplant the will which deed they filed in Butte County, do not seem to understand that in both cases, while probably attempting to convey the whole Quarter Section, excepted the fourth which was under contract for sale to you, and my attorneys both here and in California advise me that no disposition of the fourth you are interested in is conveyed but belongs to me, both as community property and by inheritance. As administrator I have filed a surety bond which will protect you in any transactions you have with me. Miss Collier and Mr. Chaplin have taken no steps to qualify legally to handle matters

and if you have occasion to write them I think it would be best to advise them to take any matters up with me, as they will fianlly have to, and there is no reason for them to annoy you or to try to take advantage of your consideration." Also he relies upon a copy of a letter to Walsh & Aylard, Kansas City, by McFate, dated August 7, 1935, in which it is stated: "Amediately after the death of Dora B. Webster I received Notice of the appointmen of Edward F. Webster as administrator of her estate. The administrator instructed me to not pay any money on the Brush Creek Property to Mr. Willis G. Chaplin. I stand ready to make payments up to date when I know who to make them to, which of course will be established in final settlement of the estate. So far I hav'ent done anything to protect myself on this deal, however my contract is of record. If you will get the administrator to advise me to make the payments to Willis G. Chaplin I would be glad to do it, as it make not difference to whom I pay the money."

On the other hand, Mrs. Sullivan testified that she did not know plaintiff, had never seen him or communicated with him; that McFate never mentioned the name Chaplin to her and that she had never heard of the firm of Walsh & Aylard; that McFate told her that Webster was administrator of Mrs. Webster's estate and that he was making payments to Webster and that she should do likewise; that McFate had told her that "there was a pile of them" trying to interfere with Webster's handling of affairs, but that she saw in the paper that he was the administrator, and that she received the letters and took it for granted that he was the rightful owner; that she never received any notification to make payments to anyone other than Webster until she received a letter from Mr. Clewe, plaintiff's present attorney, dated October 22, 1938; that Chaplin never wrote her any letters and she never knew anything about the deed to him or his claim until she received the letter from Mr. Clewe. It is therefore apparent that whether Mrs. Sullivan had notice or was aware that plaintiff was the owner of the contract and the only person entitled to receive payments, or whether she had sufficient knowledge of facts to put her on notice, were matters for the trial court, and there being a conflict in the evidence its determination must be held conclusive upon this court.

[10] As to the finding that plaintiff failed to assert his rights under the contract for a long course of time and elected to recognize the payments due under the contract as valid, and had waived his right to declare a default under the contract because of payment to Webster of the installments so paid, we think that this conclusion, too, was one which the trial court was justified in drawing, under the evidence.

Plaintiff took the land subject to the contract with McFate, which, as his deed stated, called for monthly payments; yet he never made demand upon the vendee or his assignee that payments should be made to him until the letter of October 22, 1938, was written to Mrs. Sullivan by Mr. Clewe. Appellant obviously knew that Webster was administrator of Mrs. Webster's estate, and he must have known either that Webster was collecting the payments or that the contract was in default; he did not testify in this action, and there is no evidence that the payments made to Webster were not subsequently received by him; he does not appear to have made any inquiry about the payments until the letter of his attorney was written in October, 1938, and in that letter no forfeiture was claimed; on the contrary, the letter stated: "Mr. Chaplin desires either to have the transaction completed or else to clear his title to the land. * * *"

In Lucy v. Davis, 163 Cal. 611, 616, 126 P. 490, the court said that where the assignee of a contract of sale failed to notify the vendee of the transfer of the contract to the assignee he was not in a position to complain of respondent's delay in tendering payments due after the assignment.

[11-13] That the law helps the vigilant before those who sleep on their rights is a maxim of jurisprudence (Civ.Code, sec. 3527), as is the rule that where one of two persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer (Civ.Code, sec. 3543). Plaintiff has come into court with an equitable action, to wit, a suit to quiet title, and in such action must rely upon the strength of his own title and not upon the weakness of that of his adversary; and where, as here, a party who takes title to land subject to a contract entered into

with another for the sale of a portion thereof fails to show that he has been vigilant in effecting a forfeiture of such contract for what he contends constituted defaults thereunder, and suffers the vendee to make payments to another in apparent good faith, he cannot with reason call upon a court of equity to aid him, especially where, as here, such court finds that the vendee under the contract and his assignee in possession have done all that a reasonable person was called upon to do under the circumstances. Forfeitures are not favored, and the burden of proving facts creating a forfeiture rested upon plaintiff. Riedman v. Barkwill, 139 Cal.App. 564, 567, 34 P.2d 744; Reclamation District v. Van Loben Sels, 145 Cal. 181, 184, 78 P. 638.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.



67 Cal.App.2d 711

PEOPLE v. RICKMAN.

Cr. 2308.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1945.

1. Criminal law ⇐1035(3)

Generally, complaints of misconduct of trial judge and prosecuting attorney will not serve as ground for reversal of conviction unless alleged impropriety was promptly called to attention of trial court and assigned as misconduct.

2. Criminal law ⇐1166½(1)

Generally, a judgment will not be reversed because of personal references to the counsel for the defense which cannot prejudice the defendant.

3. Criminal law ⇐1165(2)

A judgment of conviction will not be reversed where appellate court is unable to perceive that alleged misconduct had a material effect on determination of issues of fact, or where it appears that effect thereof was unimportant and especially where guilt of accused has been established by clear and convincing evidence.

4. Criminal law ⇐1162

A reversal of conviction for misconduct is not warranted except in clear and extreme cases, and unless the misconduct is obviously so flagrant and prejudicial that in opinion of appellate court based on review of entire record it has resulted in a miscarriage of justice.

5. Criminal law ⇐656(2)

Action of trial judge in calling attention of defendant's trial counsel to correct rule governing matter of impeachment of witness when it was apparent that such rule was not being followed was not misconduct.

6. Criminal law ⇐656(2)

Where deputy district attorney stated that cross-examination was getting very close to privileged testimony and, in response to statement of defendant's trial counsel, judge remarked "he only said it was getting dangerously near", and, when defendant's counsel complained that he had not been given opportunity to argue objection to line of examination being pursued, judge stated "well, it is so obvious—we have it every day, so many times down here, that we don't waste our time. If you want to argue it, go ahead", and after argument court permitted cross-examination for impeachment purposes, remarks of judge did not amount to misconduct. Code Civ.Proc. § 1881.

7. Criminal law ⇐656(2)

Where state's witness, being cross-examined as to whether he was color blind, stated that he had passed army test without being informed that he was color blind, defendant's trial counsel stated "I wish you would not volunteer all these answers", court remarked that "he has a right to defend himself and tell you why he is not color blind", and, when counsel remarked that it was not a question of whether he had passed army test or not, court remarked "let us get through with this case sometime", the remarks of the court did not amount to misconduct.

8. Criminal law ⇐700

Remarks of deputy district attorney, involving at most only personal reference to the then defense counsel's manner of conducting cross-examination, were not misconduct where remarks were not dis-

courteous and could not have resulted in prejudice to defendant.

9. Criminal law ⇐1036(1), 1044

Where trial counsel of defendant did not move to strike out testimony of state's witness which could be deemed objectionable, or ask court to instruct jury to disregard it, defendant could not complain thereof on appeal.

10. Criminal law ⇐419(10)

Defendant's legal rights were not violated by state inspector in relating conversation that took place between him and defendant following her arrest, where entire conversation pertained to subject of her arrest and whatever affirmative statements were made by inspector during conversation were made in response to defendant's inquiries. St.1941, p. 2820, § 11160.

11. Criminal law ⇐1044, 1129(1)

Where telephone conversation, after defendant's arrest, between state inspector and counsel who represented defendant at time of trial, was brought into case in answer to counsel's questions, and after inspector had given his version of conversation there was no motion made to strike out any part of it, nor was any part of it assigned as error, error was not shown.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Daisy Rickman was convicted of selling opium, and she appeals.

Affirmed.

Sol A. Abrams and Louis R. Mercado, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The appellant, Daisy Rickman, was found guilty by a jury of selling opium in violation of section 11160 of the Health and Safety Code, St.1941, p. 2820, and as a punishment therefor she was sentenced to imprisonment in the county jail for a term of one year.

The opium was purchased from appellant by a woman operator in the employ of the state narcotic division, and the sale took place in front of a shoe shining stand operated by appellant on Jones Street at O'Farrell in San Francisco. The operator paid appellant the money on the afternoon of January 10, 1944, and the next day at appellant's request she called for the package, which appellant delivered to her and which was shown to contain opium. The shoe shining stand bordered on the sidewalk, and was located nearly opposite a garage, from which the stand could be plainly seen; and the transactions involving the payment of the money and the delivery of the package were witnessed from the garage by two state inspectors, named Simpson and Fennell. At the trial the prosecution did not reveal the identity of the woman operator, but rested its case on the testimony of the inspectors and the chemist who analyzed the narcotic. At the time of appellant's arrest she admitted to Inspector Simpson, so he testified, that she had been taking money from various people as they passed her stand, and later had delivered to them certain packages, but she claimed that the packages were given to her for delivery by one Julia Murray, to whom she paid the money so collected; and that she did not know that the packages contained narcotics. Appellant did not take the witness stand to refute any of the testimony introduced against her, and she produced but one witness. His testimony, however, failed to establish any fact helpful to appellant.

Following the pronouncement of judgment the attorney who had represented appellant up to that time was succeeded by appellant's present counsel, who present the appeal. They do not question the sufficiency of the evidence, nor do they challenge the correctness of any rulings on the admissibility of evidence, or of any of the instructions. The sole contention made is that appellant was not afforded a fair trial by reason of alleged misconduct on the part of the trial judge and the deputy district attorney, and on account of some alleged prejudicial statements made by the inspectors while testifying in the case. There is no merit in any of the points so urged.

[1] It is a general rule, subject to certain exceptions not here present, that complaints of misconduct will not serve as ground for reversal unless the alleged impropriety was promptly called to the attention of the trial court and assigned as misconduct, so that the trial court is offered an opportunity to correct the irregularity and thus prevent any prejudicial effect

thereof if that be possible. 8 Cal.Jur. p. 508, 511; and see cases cited in 4 Cal.Jur. 10 Yr.Supp.(1943) pp. 916–920. In the present case there was a failure to comply with the foregoing rules.

[2-4] It is also held generally that a judgment will not be reversed because of personal references to the counsel for the defense which cannot prejudice the defendant; and most of the criticisms here relied on fall within that class. 8 Cal.Jur. p. 623. Furthermore, the law is well settled that a judgment of conviction will not be reversed where the appellate court is unable to perceive that the alleged misconduct had a material effect on the determination of the issues of fact, or where it appears that the effect thereof was unimportant or slight; and especially is this true where as here the guilt of the accused has been established by clear and convincing evidence. In other words, a reversal is not warranted except in clear and extreme cases, and unless the misconduct is obviously so flagrant and prejudicial that in the opinion of the appellate court based on a review of the entire record, it has resulted in a miscarriage of justice. 8 Cal. Jur. p. 621; 4 Cal.Jur. 10 Yr.Supp.(1943) pp. 1006–1010.

[5] Considered in the light of the legal principles last above stated, it is evident that the remarks and statements specified by appellant as constituting misconduct fall far short of being such; much less can it be said that they were of such a nature as would serve as ground for reversal. The complaints directed against the conduct of the trial judge have as their basis the following: In attempting to impeach the testimony of one of the inspectors by the use of the transcript of the testimony given at the preliminary examination, counsel for appellant was following a method which the judge deemed was not in conformity with the established rule, and he said: "The proper way to do it, if I may suggest it * * *" and he then went on to state the correct procedure as laid down by the court decisions; whereupon counsel for appellant stated: "Your Honor is taking the attitude of attempting to make counsel look ridiculous before the jury." It is quite obvious that fairly construed the remarks of the judge carried no such implication; and certainly it cannot be said to be misconduct on the part of the trial judge to call counsel's attention to the correct rule governing matters of impeachment when it is apparent that such rule is not being followed.

[6] Later, counsel for appellant began cross-examining the inspector as to how the operator was dressed, and the deputy district attorney, evidently believing that counsel's purpose was to ascertain the identity of the operator, interrupted by saying: "I think we are getting very close to the privileged testimony" (referring to section 1881, Code of Civil Procedure). Counsel for appellant argued that he had "not asked for the name yet"; whereupon the judge remarked, "He [referring to the deputy district attorney] only said it was getting dangerously near." Shortly thereafter an objection was sustained to the line of examination then being pursued, and counsel for appellant complained that he had not been given an opportunity to argue the point. In response the judge said: "Well, it is so obvious—we have it every day, so many times down here, that we don't waste our time. If you want to argue it, go ahead," which counsel proceeded to do, stating among other things that he was entitled to ask the questions for the purposes of impeachment. The court replied, "Well, I will allow it if you want it for impeachment purposes." Thereupon counsel resumed the line of examination he had been pursuing at the time the objection was made and sustained. It would seem to require no comment to demonstrate that there was nothing in the attitude or remarks of the trial judge that amounted to misconduct.

[7] On direct examination of Inspector Simpson he testified that he saw the operator hand appellant the currency, and saw appellant take it and place it in the pocket of her smock; and on cross-examination the following occurred:

"Q. Now, you say that the objects that were being passed were green like money? A. It was money.

"Q. What color? A. Green.

"Q. Is money green? A. Yes, paper money.

"Q. You have seen paper money, haven't you? A. A little, yes.

"Q. I show you here a five-dollar bill and I will ask you what color that is. A. It has the appearance of green.

"Q. Does that look green to you? A. Yes.

"Q. What color does this look like? A. That looks green, also.

"Q. That one looks green to you? A. Yes.

"Q. Have you ever been advised that you are color blind? A. No.

"Q. Can you distinguish between green and grey? A. Well, I passed the army test and they didn't tell me I was color blind in the army.

"Q. I wish you would not volunteer all of these answers.

"The Court: He has a right to defend himself and tell you why he is not color blind.

"Counsel for appellant: It is not a question of whether he passed the army test or not.

"The Court: Let us get through with this case some time."

Counsel then proceeded to interrogate the witness as to whether he could "say positively" that what he saw passed was money, and the witness replied, "I would say it was money. If you ask me for a direct answer, I will say it was money." It is apparent that under the circumstances above set forth the comments made by the judge were fully justified.

[8] Two criticisms are directed against the conduct of the deputy district attorney, but they are trivial and therefore do not require special attention. At the most the remarks complained of involved only personal references to counsel's manner of conducting the cross-examination. The remarks were not discourteous and could not possibly have resulted in prejudice to appellant; that being so, they may be dismissed without further comment. 8 Cal. Jur. p. 623, note 6.

[9] With regard to alleged prejudicial statements made by the inspectors, the record shows that all but a few of those complained of were, on motion of counsel or by the court of its own motion, stricken out and the jury was instructed to disregard them. As to the first of the remaining ones the record shows that on direct examination Inspector Simpson was asked the question: "What further, if anything, happened on the day of the 10th there, if you recall?" and he replied, "Well, I observed people associating with the defendant that had long narcotic records"; whereupon counsel for appellant remarked, "The witness knows that that is objectionable." As will be noted, the answer was responsive to the question; but even though it could be deemed to be objectionable, it was not assigned as error, nor did counsel move to strike it out or ask the court to instruct the jury to disregard it. Therefore appellant is not in a position to complain thereof on appeal.

[10] Nor does it appear that any of appellant's legal rights were violated by the inspector in relating the conversation that took place between him and appellant following her arrest. The entire conversation pertained to the subject of her arrest, and it appears that whatever affirmative statements that may have been made by the inspector during the conversation were made in response to appellant's inquiries as to the identity of the person or persons who had brought about her arrest, or in response to her claim that she did not know the contents of the packages she had been delivering to the persons from whom she had been collecting the money.

[11] Shortly after appellant's arrest counsel called Inspector Simpson on the telephone and requested permission to see the report on the case. The request was refused, and on cross-examination the inspector was interrogated about the telephone conversation. In narrating that portion thereof as to the reasons for the refusal the inspector stated among other things that he told counsel that such reports were confidential and furthermore that he would prefer to have no further conversation with counsel about the matter because of certain information given to him "around the police department" concerning counsel's reputation. As will be noted, the telephone conversation was brought into the case by counsel in answer to counsel's questions; moreover, after the inspector had been asked for and had given his version of it, there was no motion made to strike out any part of it, nor was any part of it assigned as error. Consequently no error is shown.

After reviewing the entire record, it is our conclusion that appellant was afforded a fair trial; and therefore, since the evidence is admittedly sufficient to sustain the conviction, the judgment should be affirmed. It is so ordered.

PETERS, P. J., and WARD, J., concur.

PEOPLE v. SMITH. *

Cr. 3837.

District Court of Appeal, Second District, Division 3, California.

Jan. 24, 1945.

Hearing Granted Feb. 19, 1945.

1. Receiving stolen goods ⇐8(3)

Evidence was sufficient to sustain conviction of receiving three stolen radios. Pen.Code, § 496.

2. Criminal law ⇐29

One receiving two stolen articles, with knowledge that one of them was stolen, but no guilty knowledge as to the other, or receiving several articles at one time from one person, with knowledge that they were stolen, but without knowledge that they were stolen from different owners at different times, is guilty of but one offense. Pen.Code, § 496.

3. Criminal law ⇐29

One receiving property from another, with knowledge that parts of it were stolen from two different persons, is guilty of two distinct crimes. Pen.Code, § 496.

4. Criminal law ⇐29, 507(5)

One arranging for theft of radios and sale thereof to him by thief is accomplice in theft and guilty of more than one offense of buying or receiving stolen property. Pen.Code, § 496.

5. Criminal law ⇐29

A single act or continuous series of acts may constitute two separate offenses, where elements of each offense exist.

6. Criminal law ⇐29

One receiving three radios from another, with knowledge that they were separately stolen from several owners' automobiles, was guilty of three offenses of receiving stolen property. Pen.Code, § 496.

7. Witnesses ⇐372(2)

In prosecution for receiving stolen radios, where thief testified on cross-examination that he did not tell officers what his testimony would be, that they promised him nothing, and that he was not led to believe that he would receive any leniency because of his testimony, defendant's right to cross-examine such witness was not unduly restricted by ruling sustaining objection to question whether witness expected something out of his testimony. Pen.Code, § 496.

* Subsequent opinion 161 P.2d 941.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Fred Robert Smith was convicted of receiving stolen radios, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendant was charged with five offenses of buying and receiving stolen property, consisting of a gun and five radios which had been stolen from cars. On a trial without a jury he was convicted of three offenses of receiving stolen radios. Upon his appeal he urges insufficiency of the evidence to prove that he received the property or had knowledge that it had been stolen, and relies upon certain alleged errors of law. He also contends that the radios were brought into his shop in a single transaction and that this could not be split up into several offenses.

[1] One Stepzinski stole six radios out of cars and took them to defendant's radio shop. Outside the shop he held a brief conversation with defendant, carried two radios into the shop and placed them on the floor or counter, returned to his car and brought in two more and placed these on the floor. Defendant took two of them and placed them on the floor behind the counter. Officers entered the store immediately behind Stepzinski and arrested the two men. Seven radios were taken from the shop by the officers; three of them which were brought in by Stepzinski were identified at the trial by the owners as having been stolen from their cars. This evidence, alone, was sufficient to call for an explanation by defendant of the circumstances under which the radios were brought to his shop. He was in the business of repairing and selling car radios. He had known Stepzinski for some two years; about a week before his arrest Stepzinski had come to his shop and proposed that he bring defendant some radios. Stepzinski testified that he asked defendant if he needed any

radios and defendant answered that he did; that he told defendant that he could get some—that he would take them out of cars, and defendant answered, "Bring them around." Nothing was said as to what defendant would pay for them. Stepzinski testified that defendant had not purchased them. Defendant admitted having told Stepzinski to bring in some radios but testified that they were to be brought in for repairs and that he had no intention of purchasing them. The statement of the evidence in defendant's brief and which he contends was insufficient goes no further than the above recital. We shall carry it further, for there was much else in defendant's conduct and statements which bore directly upon his knowledge, motives and intentions. The officers asked Stepzinski in the presence of defendant, prior to the arrest, if he had brought in some radios and he answered that he had not. Defendant said nothing. After the arrest they asked defendant if he had other radios and he said he had only three, the ones the officers had not taken from the shop. He told one of the officers that he had told Stepzinski that if he wanted to bring in some auto radios and they were of a usable type he would buy a few. The officers located a room and garage rented by defendant at a location other than where he lived. Here they found a .22 Colt automatic, a holster and clip, and in the garage 32 car radios of various makes. When questioned about them defendant said he had purchased them from an ex-convict, Dave Wagner, including the gun holster and clip, for which he had paid Wagner $10. He stated that he had purchased not more than 50 radios from Wagner, and when an officer asked him how long he had been buying "hot radios" from Wagner he said he had been buying radios from him for a year or so. When asked whether he knew the radios had been stolen he replied, "No, I couldn't say that I knew definitely they were stolen radios." He was asked whether he "suspicioned" they were stolen and replied, "Not necessarily, because the radios were always clean and no wires were cut"; and he testified that if a radio was brought into his shop with the lead wires cut he would say that it was stolen or taken out of a car by some one that was careless or reckless. He testified that he might have told the officers that the radios he had bought from Wagner were a little "off color" and that he knew Wagner had done "time." Upon the stand he testified that he did not know a Dave Wagner but had made up the name in order to satisfy the officers, that he had purchased most of the radios from various people, whom he did not name, and that a few were radios that had been repaired and not called for; also, that all of his purchases were for cash and that he had no checking account. It was stipulated that defendant had sold many secondhand radios and held no city license for that business.

It is unnecessary to go into greater detail as to the admissions and contradictory statements made by defendant and which tended to prove his guilt. Stepzinski had approached him in the manner of a thief and had, in effect, declared himself to be one. Defendant received from him what he should have expected and no doubt did expect—stolen property. His guilty knowledge was proven by the testimony of Stepzinski and by his own failure to give a convincing explanation of the suspicious circumstances. The evidence was sufficient to meet the requirements of law in a prosecution for the offense of receiving stolen property. People v. Cox, 1931, 117 Cal. App. 254, 3 P.2d 581; People v. Juehling, 1935, 10 Cal.App.2d 527, 52 P.2d 520; People v. Jacobs, 1925, 73 Cal.App. 334, 238 P. 770.

[2-5] We are of the opinion that defendant was properly convicted of three offenses. The crime of receiving stolen property consists of either buying or taking possession of the property of another with knowledge that it has been stolen. Penal Code, sec. 496. A single transaction may contain the elements of one or of several offenses. If two stolen articles were received, with knowledge that one had been stolen but with no guilty knowledge as to the other, there would be but one offense; guilty knowledge must exist as an independent element of each offense. If several articles were received at one time from one person, with knowledge that they had been stolen, but without knowledge that they had been stolen from different owners at different times, only one offense would have been committed. Such is the clear import of the holding in People v. Willard, 1891, 92 Cal. 482, 28 P. 585. Defendant contends that the case is authority for the proposition that where a person receives goods from another, upon a single occasion, but with knowledge that they have been taken from several persons, by separate thefts, only one offense is com-

mitted. In the Willard case the court was not considering the precise question which is before us, namely, whether several offenses are committed if the property received is known to have been stolen from several different owners. If the one receiving the property knows that part of it has been stolen from A and part from B, all of the elements of two distinct crimes are present. The receipt of the property under such circumstances takes on a multiple character, because of the guilty knowledge, for the property of one owner might be accepted and that of the other rejected. There was evidence, consisting in part of the admissions of defendant, that he and Stepzinski entered into an arrangement for Stepzinski to steal the radios and sell and deliver them to defendant. If this were true, defendant would have been an accomplice in each theft. People v. Lima, 1944, Cal., 154 P.2d 698. It would be illogical to say, under these circumstances, that he was guilty of but a single offense of buying or receiving stolen property. Vol. 2, Wharton's Criminal Law, 12th Ed., p. 1563, sec. 1256. A single act or continuous series of acts may constitute two separate offenses where the elements of each offense exist. People v. Case, 1926, 77 Cal.App. 477, 246 P. 1083; People v. Brannon, 1924, 70 Cal.App. 225, 233 P. 88; People v. Werner, 1938, 29 Cal.App.2d 126, 84 P.2d 168; People v. McIlvain, 1942, 55 Cal.App.2d 322, 130 P.2d 131.

[6] There was sufficient evidence to prove knowledge that the radios which defendant received had been taken in separate thefts. He had been told by Stepzinski that they would be taken out of cars. When they were brought into defendant's shop they had pieces of wire attached which had been cut when they were removed from the cars. Defendant testified that he did not examine them for wires but the court could have believed that he could not have picked the instruments up and placed them behind the counter without seeing the wires. And the wires, he testified, would have caused him to suspect that the instruments had been stolen. The same evidence which proved that defendant knew he was dealing in stolen property proved that he knew it was the property of several owners, taken from their respective cars. Each theft was a crime separate from the others but there would have been three offenses of theft if the property of three owners had been taken at one time and from a single location. We think there is no reason in law, and certainly no suggestion of injustice or oppression, which would compel or even justify the merger of defendant's three offenses into one. He committed wrongs against three persons when he took possession of their stolen property; he should not be allowed to escape full responsibility for no better reason than that he operated upon a large scale.

[7] During the cross-examination of Stepzinski an objection was sustained to the question: "In other words you expect something out of this, don't you?" The ruling is assigned as error. The witness had been questioned fully along this line. He had testified on cross-examination that he had not told the officers what his testimony would be, that they had promised him nothing, and that he had not been led to believe that he would receive any leniency because of the testimony which he had given. The right of cross-examination was not unduly restricted.

The judgment as to each count and the order denying motion for new trial are affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



67 Cal.App.2d 652

In re CALDWELL'S ESTATE.

CALDWELL v. CALDWELL.

Civ. 14366, 14548.

District Court of Appeal, Second District, Division 3, California.

Jan. 24, 1945.

1. Executors and administrators ⇐188

A widow's right to family allowance is not conditioned upon her having lived in a family relation with husband at time of his death and must be determined independently of circumstance that she had not lived with husband for some years prior to his death. Civ.Code, § 175.

2. Executors and administrators ⇐194(5)

Evidence did not justify denial of widow's allowance on ground that wife consented to husband's separation. Civ.Code, § 175.

3. Executors and administrators ⇐185

A widow's claim to family allowance is favored in law, and should not be deemed surrendered by agreement between spouses except by clear and explicit language. Civ. Code, § 175.

4. Executors and administrators ⇐188
Husband and wife ⇐279(1)

A property settlement agreement between spouses who had separated, providing that each party was released from all demands for any share in the other's earnings or accumulations, but that husband's liability to support wife should not be affected, did not release husband from obligation to support and did not waive wife's right to family allowance and to property exempt from execution after husband's death. Civ.Code, § 175.

5. Executors and administrators ⇐194(6)

An order denying executor's petition to vacate order for widow's allowance, which had become final before petition to vacate was filed, was not appealable. Probate Code, § 1240.

Appeal from Superior Court, Los Angeles County; John Beardsley and Thurmond Clarke, Judges.

Proceeding in the matter of the estate of Gus B. Caldwell wherein Florence M. Caldwell obtained orders setting apart proceeds of life policy and a family allowance, and Bert W. Caldwell, executor, moved to vacate the order awarding family allowance. From the orders obtained by the widow and an order denying his petition to vacate, the executor appeals.

Appeal from order denying the petition to vacate dismissed and other orders affirmed.

L. G. Hayford and Harrie R. Collins, both of Los Angeles, for appellant.

Gregory M. Creutz, of Los Angeles, for respondent.

PARKER WOOD, Justice.

The executor of the will of Gus B. Caldwell, deceased, has appealed from three orders of the superior court as follows: (1) an order denying the executor's petition to vacate an order awarding to the widow a family allowance of $100 per month from the date of death to the date of filing the inventory, amounting to the sum of $630; (2) an order setting apart to the widow, as property exempt from execution, the proceeds of a life insurance policy in the sum of $3,000; and (3) an order awarding to the widow a family allowance of $100 per month from the date of filing the inventory, January 25, 1943, until the final settlement of the estate.

Gus B. Caldwell and Florence M. Caldwell were married in 1918, and they lived together until September 4, 1933, when he left their home about 11 p. m. without her knowledge and without any notice to her of his intention to leave. Thereafter he resided separate and apart from her. He died on July 17, 1942. The record does not disclose his reason for leaving. There had been no trouble between them, and their relationship had been pleasant. The morning after he left he telephoned to her and said that he would support her as best he could. From the time he left in 1933 until April 1, 1938, he paid her $50 each month and paid the utility bills. After April 1, 1938, he was not employed regularly and his income was not sufficient to enable him to furnish any support to her, except that he did give her $5 or $10 on her birthdays and at Christmas. After he left they continued to treat each other affectionately. From the time he left until his death he visited her about every Sunday from 9 a. m. to 9 p. m., and he visited her several times each week on other days. At times, when he was at her house on rainy evenings, he stayed all night but he did not occupy a room with his wife. On several occasions when he was sick she went to the place where he was living and assisted in caring for him. In 1940 when she was sick and confined to her bed for five months he assisted in nursing her on many occasions. After 1933 a "considerable" part of his mail was received at her address. At various times after he had left the home her daughter mended his clothes. When he registered as a voter in 1940 he stated that he resided at 1815 Fremont Avenue, South Pasadena, which was the address where his wife resided, and in that year he voted in that precinct. During the 10 months preceding his death he was engaged in work wherein it was necessary that he be notified each morning

whether his services would be required on that day, and he asked his employer to notify him by telephone at his wife's address. Every morning while he was so employed she or her daughter notified him whether such a telephone message had been received. Mrs. Caldwell testified that she said to him on an occasion, when he complained about the dampness of the room where he was living, that he "had better come back" to her house, and he said that she and her daughter were sick and "It wouldn't be fair to you"; and that on another occasion when he was living and working in the south part of Los Angeles she asked him to come back, and he said the distance was too great for him to go back and forth from the home in South Pasadena to his place of work. She testified further that, "In fact, it didn't make a great deal of difference whether he came back or not, he was there practically every day."

During practically all the time when they lived together they occupied property which was separately owned by her, and while they were living together she contributed a substantial amount of her separate property for their support. There was testimony to the effect that when she petitioned for a family allowance and to have exempt property set apart to her she was in poor health and did not have sufficient funds with which to support herself. The premiums on the insurance policy were paid in part by the husband's employer and in part by the husband from community funds. The appraised value of his estate was $9,751.54.

On August 9, 1935, Mr. and Mrs. Caldwell entered into a property settlement agreement which provided in part as follows: "That henceforth each of the parties hereto shall own, hold, possess, and control any and all property that he or she now has, and any and all property of any kind or character, or any right, title or interest therein, that he or she may hereafter in any manner acquire or obtain, as his or her sole and separate property free and clear of any right, title, interest, claim or demand of the other party hereto now existing or which may hereafter arise by reason of the marital relation of the parties hereto; and that each of said parties shall have the right to enter into any contracts or obligations and to enter into and transact any business of any kind whatsoever in connection with his or her property, or otherwise, free and clear of any right, title, interest, claim or demand of the other party hereto; and that the earnings and accumulations of each party hereto shall be and remain the sole and separate property of such party; and each of the parties hereto does hereby release and discharge the other party of and from any and all claims or demands for any share, portion or interest in or to any or all of the earnings or accumulations of the other party hereto. Provided, however, that nothing herein contained shall be construed as affecting any obligation that may be imposed by law upon First Party as the husband for the support of his wife, the Second Party herein."

Appellant contends that a family allowance and the life insurance proceeds should not have been awarded to the widow for the reasons, among others, that (1) she was not a member of his family at the time of his death, (2) she consented expressly or impliedly to the separation, and (3) she released him from his obligation to support her and waived her rights as a widow by the execution of the property settlement agreement.

[1] The right of a widow to a family allowance is not conditioned upon her having lived in a family relation with her husband at the time of his death, and her right to such an allowance must be determined independently of the circumstance that she had not lived with her husband for some years prior to his decease. Estate of Gould, 1919, 181 Cal. 11, 13, 183 P. 146.

[2-4] Section 175 of the Civil Code provides: "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement." In this case the wife did not abandon her husband; on the contrary, he went away from her and from their home. His reason for leaving her is not shown by the record, and it does not appear that she caused him to leave. The finding of the trial judges that she did not consent to the separation is supported by the evidence. Even if she were living separate from him by agreement, it appears that he agreed to support her. The next morning after he left he told her he would support her as best he could, and he complied with his

agreement. The written agreement of 1935 provided that nothing therein should affect any obligation imposed upon him by law for the support of his wife. The widow's claim to a family allowance is favored in the law, and her right thereto should not be held to have been surrendered by an agreement between the spouses except by clear and explicit language. Estate of Whitney, 1916, 171 Cal. 750, 755, 756, 154 P. 855; Estate of Bidigare, 1932, 215 Cal. 28, 30, 8 P.2d 122. The written agreement shows by clear and explicit language that Mrs. Caldwell did not release him from his obligation to support her. She did not waive her right to a family allowance and did not waive her right to property exempt from execution. The trial judges were not in error in construing the agreement as insufficient to constitute a waiver by Mrs. Caldwell of any of her legal rights in and to the policy of insurance or the proceeds thereof in the event of Mr. Caldwell's death.

In the Estate of Ehler, 1931, 115 Cal. App. 403, 1 P.2d 546, the widow, who had left the decedent and had commenced an action for divorce, petitioned for a family allowance and to have certain property set aside to her as property exempt from execution. The record therein did not show whether she left him voluntarily or for good cause, and the court said at page 405 of 115 Cal.App., at page 547 of 1 P.2d, "[T]here was a total absence of any showing that respondent by her conduct lost her statutory rights as the widow of decedent." The court held therein that it was proper to award a family allowance and the proceeds of the life insurance policy to the widow.

[5] The order above mentioned denying the executor's petition to vacate the first order for a family allowance was not an appealable order. Probate Code, § 1240. The first order for a family allowance, signed by the judge, was filed on December 7, 1942. No appeal was taken from that order and it became final before the petition to vacate was filed on February 16, 1943.

The appeal from the order denying the petition to vacate the order of December 7, 1942, awarding a family allowance until the filing of the inventory, is dismissed. The order setting apart to the widow the proceeds of the life insurance policy is affirmed. The order awarding the widow a family allowance, from the date of filing the inventory until the settlement of the estate, is affirmed.

DESMOND, P. J., and SHINN, J., concur.



CULLEY v. NEW YORK LIFE INS. CO.*

Civ. 14562.

District Court of Appeal, Second District, Division 1, California.

Jan. 22, 1945.

Hearing Granted March 23, 1945.

1. Insurance ⇐146(3)

An ambiguity in terms of life policy must be construed most strongly against insurer.

2. Insurance ⇐362

Under provision relating to restoration of life policy in event of default in payment of premium after insured has become totally disabled, the only limitation as to time is that within which proof of disability must be filed and there is no limitation as to time within which arrears of premiums shall be paid.

3. Insurance ⇐362

Under provision relating to restoration of life policy in event of default in payment of premiums after insured has become totally disabled, where premiums fell due prior to receipt by company of proof of disability, payment of such premiums was not waived by terms of policy, nor would insured be entitled to refund thereof upon submission of proof of disability.

4. Insurance ⇐516

"Totally disabled", as used in life policy providing for both death and disability benefits, does not mean that insured must have been reduced to a condition of helplessness, and ability to earn remuneration or profit is made test of disability.

See Words and Phrases, Permanent Edition, for all other definitions of "Totally Disabled".

 * Subsequent opinion 163 P.2d 698.

5. Insurance ⇐362

Where insured prior to date of default in payment of premium on life policy providing for both death and disability benefits was suffering from a disease which prevented him from performing substantial duties of his occupation in the usual way, and insured was thereby prevented from earning his usual livelihood, finding that insured was totally disabled prior to date of default, so as to be entitled to take advantage of provision in policy for restoration of policy on payment of arrears of premiums if insured had become totally disabled at time of default, would be upheld.

6. Insurance ⇐362

Insured's statement of disability in letter of February 20, 1941, tendering payment of premium due on life policy providing for both death and disability benefits due August 20, 1940, and interest, did not establish that insured was not disabled on date he defaulted in payment of premium, so as not to be entitled to take advantage of provision authorizing restoration of policy in event he had become totally disabled at time of default.

7. Insurance ⇐362

Where insurance company made an investigation of matter of insured's disability and did not rely on statements made by insured or his representatives in an effort to collect disability benefits under life policy, neither insured nor insurer were bound by statements made by insured or his representatives.

8. Insurance ⇐362

Where statement of insured who was seeking restoration of life policy after default as to his disability at time of default was filed one day later than authorized by policy because of insurer's failure to furnish forms in time, insurer could not rely upon the one day delay in filing statement.

9. Insurance ⇐623(4)

An unconditional denial of liability by insurer after insured has incurred loss and has made claim under policy gives rise to an immediate right of action.

10. Insurance ⇐362

Where insured was totally disabled within provision of life policy providing for both death and disability benefits at time of default in payment of premiums, so as to be entitled to restoration of policy upon payment of arrears of premiums with interest at 5 per cent., provided due proof of disability was received by insurer not later than six months after default, and thereafter insurer denied all liability under policy, a cause of action accrued to insured immediately upon denial of liability and payment of arrears was no longer necessary to give insured such right of action. Civ.Code, §§ 1440, 1442.

11. Contracts ⇐279(1)

Where tender of performance of an act is necessary to establishment of any right against another party, such tender or performance is waived when it is reasonably certain that offer will be refused or that payment or performance will not be accepted. Civ.Code, § 1440.

12. Insurance ⇐612(2)

Under life policy providing for disability benefits upon receipt at insurer's home office, before default in payment of premiums of due proof that insured is totally and presumably permanently disabled, a cause of action on the policy accrued to insured upon insurer's denial of liability under policy without necessity of submitting proof of loss as a condition precedent to recovery and the obligation to pay disability benefits would date from denial of liability by insurer.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Dorothy K. Culley against the New York Life Insurance Company on an insurance policy issued by defendant upon life of plaintiff's husband providing for both death and disability benefits, in which policy plaintiff was named as beneficiary. From a judgment in favor of plaintiff, the defendant appeals.

Judgment modified and, as so modified, affirmed.

Meserve, Mumper & Hughes, of Los Angeles (Hewlings Mumper, of Los Angeles, of counsel), for appellant.

C. H. Hartke, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action upon an insurance policy, in which policy plaintiff was named as beneficiary. The policy in question was issued by appellant upon the life of respondent's husband, and provided

for both death and disability benefits. The policy was in the principal sum of $10,000 and as modified, called for the payment of premiums in quarter annual instalments of $70 each, payable on the 20th days of February, May, August and November of each year. Respondent's husband, the insured, died on April 14, 1941, after a protracted illness. Prior to the death of the insured an attempt was made to claim disability benefits, and appellant denied all liability under the policy on the ground that the policy had lapsed for non payment of premiums, and that the disability of the insured had occurred after the default of the insured in the payment of premiums. The present action upon the policy was instituted by respondent, as beneficiary, after the death of the insured.

It appears that installments of premium due August 20 and November 20, 1940 were not paid. The complaint herein alleges that the insured became totally disabled because of a chest cancer in or about the month of May, 1940, and was so totally and presumably disabled on August 20, 1940, and at all times thereafter until his death. The policy provided, in paragraph 4 of section 1 thereof, that: "In the event of default in payment of premium after the insured has become totally disabled, the policy will be restored upon payment of arrears of premium with interest at 5%, provided due proof that the insured is totally and presumably permanently disabled, as herein defined, is received by the Company not later than six months after said default and the benefits under this section shall then be the same as if said default had not occurred." The policy contained the following provisions with respect to total and permanent disability: "Disability shall be deemed to be total whenever the insured is wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit." "Disability shall be presumed to be permanent, (a) Whenever the insured will presumably be so totally disabled for life; or—(b) After the insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof." A form provided by appellant, and headed "Insured's Statement," with respect to claim for disability benefits, was filled out and filed with appellant on behalf of the insured on February 21, 1941. At or about the same time there was presented to appellant a check for the premium payment due August 20, 1940, with interest, accompanied by the following letter, dated February 20, 1941: "I am enclosing herewith check for $71.75, to apply on the August 20th premium of $70.00, plus interest to date of $1.75, on policy No. 8 599 144, issued to Grant B. Culley, my husband. This is in accordance with the terms of the said policy, and I further wish to state that the November 20th premium was not paid because the insured was permanently and totally disabled at that time. I am also enclosing claim for disability benefits under the above mentioned policy No. 8 599 144, and under policy No. 10 498 108." This letter was signed by the wife of the insured. Appellant refused to accept the letter and check tendered in payment of the premium. Under date of March 10, 1941, appellant wrote insured the following letter: "We wish to advise that our company has completed its investigation with respect to your claim for disability benefits, and from the information obtained it appears that you did not discontinue the performance of all work until December 19, 1940. In the circumstances, the Company is not warranted in considering that you have been continuously totally disabled as provided from a date prior thereto. Under the terms of policy #85599144 disability benefits became effective upon receipt at the company's home office before default in payment of premium of due proof that an insured is totally and presumably permanently disabled as provided. According to our records policy #859914 is in default for non-payment of the premium due August 20, 1940, and all rights to the disability benefit provision terminated as of that date. Therefore, as it appears you did not become wholly disabled until December 19, 1940, or a date subsequent to the lapse of the policy it is evident that the company is not in a position to favorably consider claim on this policy."

The complaint contains the following allegations:

"That prior to the expiration of the six months period mentioned in paragraph 4 of section 1 of the said policy of insurance and before February 20, 1941, Grant Culley was critically ill from said chest cancer, being confined to a hospital. Prior to February, 1941, and while Grant Culley was so confined to the hospital, a request was made of the defendant that he be giv-

en information concerning the status of his said policy No. 8599144 in order that he might protect his rights as set forth therein. Said defendant was notified at said time of the total disability of said Grant Culley and that he was totally and presumably permanently disabled as defined in said policy. In response to said request, he was advised that he had no rights; that the defendant had no obligations to him and that the policy of insurance had been forfeited for non-payment of premium. The defendant denied liability on said policy although it well knew of the existence of the aforesaid paragraph 4 of Section 1 of said policy and that Grant Culley had certain rights and the defendant had certain obligations in the event Grant Culley was totally disabled as set forth in said policy. That after the expiration of the six months period mentioned in paragraph 4 of Section 1 of said policy and during the months of February, March and April, 1941, the defendant entered into negotiations with Grand Culley which negotiations recognized the continued validity of the policy in that defendant requested and received further statements and letters by physicians who attended Grand Culley setting forth facts proving that Grand Culley was totally disabled from and after May, 1940, and continuously up to the time of the submission of said statements and letters and also proving that Grand Culley was totally and presumably permanently disabled as defined in said policy. That said proofs so submitted to the defendant at its request were for the purpose of complying with the instructions of the defendant and were accepted by the defendant in order that Grant Culley might receive the benefits due him under said policy. That all of the terms and conditions of said policy of insurance No. 8599144 required to be performed by Grant Culley were so performed except those which were waived by defendant as set forth herein and those which defendant is estopped to deny were performed, as set forth herein."

Appellant, as defendant, by its answer denied the allegations above quoted, except that appellant admitted that in response to an inquiry concerning the status of the policy in question, appellant notified and advised the insured that the policy had lapsed because of the failure of the insured to pay the quarter annual premium due thereon August 20, 1940, and that defendant denied liability on said policy; and except that appellant admitted carrying on negotiations relating to the rights of the insured with respect to disability under the terms of a separate and distinct policy of insurance other than the one upon which this suit is based.

The trial court found that while appellant had lapsed said policy of insurance on its records, that thereafter the insured had valuable rights under the policy provisions; and the court found that it was not true that after December 31, 1940, the policy ceased to have any value to the insured; that due proof of total and presumably permanent disability of insured, as defined in the policy, was received by appellant on or before six months after August 20, 1940, to-wit: on February 20, 1941, and that appellant denied liability on said policy on February 18, 1941. The court also found that: "It is also true that defendant has by its acts, actions and conduct waived the right to receive proof of Grand B. Culley's total and permanent disability prior to February 20, 1941, and has waived its right to require the tender to the defendant of any premiums or interest, by reason of its acts, actions and conduct." It should also be noted that the trial court found that no premium was due and payable on August 20, 1940, because the insured was totally and permanently disabled on said date. In this connection, the court found the following allegations of the complaint to be true: "That on or about the month of May, 1940, Grant Culley became totally disabled because of a chest cancer and was so totally disabled and totally and presumably permanently disabled on August 20, 1940 and on April 14, 1941, the date of death of said Grant Culley. That said Grant Culley was totally and presumably permanently disabled as defined in said policy before August 20, 1940, and at all times thereafter and until his death. That said total disability from a chest cancer was continuous from on or about the month of May, 1940 and until April 14, 1941." The court adjudged the policy valid, and an existing valid obligation of appellant, and gave judgment to respondent upon the policy in the sum of $10,632.46, including interest from April 14, 1941, to the date of judgment.

Appellant contends that regardless of when total disability commenced, the policy lapsed for default in payment of premiums; and that the policy was never restored under the terms of the restoration

clause of the policy. Respondent contends that the finding of the court that the insured was totally and permanently disabled prior to August 20, 1940, is supported by the evidence; and that the findings of waiver of the provisions of the policy on the part of appellant are likewise supported by substantial evidence.

[1-3] The restoration clause, referred to, is paragraph 4 of section 1 of the policy, above quoted. The provisions thereof are reasonably plain. Under these provisions, if the insured becomes totally disabled and thereafter defaults in payment of premiums, if the insured files with the insurance company "due proof" of such total disability as the policy requires, within six months after such default, the benefits under the policy will be restored to the same status as before the default occurred, upon payment of the arrears of premium with 5% interest. It is to be noted that the only limitation as to time in said provisions is that within which the proof of disability must be filed. There is no limitation as to time within which arrears of premium shall be paid, under such circumstances. Appellant contends that in any event, under the terms of the policy, proof of disability must be received before default in payment of premiums. This contention is based upon paragraph 3 of section 1 of the policy which provides that benefits will be granted upon receipt at the Company's home office, before default in payment of premium, of due proof that the insured is totally and presumably permanently disabled. Such contention is wholly inconsistent with the provisions of paragraph 4 of section 1, above, and at most creates an uncertainty or ambiguity in the terms of the policy, which, under the well settled rule in such instances, must be construed most strongly against the insurer; and it must be assumed that the trial court so construed it. It should be pointed out, however, that both respondent and the trial court appear to have labored under a misapprehension regarding the obligation to pay premiums after disability. It is expressly provided by the terms of the policy that any premium due prior to approval of proof of disability is payable in accordance with the terms of the policy, but if due after receipt of proof will, if paid, be refunded upon approval of proof. Any premium falling due after approval of proof and during disability is expressly waived. The premiums here in question both fell due prior to receipt by the company of proof of disability and payment of such premiums was not waived by the terms of the policy, nor would the insured be entitled to a refund thereof under such terms if the same had been paid.

[4, 5] In the present case the prime requisite to recovery under the policy was the occurrence of total disability prior to August 20, 1940, the date of the first default in payment of premium. Under the terms of the policy, as above noted, an insured is deemed to be totally disabled when prevented by injury or disease from engaging in "any occupation whatsoever for remuneration or profit." The rule of construction of such a policy provision is now settled in this state, and there appears to be little, if any, need for further discussion or analysis of the subject. However, it should be pointed out that the language of the clause here in question, taken in its literal sense, does not mean that to be disabled the insured must have been reduced to a condition of helplessness. The ability to earn remuneration or profit is plainly made the test of disability, even under a literal interpretation of the policy provision. It is the settled rule in this state that the question of disability is one of fact for the decision of the trial court or jury; and if it appears from the evidence in the present case that the insured prior to August 20, 1940, was suffering from a disease which prevented him from performing the substantial duties of his occupation in the usual way, and that the insured was thereby prevented from earning his usual livelihood, the finding of the court as to total disability prior to said date must be upheld. Wright v. Prudential Ins. Co., etc., 27 Cal.App.2d 195, 80 P.2d 752; Hill v. New York Life Ins. Co., 38 Cal.App.2d 627, 101 P.2d 752; Hurwit v. Prudential Insurance Co. of America, 45 Cal.App.2d 74, 113 P.2d 691; Clark v. Metropolitan Life Ins. Co., 47 Cal.App.2d 773, 118 P.2d 919; Trousdell v. Equitable Life Assur. Soc., 55 Cal.App.2d 74, 130 P.2d 173, 990; Erreca v. Western States Life Ins. Co., 19 Cal.2d 388, 121 P.2d 689, 694, 141 A.L.R. 68. This is in accord with the rule of the cases just cited, and is not in conflict with the statement in Erreca v. Western States Life Ins. Co., supra, that: "Under this construction, 'any occupation' may mean the insured's usual occupation only if he is for any reason unfit to perform the duties pertaining to any other type of business or

employment." The statement just quoted is qualified by the following language, from the same case: "This construction of the words 'any occupation' is based upon the theory that it is unreasonable to deprive an uneducated laborer, disabled from performing any manual work, of the benefits of his policy, because he might notwithstanding those disabilities, with training and study, pursue a profession at some future date, or become an accountant or a banker. And it would be equally unreasonable to hold that a doctor, lawyer, or business executive is not totally disabled from engaging in 'any occupation' or from performing 'any work' because he is able to run a news stand or work as a day laborer." It appears from the record that the insured in the present case was engaged in the real estate and appraisal business almost exclusively for fifteen years, and had the general duties of a real estate broker. If it may be established by the evidence that the insured, because of the disease from which he suffered, was unable to perform the substantial duties of such occupation in the usual way, and was thus prevented from earning his usual livelihood, such a state of facts would support an inference that the insured was unable to perform the duties of any type of occupation for which he was fitted, for remuneration or profit, and thus support the finding of the trial court with regard to the time when the insured's total disability occurred.

[6, 7] There is evidence in the record that insured developed what was apparently a violent pain in his left arm in the spring of 1940; that insured would continually grab his arm, and would rub it all the time during conferences. There was a noticeable change in insured's activity in the early part of 1940. This change became very marked and resulted in insured's doing much less walking than he customarily did; and it was necessary for him to have someone else drive his car, as the pain in his arm prevented his driving. His attendance at the office became irregular. When at the office, very often he would just sit and stare. In the previous year, 1939, insured would make an average of three or four appraisals a month. After June 1940 he made but two small appraisals. From July 1940 to December 1940 insured earned but $150 from his efforts in his real estate association. His activities on the realty board were markedly curtailed after the first three months of 1940. One witness testified that it was about May 1940 when he first noticed that insured was losing his zest and zeal for the interest of the board. The evidence presented in the record sufficiently establishes the fact that the insured was suffering from disease prior to August 20, 1940, and that his consequent state of health was the cause of a marked decrease in his business activities, which had very seriously affected his earning capacity. This last fact is demonstrated by the negligible earnings of insured for the last six months of 1940. The evidence is sufficient to support the finding of total disability of insured prior to August 20, 1940, the date of the first default in the payment of premiums. Appellant contends that the insured's statement of disability and the letter of February 20, 1941, tendering payment of premium due August 20, 1940, and interest, show that insured was not disabled on August 20, 1940. The documents in question do not of themselves establish such fact. Moreover, since it appears from the evidence that appellant made an investigation of the matter of disability and did not rely on the statements made by insured or his representatives, it cannot be held that either the insured or respondent were bound by such statements.

[8] Although the statement of insured as to disability, made on the form furnished by appellant, was filed six months and one day after the first default in payment of premiums, there is sufficient evidence to show that the representatives of insured requested such form for the purpose of presenting proof of disability and relied on appellant to supply the same; and the evidence is sufficient to have warranted an inference by the trial court that the statement was filed one day late because of the failure of appellant to furnish the form in time. This being true, appellant's effort to charge respondent with the one day delay cannot be upheld.

[9-11] Therefore, regardless of when appellant may have denied liability under the policy, it is clear that the insured at all times after August 20, 1940, had a valid subsisting interest in the policy in question. Such interest consisted of the right to restoration of the policy provisions under paragraph or subdivision 4 of section 1 of the policy. Moreover, after the filing of the insured's statement of disability, there remained only the payment of arrears in premiums with interest in order to

restore insured to full rights under the policy. The effect of the rejection by appellant of the tender of a portion of the arrears need not be considered, because it is definitely established that appellant denied all liability under the policy in the letter written March 10, 1941, above quoted. A cause of action accrued to insured immediately upon such denial of liability, and the requirement of payment of arrears was no longer necessary to give insured such right of action. "The rule is * * * settled * * * that an unconditional denial of liability by the insurer after the insured has incurred loss and made claim under the policy gives rise to an immediate right of action." Bollinger v. National Fire Insurance Co., 25 Cal.2d 399, at page 404, 154 P.2d 399, at page 402; Paez v. Mutual Indemnity, etc., Ins. Co., 116 Cal. App. 654, 3 P.2d 69. While the cases cited in support of the above quoted statement from Bollinger v. National Fire Ins. Co., supra, are mostly concerned with waiver of the necessity of proof of loss under the terms of an insurance policy, yet the principle here involved is that of a general rule with relation to contracts, namely, that when tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived, or becomes unnecessary, when it is reasonably certain that the offer will be refused, or that payment or performance will not be accepted. Hoppin v. Munsey, 185 Cal. 678, 198 P. 398; Lewis v. Fowler, 80 Cal.App. 717, 252 P. 786; Cowan v. Tremble, 111 Cal.App. 458, 296 P. 91; Hills v. National Albany Exchange Bank, 105 U.S. 319, 26 L.Ed. 1052, 12 F. 93. At the time of appellant's denial of liability, the insured was entitled to be restored to his rights under the policy on payment of arrears of premium. This was a condition precedent to enforcing a claim under the policy. But the insurer denied all liability; and to require the insured thereafter to tender full payment of arrears before bringing suit would be to require an idle act. It should be emphasized that there was no default on the part of the insured with respect to carrying out the restoration provisions of the policy in connection with payment of arrears, since, as already mentioned above, the policy did not provide a time limit for such payment. Hence, the provisions of section 1440 of the Civil Code are also applicable, namely; "If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party." It should also be pointed out that the denial of liability by appellant was unconditional and was not a mere denial of liability until the arrears had been paid. Moreover, a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it was created. Sec. 1442, Civ.Code.

If the date of denial of liability by appellant is taken as February 18, 1941, as found by the trial court, the conclusion here reached with respect to the right of recovery under the policy would be the same, except that in such instance the requirement of filing "due proof" of disability not later than six months after disability would thus have been waived. Since it has already been held above that appellant is estopped, under the circumstances considered, to enforce such provision, further consideration of the evidence tending to support the finding of the court as to the date of denial of liability does not appear necessary. Under the facts presented herein, any contention by appellant of lack of authority in its agents or representatives in the matter is wholly without merit.

[12] Appellant contends that the trial court erred in awarding respondent judgment for nine months disability benefits. The court concluded that respondent was entitled to judgment against appellant in the sum of $900 for disability benefits under the policy. The policy provided for disability benefits in the sum of $100 per month. Subdivision 3 of section 1 of the policy provides in part: "Benefits—Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally and presumably permanently disabled and that such disability occurred after the insurance under this Policy took effect and before its anniversary on which the Insured's age at nearest birthday is sixty years, the following benefits will be granted: (a) Income Payments—The Company will pay to the Insured a monthly income of $10 per $1,000 of the face of the policy during his lifetime and continued disability, beginning immediately on receipt of said proof. Any income payment due before the Company

approves the proof of disability shall be payable upon such approval. * * *" It is plain from the language of the policy, above quoted, that the monthly disability payments are to begin on receipt of proof of disability; and appellant has submitted authorities so construing such provision, though the language itself appears unambiguous in this respect. But in the present case the trial court found that appellant had denied liability under the policy on February 18, 1941. There is sufficient evidence to support such finding in the letter of February 13, 1941, written to insured from the home office of appellant in New York City, as follows: "This policy having lapsed for non-payment of premium due, as specified above, the indebtedness against said policy at date of lapse, as shown above, has been satisfied by deduction from the cash value of the policy pursuant to the terms of the policy and policy loan agreement. The excess of the cash value over the indebtedness has been used to purchase and has purchased temporary insurance for $7903 which expired December 31, 1940. The policy has no further insurance value and has been canceled on the company's records."

Hence, on February 18, 1941, in accordance with the authorities heretofore cited on the effect of denial of liability under an insurance policy, a cause of action on the policy accrued to insured at that time without the necessity of submitting proof of loss as a condition precedent to recovery. There being no necessity thereafter to file a proof of loss in order to recover disability benefits, the obligation to pay disability benefits must date from the denial of liability by appellant, as found by the trial court. Since it is obvious that the award of disability benefits in the sum of $900 is based upon a calculation which sets the accrual of the obligation to pay such benefits at a date considerably prior to February 18, 1941, the judgment must be modified in this respect.

It follows that the material findings of the trial court as to liability of appellant under the policy in question are sustained by the evidence and that respondent was entitled to recover under the policy. However, the trial court was in error in finding that the premiums due August 20 and November 20, 1940, were not due because of the disability of insured, as has already been pointed out above. While it was not necessary, under the circumstances presented, to tender payment thereof with interest before bringing suit herein, the premium payments in question were not excused under the terms of the policy, nor was the ultimate payment thereof waived. The trial court was also in error in awarding judgment in the sum of $900 for disability benefits.

The judgment is therefore modified to provide for deduction from the amount recovered of the installments of premium in question, with interest thereon at 5% to date of judgment, and to provide for recovery of disability benefits from February 18, 1941, only. As so modified the judgment is affirmed; respondent to recover costs on appeal.

YORK, P. J., and WHITE, J., concur.



67 Cal.App.2d 800

In re CLINE'S ESTATE.

BROWN v. RAINVILLE.

Civ. 14664.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1945.

1. Wills ⇐750

In reaching a determination of the nature and character of a legacy, the intent of testator is of primary importance. Probate Code, § 161.

2. Wills ⇐765

A specific legacy is lost if subject of it is disposed of by testator, or is extinguished in his lifetime, notwithstanding will may unmistakably indicate that testator intended to recognize and treat the legatee as an object of his bounty, and therefore, where language of will reasonably admits of such construction, court will consider legacies as demonstrative rather than specific. Probate Code, § 161.

3. Wills ⇐755

A "demonstrative legacy" is one given with reference to a particular fund only for purpose of pointing out a convenient

method of payment and wherein legatee will not be disappointed though the fund totally fails. Probate Code, § 161.

See Words and Phrases, Permanent Edition, for all other definitions of "Demonstrative Legacy".

4. Wills ⇐750

Whether legacy is to be treated as a demonstrative legacy or a specific legacy depends on intent of testator as reflected in language used by him. Probate Code, § 161.

5. Wills ⇐755, 765

A bequest of $3,000 inherited by testator from estate of his father with direction that such sum be paid before any other bequest was not a "specific legacy" but was a "demonstrative legacy" which was not adeemed because of nonexistence of the subject matter thereof at time of testator's death. Probate Code, § 161.

See Words and Phrases, Permanent Edition, for all other definitions of "Specific Legacy".

6. Wills ⇐765

Ademption ordinarily applies to special and not to general legacies, and it is only accomplished when a change with respect to the subject matter takes place which results in satisfaction or abolishing of the gift.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Proceedings in the matter of the estate of Henry H. Cline, also known as Herman H. Cline, deceased, wherein Madylon M. Brown filed a petition for partial distribution which was contested by Maurine Phyllis Cline Rainville. From an order dismissing the petition for partial distribution, Madylon M. Brown appeals.

Reversed and remanded, with directions.

Warner I. Praul and Porter & Sutton, all of Los Angeles, for appellant.

Michel F. Shannon and Thomas A. Wood, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from an order denying a petition for partial distribution. The decedent, Henry H. Cline, died testate on the 17th day of June, 1937. His will dated December 11, 1936, was duly admitted to probate. The third paragraph of said will reads as follows: "I hereby give and bequeath to Madylon M. Brown of Los Angeles, Calif. the sum of Three Thousand ($3,000.00) Dollars, inherited by me from the estate of my father, Samuel Newton Cline, and I direct that this sum be paid before any other bequest hereinafter made."

By her petition for partial distribution filed herein, appellant alleged that decedent's estate is of the total value of $31,615; that there is sufficient cash on hand in said estate, to wit, the sum of $5,330 or thereabouts, to pay all legatees under the terms of said will; that over four years have elapsed since the issuance of letters testamentary and more than six months since the first publication of notice to creditors; that no unpaid claims of creditors remain; that the cash on hand is sufficient to pay, over and above any specific bequests, all expenses of administration; that there are no inheritance taxes due the State of California; and that all personal property and other taxes due from said estate have been paid.

The answer to the petition expressly admits that the administratrix of the estate has on hand a sum in excess of $5,000, and that the will contains the foregoing provision for the $3,000 legacy to appellant. It is further averred by the answer that one of the assets of the estate is a note for $24,000, the makers of which have been adjudged bankrupt, by reason of which fact the amount of money which the estate will receive in payment of said note is uncertain, and therefore the estate cannot be closed.

Finally, the answer alleges that the decedent herein, Henry H. Cline, never received from the estate of his father the sum of $3,000, or any other sum, and that there did not come into the hands of the testator in his lifetime, or into the hands of the administratrix of his estate, subsequent to his death, the sum of $3,000, or any part thereof. That therefore the legacy to appellant herein is adeemed.

Upon the evidence introduced, the trial court found that the value of the estate of decedent's father, Samuel Newton Cline, deceased, was approximately $4,000, and that said estate was distributed to the four children of said Samuel Newton Cline; that the decedent, Henry H. Cline, did not receive out of the estate of his father the sum of $3,000 as specified in the third paragraph of the last will and testament of

said decedent. The court then found further that the aforesaid third paragraph of the last will and testament of Henry H. Cline, deceased, "was adeemed by reason of the fact that the said Herman H. Cline, deceased, did not, during his lifetime, nor did his estate, subsequent to his death, receive out of or from the estate of his father, Samuel Newton Cline, deceased, the sum of Three Thousand Dollars ($3,000.-00)".

Based upon the foregoing findings the court made its order that the petition of appellant herein for partial distribution be dismissed. It is from such order that this appeal is prosecuted.

From the record before us, it would appear that at the trial evidence, both documentary and oral, was introduced. From the findings of the trial court, we conclude that the Superior Court file containing the inventory and appraisement filed in the matter of the estate of Samuel Newton Cline, deceased, was introduced into evidence and therefrom the court found "that the value of the Estate of Samuel Newton Cline, Deceased, was approximately Four Thousand Dollars ($4,000.00), and that said estate was distributed to the four (4) children of said Samuel Newton Cline, and that Henry H. Cline, also known as Herman H. Cline and H. H. Cline, deceased, did not receive out of the Estate of Samuel Newton Cline the sum of Three Thousand Dollars ($3,000.00) as specified in paragraph third of the Last Will and Testament of said Henry H. Cline."

The parol evidence consisted of the testimony of James W. Cline, who was the administrator of the estate of Samuel Newton Cline, father of the decedent in the instant proceeding. This witness testified that at or about the time when the court had ordered distribution of the estate of Samuel Newton Cline, which was some time in 1928, the four children, including the decedent herein, Henry H. Cline, met and adjusted certain debts owing from some of the heirs to their father, and divided certain moneys obtained from a $3,000 mortgage held by the father or the administrator of his estate; that, as a result of this adjustment and settlement made out of court, the testator herein, Henry H. Cline, received approximately $2,200. While it is not particularly clear, we interpret the record herein to mean that the estate of testator's father was appraised at $4,100. If that be true, then testator herein inherited one-fourth of $4,100, or $1,025. Appellant, however, urges that, while the inventory and decree of distribution in the father's estate show that the amount inherited by the testator was considerably less than $3,000, the $2,200 received outside of the probate proceedings came from the father's estate and was therefore "inherited" by the testator, and, in any event, that the interest on the $2,200 from the date of its receipt by the testator in 1928 up to the time when he made his will in 1936 would easily bring the total amount up to $3,000.

From a reading of paragraph third of the testator's will, it is at once apparent from his use of the language "the sum of Three Thousand Dollars ($3,000.00) inherited by me from the estate of my father" that it was his understanding and belief that he had in fact, as he declared, inherited the sum of $3,000 from the estate of his father and that he bequeathed such inheritance to appellant herein.

Upon this appeal respondent administratrix has apparently abandoned her claim urged in the trial court that the testator never received the sum of $3,000 from his father's estate, because, in her brief, she says with reference to such inheritance, "It is immaterial what the sum was, whether it was $3,000.00 or whether it was less" Respondent now stands upon the claim that the legacy here involved is a specific legacy, and, the subject matter thereof not being in existence at the time of the death of the testator, the legacy has failed and the bequest to appellant was adeemed. Therefore, the primary question presented on this appeal is whether the aforesaid pertinent bequest in paragraph third of testator's will constitutes a specific, demonstrative or general legacy, and, if it be construed as a specific bequest, has the legacy failed?

Subdivision 1, section 161, of the Probate Code defines a specific legacy as follows: "A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific * * *."

Subdivision 2 of the section thus defines a demonstrative legacy: "A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid."

After defining an annuity and a residuary legacy in subdivisions 3 and 4, the same

section, in subdivision 5 thereof, provides: "All other legacies are general legacies."

[1, 2] Citation of authorities is unnecessary for the statement that in reaching a determination of the nature and character of the legacy it is an established principle of law that the intent of the testator is of primary importance. Because of the harshness of the doctrine that a specific legacy is lost if the subject of it is disposed of by the testator, or is extinguished in his lifetime, notwithstanding the will may unmistakably indicate that the testator intended to recognize and treat the legatee as an object of his bounty, the courts have adopted a policy, where the language of the will reasonably admits of the application of such policy, to consider legacies as demonstrative rather than specific.

[3-5] If it be the intention of the testator as expressed in his will that prevails, let us examine the language used in paragraph third of the testamentary document with which we are here concerned. After bequeathing to appellant the sum of $3,000 inherited by him from the estate of his father, the testator, in clear and emphatic language, states: "And I direct * * * that this sum be paid before any other bequest hereinafter made". Whether the legacy here in question is to be treated as a demonstrative legacy, that is to say, one given with reference to a particular fund only for the purpose of pointing out a convenient method of payment and wherein the legatee will not be disappointed though the fund totally fail, or as a specific legacy of a fund itself with the object in view of burdening that fund alone with payment of the legacy, depends upon the intent of the testator as reflected in the language used by him. Whatever else the testator intended, there can be no doubt but what he directed payment of the legacy to appellant "before any other bequest hereinafter made". We are persuaded that, from his language, the general intention of the testator must be held to be that the legacy about which this controversy revolves was to be treated as a demonstrative legacy and not a specific legacy. Both of the elements necessary to constitute a demonstrative legacy are present in the instant case, viz., that the testator intended to make an unconditional gift in the nature of a general legacy, and secondly, the bequest indicates the fund out of which the legacy is payable. Maxim v. Maxim, 1930, 129 Me. 349, 152 A. 268, 73 A.L.R. 1244.

[6] Respondent's contention that the legacy given to appellant has been adeemed cannot be sustained. While it is true that ademption ordinarily applies to special and not to general legacies (28 R.C.L. 344), it is only accomplished when a change with respect to the subject matter takes place which results in the satisfaction or abolishing of the gift. In Estate of McLaughlin, 97 Cal.App. 485, 488 and 490, 275 P. 875, 877, it is said: "In 3 Woerner's Law of Administration 1523, § 446, it is said a legacy is adeemed when, by some act of the testator the thing devised has ceased to exist in the form in which it is described in the will, for the reason that, upon the death of the testator, there is nothing answering the description of that property which may be delivered to the legatee. * * * In 40 Cyc. 1046, § C, it is said: 'The weight of authority is to the effect that a change, subsequent to the making of the will, in the form of property devised or bequeathed does not prevent the operation of the provisions of the will and the property in its changed form passes to the devisee or legatee.'"

To the same effect section 78 of the Probate Code provides that: "* * * nor a conveyance, settlement, or other act of the testator, by which his interest in any such property is altered, but not wholly divested, is a revocation of the disposal; but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will."

The exchange of stock for notes of a corporation is not an ademption; neither is the exchange of specifically devised shares of stock for other shares an ademption; nor is the exchange of stock for bonds. It has also been held that the bequest of a specific diamond brooch was not adeemed by subsequently applying it as part payment upon a more valuable brooch, but that the latter article of jewelry was a mere substitution which would pass by the terms of the will. Estate of McLaughlin, supra. A cardinal rule for the construction of a will, or the terms thereof, being to ascertain the intention of the testator, we are impressed, in view of the decisive language used by the testator in the instant case in paragraph third of his will, that he never intended by any act of his to wholly divest himself of the money inherited by him from his father and bequeathed to appellant, nor did the testator intend by any act of his to destroy the existence of the $3,000

in the form in which it is described in the will. It is also worthy of note that the testator inherited the money from his father in 1928, while he did not execute his will until 1936. To us this is a strong indication that, at the time he made his will, the testator included in his cash assets the money inherited from his father, and certainly there is no showing that by any act or conduct of his after he made his will and up to the time of his death he intended to abolish the gift to appellant. On the contrary, his express direction was that such bequest "be paid before any other bequest hereinafter made". We therefore conclude that the legacy here in question is demonstrative; that it was not adeemed; and that appellant is entitled to have the same paid out of the general assets of the estate.

The order appealed from is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

YORK, P. J., and DORAN, J., concur.



67 Cal.App.2d 745

WADE v. BOARD OF ADMINISTRATION OF ALAMEDA COUNTY EMPLOYEES' RETIREMENT SYSTEM et al.

No. 12766.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1945.

Rehearing Denied March 2, 1945.

1. Counties ⇐69(3)

County elective officers are not "employees" within meaning of county charter provision entitling county "employees" to the benefits of county retirement system.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

2. Statutes ⇐205

To give proper interpretation to certain words or phrases used in one part of an act or statute, the entire act or statute may be examined to ascertain meaning of the words or phrases.

3. Counties ⇐69(3)

The rule of liberal construction of retirement and pension statutes does not permit the courts to construe the words "county employees", as used in county charter provisions entitling county employees to benefits of retirement system, to include county officers.

4. Constitutional law ⇐70(3)

That public economy and efficiency would be promoted by construing the term "county employees", as used in county charter provisions entitling county employees to benefit of retirement system, to include "county officers" was a matter for legislative consideration and not for the court.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by G. E. Wade against the Board of Administration of the Alameda County Employees' Retirement System and others for declaratory relief for the purpose of obtaining a judicial determination as to whether an elective county officer is eligible to membership in the retirement system. From a judgment of dismissal, plaintiff appeals.

Affirmed.

J. Paul St. Sure and Edw. H. Moore, both of Oakland, for appellant.

Ralph E. Hoyt, Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and Stanley C. Smallwood, Deputy Dist. Atty., all of Oakland, for respondents.

KNIGHT, Justice.

Pursuant to the authority granted by section 14 of the Alameda County Charter, authorizing the establishment of a retirement system for the benefit of "county employees," the board of supervisors passed an ordinance, which was approved by a vote of the electors, setting up such a system. The plaintiff herein holds an elective office in the county, namely, that of county clerk; and he brought this action for declaratory relief against the Board of Administration of the Alameda County Employees' Retirement System for the purpose of obtaining a judicial determination as to whether an elective county officer is eligible to membership in the retirement system. The trial court held on demurrer that he was not, and the demurrer was sustained without

leave to amend. From the judgment of dismissal entered thereon plaintiff appeals.

Section 14 of the charter was approved by the electors on November 6, 1928. The pertinent provisions thereof read: "The Board of Supervisors, if deemed expedient, may provide, after actuarial investigation, by ordinance adopted by a four-fifths vote, for the purchase of annuities or insurance for County *employees,* or for an annuity or insurance fund, the basis of which in whole or in part, shall be contribution by the employees to be benefited. * * *" (Italics ours.) The ordinance adopted pursuant to the foregoing section of the charter was passed by the board of supervisors on October 6, 1934, approved by the electors at the general election held on November 6, 1934, and became effective January 1, 1935. By its terms it creates an Alameda County Employees' Retirement Fund and establishes a board of administration to administer it. Sections 4, 5 [a]. The board determines all questions relative to the eligibility of members. Section 5 [c]. All persons "who are employees" of the county on January 1, 1935, are declared to be members of the system and "all persons entering the employ" of the county on or after that date shall automatically become members of the system upon the date of their employment. Section 6 [a]. Section 2 [c] defines the word "employee" as meaning "any person in the employ of the County of Alameda whose compensation in such employment is paid wholly by the County." Part time and seasonal employees, institutional inmates and persons in institutions primarily for training purposes are excluded from membership (section 6 [d], 9 [e]), and persons receiving not more than $95 a month may elect to be exempt. Members contribute to the fund five per cent of the amount of compensation not exceeding $250 a month, and department heads certify the amount of contributions to the auditor. The contributions of the members to the retirement fund are matched by the county. Section 8. Retirement may be had after 10 years' service provided the member has reached the age of 60 years. At age 70 retirement is compulsory. Section 10. Members may retire for superannuation, with the amount of allowance based upon age at retirement and length of service (section 11), and for disability (section 12). Provision is also made for return of contributions upon death occurring prior to retirement, and for reinstatement. Sections 14, 15. The system is designed to be self-sustaining through the equal contributions of the members and the county, and if it becomes actuarially unsound necessary reductions must be made in benefit payments. Section 16.

Plaintiff's salary as county clerk is wholly paid by the county; and in April, 1943. he certified that the sum of $12.50 should be deducted from his April salary as his contribution for the month to the retirement fund. At the same time he tendered such additional sums as he claimed were theretofore due from him as contributions to the retirement fund. The certification and tender were rejected by the board on May 24, 1943, and on March 9, 1944, plaintiff brought the present action.

So far as the record shows, prior to the proceeding taken by plaintiff in April, 1943, none of the elected officers of the county sought the benefit of the retirement system. However, at the general election of November 8, 1938, there was submitted to the voters of the county a charter amendment which if adopted would have added to the charter a new section to be numbered 14½ whereby all elective county and township officers would have been, by the express terms of the proposed amendment, included in the retirement system. The electors rejected the proposed amendment; and two years later at the general election of November 5, 1940, a charter amendment in the same form as the one rejected in 1938 was submitted to the electors of the county, and likewise it was rejected.

[1] It is agreed that the authority of the board of supervisors to set up a retirement system is derived solely from and must be measured by the provisions of section 14 of the charter; and it is our conclusion that the trial court's decision must be sustained upon the ground that the words "county employees" as used in that charter section cannot be construed to include county elective officers. Such doubtless was the construction placed thereon by the proponents of the charter amendments which were submitted to and rejected by the electors in 1938 and again in 1940; otherwise it would not have been necessary to have enacted an additional charter section to cover elective officers. Moreover, the rejection of the proposed amendments by the voters at the two elections clearly signified two things, that the voters construed section 14 as excluding elective

officers from the retirement system, and that they believed that the charter should not be amended so as to include elective officers.

However, aside from the foregoing considerations, an examination of other sections of the charter shows that nowhere therein is the word "employee" so used that it can be interpreted to include elective officers. In other words, nowhere does the charter use either the word "employee" or any other collective term as including both elective officers and other persons in the service of the county, even in those portions of the charter where the same provisions are applicable to both, and a collective term could have been used. For example section 12 [b] gives the board of supervisors authority to provide compensation for "elective and appointed officers, assistants, deputies, clerks, attaches and employees," and contains other provisions not material here. Section 12 [f] authorizes the board of supervisors to require "any county or township officer or employee to give bond," to insure faithful performance of his duties. Section 19 provides that all officers, boards and commissions collecting fees "and all officers or employees collecting or receiving any moneys" shall make regular settlement with the county treasurer. Section 65 provides that "All officers, assistants, deputies, clerks, attaches and employees" are allowed necessary traveling expenses. Section 66 provides that "No elective or appointive officer or employee who receives compensation as such" shall hold certain other specified offices; also that "No officer or employee shall be interested" in contracts with the county; also that "No officer or employee shall receive any commission * * * from or by reason of any dealings with * * * the county; * * *" also that "It shall be the duty of every officer and employee" to report violations of section 66.

As will be noted from the above sections, in no instance, although several opportunities so to do were presented, does the charter use the word "employee" to include elective public officials, but always employs the word "officers" or "elective officers" when elective public officials were intended to be included. That being so, it would be manifestly unreasonable to single out section 14 of the charter and hold that the term "employees" as there used was intended to include elective officers.

[2] Plaintiff calls attention to two charter sections wherein the word "employee" is used in such a way as of necessity to include *appointive* officers, and he argues that since the word is given different meanings in various sections, it is impossible to determine the meaning of the word as it is used in section 14 by referring to other sections wherein it is used; that the word must be interpreted only in the light of the particular section in which it is used. It is a well settled rule of statutory construction, however, that in order to give proper interpretation to certain words or phrases used in one part of an act or statute, the entire act or statute may be examined to ascertain the meaning of the words or phrases giving rise to the controversy. Applying that rule of construction to the situation here presented, it is reasonable to assume that if it had been the intention to include elective officers in the retirement system authorized by section 14, that section would have been worded the same as the other sections of the charter above referred to, by mentioning both officers and employees.

Plaintiff argues that the use of the word "employee" signifies employment, that the word "employment" is a generic term, which may be properly defined as "the use of one's services"; and that such being the case every public office is an employment and every elective officer must of necessity be an employee. In support of the above argument plaintiff cites the cases of Patton v. Board of Health, 127 Cal. 388, 59 P. 702, 78 Am.St.Rep. 66; White v. City of Alameda, 124 Cal. 95, 56 P. 795; and Empey v. Yost, 182 Wash. 17, 44 P.2d 774. There would appear to be three answers to this argument. In the first place, while it is true that in some relationships an officer may be considered an employee, the particular question here to be determined is whether an elective officer may be considered an "employee" within the meaning of Section 14 of the charter; and for the reasons herein given it is our opinion that it may not be so held. Secondly, the courts of this state in dealing with the question of the legal status of public officers and employees have drawn a clear distinction between the two, which governs in most cases, unless it clearly appears from the context or special definition that a different meaning was intended. See Coulter v. Pool, 187 Cal. 181, 201 P. 120; Foucht v. Hirni, 57

Cal.App. 685, 208 P. 362; Couts v. County of San Diego, 139 Cal.App. 706, 34 P.2d 812; Patton v. Board of Health, supra; People v. Wheeler, 136 Cal. 652, 69 P. 435. Here the charter contains no definition of an employee, nor have we found anything in the context that would justify the conclusion that the word "employee" as used in section 14 of the charter was intended to include also the elective officers of the county. The third answer is that nowhere in the charter is the word "employee" used in connection with elective officers. As shown in detail in defendants' brief, it is used in numerous places in the charter in connection with deputies, assistants, attaches and other employments, but at no place, so far as our attention has been called, is it implied that an elective officer is employed.

Plaintiff cites two cases from foreign jurisdictions (Kelly v. Loveland, 141 Pa. Super. 455, 15 A.2d 411; Russell v. Secretary of Commonwealth, 304 Mass. 181, 23 N.E.2d 408); but they are not in point for the reason that in each of them the statute or ordinance the court was called upon to construe contained a definition of the word "employee," and the decisions therein were based on such definition; whereas here section 14 of the charter contained no definition of the words "county employees."

[3] In further support of his basic contention that as an elected public officer he is entitled to the benefits of the retirement system plaintiff cites cases to the effect that the rule in this state for the construction of retirement and pension statutes is one of liberality. Such is doubtless the law, but the rule of liberal construction does not go so far as to permit courts to rewrite the statute it is called upon to construe; and here, in order to sustain plaintiff's basic contention, it would be necessary to revise section 14 of the charter by inserting therein two words, so that the particular portion thereof in question here would then read "county officers and employees," instead of "county employees."

[4] Plaintiff points out that the declared dual purpose of establishing the retirement system, as it is set forth in section 1 of the ordinance, is the promotion of the public economy and efficiency by retirement of incapacitated employees, and the recognition of a public obligation toward them by providing for retirement with compensation; and he argues that public economy and efficiency would be served just as well, if not more so, by the retirement of an incapacitated elective officer as by the retirement of his deputy or assistant, and that the justification and need for the care of elective officers, who have devoted many years of faithful service to a county, are just as compelling as in the case of the ordinary employee. This is an argument which might well be made in support of a movement for a legislative change in the provisions of section 14, but obviously such change may not be brought about by way of judicial construction.

We are of the opinion also that the provisions of the ordinance enacted pursuant to section 14 of the charter may not be so construed as to include elective officers within the retirement system; but in view of the construction placed on the enabling provisions of section 14 of the charter an analysis of the ordinance provisions becomes unnecessary, since in any event the board of supervisors, in the enactment of the ordinance, would have exceeded its power if it had attempted to go beyond the scope of the enabling provisions of section 14 of the charter.

As we have said, the action herein is for declaratory relief, and the appeal is from a judgment of dismissal entered pursuant to an order sustaining the demurrer to the amended complaint without leave to amend. In view of the decision rendered in the recent case of Maguire v. Hibernia Savings & Loan Society, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, which was decided but not reported at the time of the ruling on demurrer herein, the parties to this appeal have filed a written stipulation to the effect that for the purposes of this appeal this court may consider the judgment of the superior court an adjudication on the merits that plaintiff is not entitled to membership in and has no rights against or with reference to the Alameda County Employees' Retirement System, and that the amended complaint to which the demurrer was sustained may be considered as an agreed statement of facts upon which the judgment was based; accordingly this has been done in determining the appeal.

Whatever remaining arguments may have been made in support of the appeal are only incidental to those already noticed, and are deemed to be without merit.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

67 Cal.App.2d 702

ASTONE et al. v. OLDFIELD et al.
Civ. 3148.

District Court of Appeal, Fourth District, California.
Jan. 26, 1945.

1. Appeal and error ⇐1047(3)
Trial ⇐89

Where witness testified that brakes on defendant's truck were in good condition and sufficient to bring the vehicle to a stop within the distance specified in statute and no objection was made thereto and no motion was made to strike it out and there was no evidence contradicting such testimony, denial of motion to strike out testimony of witness that truck brakes conformed with the law requirements was error but not prejudicial. Vehicle Code, § 670, St. 1935, p. 222.

2. Appeal and error ⇐1170(9)
Negligence ⇐138(3)

Where plaintiffs' own evidence showed that they were contributorily negligent, the giving of an instruction on unavoidable accident was erroneous, but not prejudicial to plaintiffs. Const. art. 6, § 4½.

3. Trial ⇐228(1)

The court is not required to state all the law applicable to a case in a single instruction.

4. Trial ⇐295(1)

The instructions must be read as a whole, and each instruction should be considered in connection with the others, and if, without straining any portion of the language, the instructions harmonize as a whole and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to just criticism, or because a separate instruction does not contain all the conditions and elements which are to be gathered from the instructions as a whole.

5. Trial ⇐285

The entire instructions should be given a fair and reasonable construction with a view to ascertaining their probable effect upon the jury, and must be considered in the light of the issues raised by the pleadings, and the words employed will be construed in accordance with their natural and ordinary meaning.

6. Trial ⇐253(4)

An instruction on right to assume that other persons using the highway will also use ordinary care and obey the law was not error merely because it omitted necessary element to effect that a person may not rely on such an assumption if he knows or has reason to know that other person will not obey the law or use ordinary care, where instruction immediately preceding it contained the missing element and instruction immediately following informed jurors that they must not base their verdict upon any single instruction but must consider all of them as a whole.

7. Automobiles ⇐246(41)

In action for injuries resulting from collision of motor vehicles, where four witnesses testified to the condition of the brakes on one vehicle or the other, without counting the testimony of a member of the California Highway Patrol as to condition of brakes on defendant's truck, the condition of brakes was an issue upon which the court could properly instruct the jury.

8. Automobiles ⇐245(50)

In action for injuries resulting from collision between motor vehicles, whether defective brakes on plaintiffs' automobile contributed to the collision was for jury.

9. Evidence ⇐588

The jurors are the judges of the weight of the evidence and the credibility of witnesses, and may reject part or all of the testimony of a witness or accept any part of it as true.

10. Trial ⇐295(6)

Where it clearly appeared from evidence that two motor vehicles involved in intersection collision were approaching intersection at time plaintiffs testified that they looked and failed to see defendant's vehicle, any error in first sentence of instruction that it is as much negligence to look and not to see, as it is negligence not to look at all, was cured by succeeding sentence that if jury found from evidence that if plaintiff driver did not use his powers of observation as a reasonably prudent person would have done in same circumstances and was guilty of negligence, etc., verdict must be against plaintiffs and in favor of defendants.

11. Appeal and error ⇐1064(1)

Minor errors in instructions given that did not mislead the jury or prejudice party

complaining did not warrant a reversal of judgment.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Tony Astone and Rose Astone against Robert Yale Oldfield and Stewart & Nuss, Inc., for damages resulting from collision between two motor vehicles. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

M. G. Gallaher, of Fresno, Bernard E. Allard, of San Francisco, and Rae B. Carter, of Fresno, for appellants.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered after a jury had returned a verdict for defendants in an action for damages resulting from a collision between two motor vehicles in the intersection of Shaw and Brayley Avenues in the County of Fresno shortly after five o'clock in the afternoon of November 23, 1942.

Plaintiffs are husband and wife. They were traveling south on Brayley Avenue in a 1930 Durant automobile driven by Tony Astone. Robert Yale Oldfield, an employee of Stewart & Nuss, was driving a dump truck east on Shaw Avenue. With its load it weighed about twelve tons. It had a wheel base of ten feet and an overall length of fourteen feet.

Brayley Avenue runs north and south, and Shaw Avenue east and west. The improved portion of Brayley Avenue is between 17 and 19 feet wide and Shaw Avenue is between 25 and 26 feet wide. The intersection is an obstructed one as defined in section 511 of the Vehicle Code, St. 1941, p. 2716.

There is a bridge over a canal which crosses Shaw Avenue. The east end of this bridge is about 265 feet west of the intersection. On leaving this bridge the roadway to the east descends three feet and nine and one-half inches in about 145 feet and then runs on level to the intersection.

There is a fig orchard at the northwest corner of the intersection. It had commenced to drop its leaves and a witness estimated that on the day of the accident about 25% of its foliage had fallen. The tree next to the south end of the row adjoining Brayley Avenue on the west was gone leaving a clear space about 45 feet wide through which a driver on either street could see a vehicle on the other from points about 85 feet north or west of the intersection. One small fig tree remained near the northwest corner of the intersection. Its branches covered a space about ten feet in diameter. They were about 20 feet west of the west edge of the improved portion of Brayley Avenue, about 15 feet north of the north edge of the improved portion of Shaw Avenue and about 25 feet northwesterly from the point of intersection of those lines. A photograph indicates that a driver on Brayley Avenue could see Shaw Avenue through the fig trees from a point further than 85 feet north of the intersection.

Tony Astone testified that the brakes on his automobile were in good condition and when applied would stop the car in a very short distance, which he estimated at about two feet, when the vehicle was traveling 15 miles an hour. This is disputed by the evidence of two mechanics who examined, tested and drove the car after the accident. They found the brake linings were gone on three wheels and mostly worn away on the fourth; that the brakes were full of grease; that the car was practically without brakes.

Tony testified that before the accident he was driving south on Brayley Avenue at a speed of 20 miles an hour; that when one or two hundred feet north of the intersection he took his foot off the throttle and proceeded at a gradually reduced speed so that he entered the intersection at 15 miles an hour; that when he had cleared the fig trees and had about reached the intersection he looked in both directions and saw no vehicles on Shaw Avenue; that he proceeded into the intersection and suddenly saw the truck bearing down on him; that he could not avoid the collision; that at the moment of impact the rear wheels of his automobile were on or south of the center line of Shaw Avenue, and west of the center line of Brayley Avenue; that he had crossed many times and knew that Shaw Avenue was a through street that sometimes carried considerable traffic.

Mrs. Astone testified that when the automobile had about reached the intersection she looked in both directions on Shaw Avenue and saw no vehicles; that she saw the

truck for the first time immediately before the collision when it was four or five feet away.

The front of the truck struck the right rear door of the automobile turning it over on its right side. Both plaintiffs were seriously injured.

T. E. Tucker testified that he was driving his car west on Shaw Avenue and was about 350 or 400 feet east of the intersection at the time of the collision.

Oldfield testified that he was driving the truck east on Shaw Avenue at a speed of about 30 miles an hour; that when he crossed the bridge already mentioned, he applied the brakes gently descending the slight decline to keep the vehicle from gaining speed; that he kept his foot on the brake in approaching the intersection; that he saw the Astone car traveling south on Brayley Avenue when he was about 50 or 75 feet west of the intersection; that the two vehicles approached the intersection at about equal distances from it; that he applied his brakes gently in approaching the intersection; that when his rear wheels were 30 feet west of the intersection he realized the Astone car was not going to stop; that he applied his brakes hard, locking some if not all of the six wheels on the truck; that "up until the time before the impact he (Astone) was—it looked like he (Astone) was attempting to slow down and then he picked up speed at approximately just before the impact: * * *" that Astone swerved to his left just before the collision; that both vehicles entered the intersection at about the same time; that the speed of the truck had been reduced to about 15 or 20 miles an hour at the time of the impact; that the speed of the Astone car was 15 or 20 miles an hour when it was crossing the intersection.

Plaintiffs do not contend that the verdict lacks evidentiary support, nor could they well do so in view of the evidence. Oldfield testified that the two vehicles approached the intersection at about the same distances from it. The undisputed evidence shows Astone had two unobstructed views of portions of Shaw Avenue westward from the intersection. The first was from a point at least 85 feet north of the intersection, to a point about 40 feet north of the intersection; the second was from a point about 25 feet north of the north line of the intersection. Had he availed himself of either, he could have seen the approaching truck, if the undisputed testimony of Oldfield to the effect that the two vehicles approached the intersection at about equal distances from it be accepted as true. If the vehicles reached the intersection at the same time, Astone should have yielded the right of way to the truck which was to his right. Sec. 550, Vehicle Code, St.1937, p. 619. The conclusion of contributory negligence on the part of plaintiffs, if drawn by the jury, would find ample support in these facts.

Plaintiffs base their argument for a reversal of the judgment on the denial of their motion to strike out an answer of a member of the California Highway Patrol as to the condition of the brakes on the truck, and also upon instructions given at the request of defendants which they maintain were prejudicially erroneous.

The officer gave the following testimony after testifying that he had tested the brakes on the truck: "Q. What did you find the condition of the brakes to be? A. We found that the truck brakes conformed with the law requirement." The motion to strike was on the ground that the answer was a legal conclusion of the witness. We are of the opinion that technically it would have been better to have granted the motion.

Oldfield testified in effect that the brakes on the truck were in good condition and sufficient to bring the vehicle to a stop within the distances specified in the statute. Sec. 670 Vehicle Code, St. 1935, p. 222. This evidence was received without objection and no motion was made to strike it out. There was no evidence contradicting this testimony.

[1] With this state of the record we do not regard the error, if any, in denying the motion to strike, as prejudicial. The answer of the officer was merely cumulative of other evidence already before the jury, the truth of which was not disputed by anything in the record. The denial of the motion, while perhaps error, thus was not so serious as to require a reversal of the judgment.

Defendants seek to support this ruling of the trial court by arguing that the answer of the officer was in respect to a composite fact, the admission of which in evidence was within the discretion of the trial court. In support of this argument they cite such cases as Kreuzberger **v.** Wingfield, 96 Cal. 251, 31 P. 109; Kaltschmidt **v.** Weber, 145 Cal. 596, 79 P. 272; Nolan

v. Nolan, 155 Cal. 476, 101 P. 520, 132 Am. St.Rep. 99, 17 Ann.Cas. 1056; Hardison v. Davis, 131 Cal. 635, 63 P. 1005; Whitfield v. Debrincat, 50 Cal.App.2d 389, 123 P.2d 591. In view of our conclusions already stated we do not need to pursue this subject further.

At the request of defendants the trial judge gave an instruction on unavoidable accident. Plaintiffs maintain that the instruction, while correct in form, was inapplicable to the facts of this case and that it was prejudicial error to give it. Hyman v. Market St. Ry. Co., 41 Cal.App.2d 647, 107 P.2d 485; Scandilas v. Jenny, 132 Cal. App. 307, 22 P.2d 545. They argue that the evidence is so clear to the effect that the accident was caused by the negligence of one driver or the other that there is no room to even suppose that it was the result of an unavoidable accident.

Defendants argue that if the testimony of plaintiffs be accepted as literally true in all its details, and the evidence of Oldfield be believed in its entirety, the conclusion, if drawn, that neither was guilty of negligence must follow, and therefore, the collision could have been only an unavoidable accident.

[2] From a study of the record we regard this argument as extremely tenuous and not justified. To the contrary the testimony of plaintiffs to the effect that they did not look for traffic on Shaw Avenue approaching from the west until they had about reached the north boundary of the intersection, and then, when they looked, they did not see the approaching truck which must have been in plain sight, coupled with other undisputed evidence to the effect that they had a clear view of Shaw Avenue from two places on Brayley Avenue north of the intersection, all point so strongly to the contributory negligence of Tony Astone that there was hardly room for any reasonable belief that the collision was due to unavoidable accident. We must conclude that the members of the jury were reasonable men and women and therefore must ascribe the verdict reached by them in deciding a question of fact, to the reasonable conclusion that Tony Astone was guilty of negligence that proximately contributed to the accident, rather than to any mental confusion produced by the instruction on unavoidable accident. His negligence is so apparent from his own testimony that it is highly improbable that the jurors could have been influenced by the instruction. While the instruction should not have been given we cannot regard the giving of it so prejudicially erroneous as to require a reversal of the judgment. Sec. 4½, Art. VI, Const.

At defendants' request the trial judge gave the following instruction to the jury:

"A person who exercises ordinary care himself has a right to assume that other persons using the highways will also use ordinary care and obey the law. In this case, if you find from the evidence that Robert Oldfield was in the exercise of ordinary care at the time of, and preceding, the collision, he had the right to assume that the plaintiff, Tony Astone, would exercise ordinary care and obey the law."

Plaintiffs attack this instruction on the ground that it omitted the necessary element to the effect that a person may not rely on such an assumption if he knows or has reason to know that the other person will not obey the law or use ordinary care. Angier v. Bruck, 56 Cal.App.2d 55, 131 P.2d 876.

The instruction immediately preceding the one we have quoted contained the missing element. The instruction immediately following informed the jurors that they must not base their verdict upon any single instruction but must consider all of them as a whole.

[3-5] What was said in Barlow v. Crome, 44 Cal.App.2d 356, 112 P.2d 303, 305, is applicable here:

"It has been often stated that a trial court is not required to state all the law applicable to a case in a single instruction. The instructions must be read as a whole, viz., each instruction should be considered in connection with the others and if, without straining any portion of the language, the instructions harmonize as a whole, and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to just criticism, or because a separate instruction does not contain all of the conditions and elements which are to be gathered from the instructions as a whole. The entire instructions should be given a fair and reasonable construction with a view to ascertaining their probable effect upon the jury, and must be considered in the light of the issues raised by the pleadings, and the words employed will be construed in accordance with their natural and ordinary meaning. (Citing cases.)"

[6] Taken in their entirety the instructions properly set forth the law on this subject.

The trial court instructed the jury on the question of the negligence of a person who knowingly operates a motor vehicle with insufficient and deficient brakes. Plaintiffs urge that it was error to give such an instruction as "thereby the court submitted an alien issue to the jury and an issue that was plainly calculated to mislead the jury."

[7] We cannot agree with this contention. Four witnesses testified on the question of the condition of the brakes on one vehicle or the other, without including the evidence of the officer already alluded to. Plainly the condition of brakes was made an issue during the trial.

[8, 9] It is also urged that the defective brakes on the Astone car were not involved in the case nor a contributing cause of the collision. We cannot agree with this argument. Astone testified that his car slowed down for at least 100 feet before reaching the intersection. Oldfield testified that the automobile first slowed down and then speeded up in the intersection. The jurors are judges of the weight to be given evidence and the credibility of witnesses. They may reject part or all of the testimony of a witness, or accept any part of it as true.

The foregoing testimony would support either of two reasonable inferences, if drawn. First, the jurors may have concluded that on entering the intersection Astone applied his brakes and, finding them worthless, had speeded up in an endeavor to cross in front of the truck. Second, they might have concluded that the slowing of the automobile in the intersection was a continuation of the slowing process mentioned by Astone during the 100 feet north of Shaw Avenue, and that, knowing his brakes were worthless and that he could not avoid a collision by stopping his car, he had attempted to avoid the collision by speeding up in an endeavor to cross in front of the truck.

Under these circumstances the question of the condition of the brakes was a material issue on which it was proper to instruct the jury.

The following instruction was given at the request of defendants:

"It is as much negligence to look and not to see as it is negligence not to look at all. Therefore, if you find from the evidence that plaintiff, Tony Astone, did not use his powers of observation as a reasonably careful and prudent person would have done in the same circumstances, and that he was guilty of negligence which proximately contributed to the happening of the collision, your verdict must be against the plaintiffs and in favor of the defendants."

[10] Plaintiffs urge that the first quoted sentence is erroneous because of the omission of the words, "that which is in plain sight", or words to that effect, after the word "see". Of course it is not negligence to fail to see something that is concealed and it would have been better form to have incorporated the suggested words in the sentence. However, in the next sentence the jury was instructed that if "Tony Astone did not use his powers of observation as a reasonably careful and prudent person would have done in the same circumstances, and that he was guilty of negligence," etc., he could not recover. No reasonable person would expect another person, no matter how reasonably prudent or careful he might be, to see something not within the range of his vision. The suggested words are implied in the whole instruction and plaintiffs were not prejudiced by its being given in the form proposed. It clearly appears from the evidence that two vehicles were approaching this intersection on Shaw Avenue at this time, and that Astone saw neither of them.

[11] While there may be minor errors in the instructions given, we cannot conclude that the jury was misled and that plaintiffs suffered sufficient prejudice therefrom to warrant a reversal of the judgment. Shuey v. Asbury, 5 Cal.2d 712, 55 P.2d 1160.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

67 Cal.App.2d 789

PEOPLE v. MOORE.

Cr. 1881.

District Court of Appeal, Third District, California.

Feb. 1, 1945.

1. Kidnapping ⇐5

Under child stealing statute the intent to detain and conceal may be gathered from all the circumstances of a case before and after the act. Pen.Code, § 278.

2. Kidnapping ⇐1

The word "detain" within child stealing statute does not necessarily include the idea of force, but includes delaying, hindering, retarding, etc. Pen.Code, § 278.

See Words and Phrases, Permanent Edition, for all other definitions of "Detain".

3. Kidnapping ⇐6

In prosecution for child stealing, whether accused fraudulently took the child away and whether he did so with intent to detain and conceal him from his mother were for jury. Pen.Code, § 278.

4. Kidnapping ⇐5

In prosecution for child stealing, fact that accused committed acts of sexual perversion upon the child was proper for jury to consider in determining accused's intention. Pen.Code, § 278.

5. Criminal law ⇐1036(1)

Accused could not claim error in admission of testimony to which he did not object at trial.

6. Criminal law ⇐507(1)
Infants ⇐66

A child under age of 14, in absence of clear proof that he knew wrongfulness of criminal act at time of its commission, is deemed incapable of committing a crime, and in absence of such proof cannot be held to be an accomplice.

7. Kidnapping ⇐1

That child might have gone with accused willingly was immaterial in determining accused's guilt of child stealing since the offense is one against the parent and not against the child. Pen.Code, § 278.

8. Kidnapping ⇐5

Evidence sustained conviction of child stealing. Pen.Code, § 278.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

George E. Moore, alias Bill Evans, alias Bill Timmons, whose true name is John Shead, was convicted of feloniously taking a boy from his mother with intention to retain and conceal him from his parent, and he appeals.

Affirmed.

John Shead, in pro per.

Robt. W. Kenny, Atty. Gen., and D. K. Lener, Arthur A. Ohnimus and James O. Reavis, Deputy Attys. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed in the Superior Court of Sacramento County defendant was charged with a violation of section 278 of the Penal Code, in that on or about the 1st day of September, 1943, he wilfully, maliciously, forcefully and feloniously took a boy of the age of 12 years away from his mother with the intent to retain and conceal said child from his parent. He was convicted and now appeals on the sole ground that the verdict of the jury is contrary to the law and the evidence and is insufficient to sustain the conviction.

The evidence shows that the child was living in Sacramento with his mother who was employed in a cafe as a waitress. She testified that defendant, whom she knew as Bill Timmons, about May 1, 1943, asked her permission to take the boy to Livermore where he had a home on a ranch, saying that his wife wanted to take the boy there and keep him for the summer; that the boy wanted to go and that she consented on condition that he bring the boy home occasionally; that toward the end of July, after the boy had returned home, she had a conversation with him and defendant, at which time she consented that the boy should again go with defendant to the ranch on condition that he be returned not later than the time when school would start, about the first of September; that she did not see the boy again until she found him with defendant in Phoenix, Arizona, the following February; that she did not give defendant permission to take the child anywhere except to Livermore; that when the child was not returned around September 1st she went to Livermore and found a Timmons ranch, but that it did not belong to this defendant; that neither the boy nor defendant contacted her, though she heard they were in Sacramento in September;

that she reported to the police after her return from Livermore, and when she changed her place of residence gave them her new address.

The boy testified that when he first went to Livermore with defendant he stayed two weeks, then came home; that later he went there again with defendant after his mother had given permission for him to stay until school started; that after they went to Livermore the second time they stayed there but one day, then went to Salem, Oregon, thence to Portland and Eugene; that after leaving Eugene they returned to Sacramento in November which was after school had started; that he then went to the cafe to find his mother, but defendant did not go with him; that his mother was not there; that one of the waitresses gave him his mother's address but that he did not get it right, and though he went to two hotels he did not find her; that after staying in Sacramento overnight defendant bought bus tickets and they went to Phoenix, Arizona, where they stayed in a cabin for several months; that they slept together and that defendant committed unnatural sex acts upon him.

Defendant did not testify in his own behalf, but he contends that he returned the child to Sacramento, and being unable to find his mother continued to take care of him and send him to school; that the evidence shows that he did not "maliciously, forcibly or fraudulently take or entice away the child from his mother with intent to detain and conceal him."

[1-4] It is well established, however, that the intent to detain and conceal may be gathered from all of the circumstances of a case both before and after the act. People v. Simmons, 12 Cal.App.2d 329, 55 P.2d 297; People v. Annunzio, 120 Cal.App. 89, 7 P.2d 739; People v. Palmer, 50 Cal.App. 2d 697, 123 P.2d 882. The word "detain" does not necessarily include the idea of force, but includes delaying, hindering, retarding, etc. (People v. Smith, 17 Cal.App. 2d 468, 62 P.2d 436; People v. Simmons, supra); and that defendant fraudulently took and enticed the child away is inferable not only from the fact that he made false statements to the boy and his mother regarding having a wife and a home in Livermore to which place he desired to take the boy, but also from the fact that when they went to Livermore the second time they stayed there but one night and then went to Oregon without the consent or knowledge of the boy's mother. There is no evidence, and appellant makes no contention, that he had the consent of the mother to take the boy to Oregon or to Arizona, or that he ever advised the mother where they were. Whether defendant fraudulently took the child away, and whether he did so with the intent to detain and conceal him from his mother, were facts for determination by the jury, and the fact that defendant committed acts of sexual perversion upon the boy is one which is was proper for the jury to consider in determining defendant's intention. People v. Edenburg, 88 Cal.App. 558, 567, 263 P. 857; People v. Smith, supra; People v. Torres, 48 Cal.App. 606, 192 P. 175; People v. Simmons, supra.

[5, 6] Appellant argues that the testimony of the boy as to these acts of perversion, under section 1111 of the Penal Code, required corroboration since the boy was an accomplice; but it does not appear that defendant objected to the testimony on that ground or at all. Furthermore, a child under the age of fourteen, in the absence of clear proof that he knew the wrongfulness of the act at the time of its commission, is deemed incapable of committing crime, and in the absence of such proof cannot be held to be an accomplice. People v. Becker, 140 Cal.App. 162, 164, 35 P.2d 196; People v. Mack, 24 Cal.App.2d 438, 439, 75 P.2d 547; People v. Singh, 62 Cal.App. 450, 453, 217 P. 121.

[7] It is also immaterial that the boy may have gone with defendant willingly, for the offense is one against the parent and not against the child. People v. Gillispie, 104 Cal.App. 765, 286 P. 502; People v. Torres, supra; People v. Simmons, supra.

[8] As we are satisfied that the evidence was entirely sufficient to sustain defendant's conviction, the judgment is affirmed, as is the order denying the motion for a new trial.

PEEK and THOMPSON, JJ., concur.

KIRK v. LOS ANGELES RY. CORPORATION.*

Civ. 14714.

District Court of Appeal, Second District, Division 2, California.

Jan. 26, 1945.

Rehearing Denied Feb. 13, 1945.

Hearing Granted March 26, 1945.

1. Appeal and error ⇐927(3)

Evidence must be reviewed in the light most favorable to plaintiff in passing upon a motion for nonsuit.

2. Street railroads ⇐114(14)

Evidence sustained findings that pedestrian who, having passed immediately in front of moving street car and being aware of necessity for haste, stooped to retrieve her purse from the ground and while in stooping position was struck by steps of street car, was guilty of negligence which contributed to injury so as to preclude recovery, regardless of negligence of motorman.

MOORE, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Helen Kirk against Los Angeles Railway Corporation for injuries suffered by plaintiff when struck by defendant's street car. At the conclusion of plaintiff's evidence, the trial court granted a motion for nonsuit and from the ensuing judgment, plaintiff appeals.

Judgment affirmed.

Entenza & Gramer and John J. Craig, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover for injuries which she suffered when she was struck by defendant's street car. At the conclusion of plaintiff's evidence the trial court granted a motion for a nonsuit and plaintiff has appealed from the ensuing judgment.

Plaintiff was standing at the southeast corner of Seventh Street and Broadway in the city of Los Angeles at 11 o'clock p. m. on May 23, 1942. In company with two soldiers she started to cross Broadway going in a westerly direction. As she started the green light "go" signal was displayed. Several persons were crossing ahead of plaintiff and others were crossing in the opposite direction. Two lines of vehicles were standing at her left. At this intersection two lines of street car tracks extended north and south along Broadway. When plaintiff arrived at a point between the first two car tracks the traffic signal changed to "stop". When plaintiff arrived at a point close to the southbound street car tracks she saw defendant's street car approaching from her right. She quickened her pace to cross in front of the street car. One of her companions "grabbed" her arm and called her attention to the fact that the street car was very close. Her purse was pushed from under her elbow and it struck the ground about two feet west of the west rail of the southbound car tracks. The contents of the purse were scattered about. She testified that "without pausing" she stooped to retrieve her purse. A witness for plaintiff testified that plaintiff was bent over, facing southwest and her hands were on the ground. Plaintiff's companions had crossed immediately in front of her. The street car was traveling from 10 to 12 miles per hour, its bell ringing.

[1, 2] Considering the evidence under the rule that it must be viewed in the light most favorable to plaintiff in passing upon a motion for a nonsuit, it may be reasonably inferred that defendant's motorman was guilty of negligence in starting his car before the proper signal was given him. But plaintiff must meet the more serious charge that her own evidence shows that she was guilty of negligence which contributed to her injuries. It appears without contradiction that plaintiff saw the necessity of hurrying in order to cross in front of the approaching street car and that she actually did succeed in passing in front of the car. It is also apparent that she would have escaped injury if she had not stooped to retrieve her purse. No argument is necessary to convince that plaintiff's forward motion was retarded when she stooped to pick up her purse and that the act of stooping brought her hip in contact with the steps of the street car, the front part of which had already reached a point beyond the point where plaintiff was stooping. The trial judge reached the conclusion that the only reasonable view that could be taken of the evidence was that plaintiff was guilty of negligence which con-

* Subsequent opinion 161 P.2d 673.

tributed to her injuries. We see no occasion to interfere with his judgment.

The judgment is affirmed.

McCOMB, J., concurs.

MOORE, Presiding Justice.

I dissent. The only point involved is whether the only reasonable view of the evidence required the court to determine as a matter of law that plaintiff was negligent in stooping to retrieve her purse. The test is whether she, while in a position where she had a right to be, did an unreasonably careless act in attempting to recover a property which under the same circumstance it might reasonably be determined that an ordinarily prudent person might have done. For the court to say as a matter of law that she was negligent took from the jury the task which the law had assigned to them. In crossing a street in the midst of traffic a person carries with him the totality of his ego: his emotions, his impetuosity, his instinct for self-preservation, his attachment to and his zeal to guard and conserve his personal possessions, or his phlegmatism and apathy with regard to the world around him. If in view of an approaching peril, one errs or miscalculates or becomes confused he is not thereby necessarily negligent. The question he presents is whether it was negligence for him as a reasonably prudent person, under the circumstance of his case, so to err or miscalculate.

Such was the problem which should have been submitted to the jury in the case of appellant. She was lawfully pursuing her way over a cross-walk; knew that the motorman was obliged to see her and to use ordinary care not to strike her and knew that if she was in a position of peril the motorman would sound his gong. Amendt v. Pacific Electric R. Co., 46 Cal.App.2d 248, 253, 115 P.2d 588. In stooping for her purse the jury might reasonably have found that she did what a woman of ordinary prudence would have done in her situation. Giving every item of her proof and every legitimate inference their full value, and disregarding all evidence that favored defendant the evidence was sufficient to support a verdict if one should be returned in favor of plaintiff. Gish v. Los Angeles R. Corp., 13 Cal.2d 570, 90 P.2d 792.

Rehearing denied; MOORE, P. J., dissenting.

67 Cal.App.2d 901

PEOPLE v. SUKOVITZEN.

Cr. 1892.

District Court of Appeal, Third District, California.

Feb. 5, 1945.

Criminal law ⇐1182

Where appealing defendant did not file opening brief within 30 days nor appear for oral argument after notice, judgment and order appealed from were affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

William Allen Sukovitzen was convicted of first-degree robbery, and he appeals.

Affirmed.

William Allen Sukovitzen, in pro per.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Dep. Atty. Gen., for respondent.

PER CURIAM.

The appellant, William Allen Sukovitzen, was convicted in the Superior Court of the State of California, in and for the County of Sacramento, on October 17, 1944, of the crime of robbery of the first degree, a felony.

The transcript on appeal was filed in this court on November 27, 1944, and the clerk of this court duly notified appellant of the filing of same and advised him that he had 30 days thereafter within which to file his opening brief on appeal, but no brief has been filed by or on behalf of said appellant.

On January 8, 1945, the cause was regularly placed on the calendar of this court for oral argument on February 5, 1945, at 10 o'clock a. m., of said day, and appellant duly notified thereof by said clerk. No appearance was made at the time the case was called for hearing, and no brief on behalf of appellant was then, nor at all on file, nor any showing of excuse made for the failure to file said brief, therefore, pursuant to the provisions of Section 1253 of the Penal Code of the State of California, the judgment and the order appealed from are affirmed.

67 Cal.App.2d 698

KELSO et al. v. ULRICH et al.

2 Civ. 14652.

District Court of Appeal, Second District, Division 2, California.

Jan. 26, 1945.

As Corrected Feb. 8, 1945.

1. Vendor and purchaser ⇐93, 296

A vendor, on vendee's noncompliance with terms of contract for sale of realty on deferred payments, times of which are made of essence of contract, may rescind contract and retake possession of realty.

2. Vendor and purchaser ⇐299(1)

In absence of sufficient equitable showing by vendee to excuse his noncompliance with terms of contract for sale of realty on deferred payments, times of which are made of essence of contract, vendor, while standing on contract, is entitled to decree forfeiting all of vendee's rights thereunder in order to cut off possibility of further claims by vendee which might cloud vendor's title.

3. Vendor and purchaser ⇐335

On forfeiture of purchaser's rights under contract for sale of realty on deferred payments, times of which are made of essence of contract, because of purchaser's noncompliance with terms thereof, vendors have right to retain moneys theretofore paid on contract by purchaser.

4. Vendor and purchaser ⇐86

A vendee refusing to complete contract to purchase realty in his possession abandoned contract.

5. Vendor and purchaser ⇐299(1)

A vendee, refusing to complete his written contract to purchase realty in his possession, divests himself of equitable estate acquired under writing and becomes "trespasser" or "tenant at will", against whom vendor may maintain ejectment.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant at Will" and "Trespasser".

6. Quieting title ⇐10(2)

Under contract for sale of realty on deferred payments, times of which are made of essence of contract, action by vendor to quiet title to realty is appropriate remedy in case of vendee's default.

7. Damages ⇐78(6), 79(5)

A contract for sale of realty on deferred payments, times of which were made of essence of contract, was not void under statute declaring every contract, by which amount of damage or other compensation for breach of obligation is determined in anticipation thereof, void to such extent, nor was provision in contract for forfeiture thereof on purchaser's default unjustified by statute authorizing parties to contract to agree therein on presumable amount of damage from breach thereof when it is impracticable to fix actual damage. Civ. Code, §§ 1670, 1671.

8. Vendor and purchaser ⇐95(2)

Vendors of realty did not waive right to declare forfeiture of sale contract for purchaser's default in payments, times of which were made of essence of contract, by establishing escrow with bank, for purpose of enabling purchasers to comply with contract with assurance of receiving title to realty on payment of moneys due, after continued defaults were made and repeated demands to cure them were ignored by purchaser.

9. Vendor and purchaser ⇐299(3)

In vendor's action to forfeit purchaser's interest in contract for sale of realty and moneys paid thereunder because of defaults in payments, times of which were made essence of contract, declaration in answer that purchaser offered to pay vendors sums in arrears on furnishing of sufficient deed to property with title certificate did not preclude declaration of forfeiture, in absence of accompanying tender of moneys due.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Elliott L. Kelso and another against Harry F. Ulrich, his wife, and others to forfeit defendants' interest in a contract to purchase realty from plaintiffs and moneys paid thereunder, cancel the contract, and quiet title to the realty. Judgment for plaintiffs, and named defendant appeals.

Affirmed.

See, also, 153 P.2d 440.

William R. Law, of Los Angeles, for appellant.

Edward D. Garratt, of Los Angeles, for respondents.

MOORE, Presiding Justice.

On June 15, 1943, plaintiffs were the owners of a home site lot in the city of Los Angeles. On that day the defendant Harry F. Ulrich by a writing contracted for the purchase of the property on the following terms, to-wit: To pay two notes secured by trust deeds upon the premises in the sums of $1,539.31 and $1,027.33, in installments payable respectively at $17 and $33 per month; to pay the sum of $650 cash and the balance of $500 on October 1, 1943, with interest at 6 percent; to pay the current and subsequent taxes and assessments. The cash payment was made and the purchaser entered into the possession of the property. Thereafter no payments were made by defendants on either of the trust deed notes. Neither was any tax paid by defendants, and they defaulted in the payment of the $500. Although notified of their defaults, none of them was cured. To save themselves from loss plaintiffs made the payments on the trust deed notes to and including those accruing in the month of December, 1943, in the aggregate sum of $193, no part of which was ever paid to plaintiffs.

Subsequent to October 1, 1943, plaintiffs demanded of defendants that they pay the balance due under their contract and cure existing defaults, but defendants were deaf to all demands. To expedite the consummation of the purchase and sale of the property on October 23, 1943, plaintiffs opened an escrow with the Bank of America National Trust & Savings Association, South Pasadena Branch, and deposited therein a good and sufficient grant deed conveying the real property from plaintiffs to defendant Harry F. Ulrich. Also, they deposited a policy of title insurance showing the title to be vested in the buyer but defendants made no deposit of moneys in such escrow. Thus the matter rested till December 24, 1943, when plaintiffs notified defendants that in the event of their noncompliance with the contract by December 27, forfeiture of all moneys paid and of all rights of defendant under the agreement would be declared. Again defendants defaulted. On January 6, 1944, plaintiffs notified defendants in writing that by reason of their defaults in failing to make payments provided to be made by the contract plaintiffs had elected to declare the interest of defendants in the contract, in the property and in the moneys paid thereon to be forfeited, and they did so declare and that the agreement was cancelled. Also, they demanded that the Ulrichs surrender possession of the premises, which demand defendants ignored.

On January 8, 1944, plaintiffs filed their complaint setting forth the foregoing facts and demanded judgment forfeiting the interest of defendants in the contract and in all moneys theretofore paid under it and for its cancellation. In a second count they sued to quiet title. Mrs. Ulrich having defaulted and defendant Harry having duly answered, the cause was set for trial on March 14, 1944, when the defendants again defaulted by failing to appear at the trial. On motion the answer was stricken and judgment was granted as prayed by plaintiffs.

[1-6] The contentions made on this appeal are (1) that the complaint does not state a cause of action, and (2) that respondents waived the right to declare a forfeiture by entering into an escrow agreement. In making such contentions appellant is apparently oblivious of the uniformity of decisions in this state upholding judgments of the forfeiture of contracts for the purchase on deferred payments of real property where time has been made of the essence of such contracts. The decisions vary slightly in diction and phraseology, but for over 50 years they have maintained a constant trend in support of the vendor's paramount right of forfeiture of such contracts. The vendor may upon the noncompliance of the vendee rescind the contract and retake possession of the property. Miller v. Wadingham, 1891, 3 Cal.Unrep.Cas. 375, 25 P. 688, 11 L.R.A. 510. In the absence of a sufficient equitable showing by vendee to excuse his failure to comply with the terms of the contract, the vendor, while standing on his contract, is entitled to a decree forfeiting all of the rights of the purchaser thereunder in order to cut off the possibility of any further claim by the vendee which might embarrass or cloud the title. And they have the right in equity and in law to retain the moneys theretofore paid on the contract. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 11, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17. In a recent decision involving a contract for the purchase of real property in which time was of the essence, it is held that where all installment payments under the contract have become in default and notice has been given that unless the payments shall have been made within a reasonable period all of

the vendee's rights under the contract shall be forfeited, the vendor is entitled to judgment forfeiting the right of the vendee to the contract and to moneys paid thereunder. Sawyer v. Sterling Realty Co., 41 Cal.App.2d 715, 724, 107 P.2d 449. Where a vendee in possession has refused to complete his contract of purchase he may be considered to have abandoned the contract. He has by his wrongful act divested himself of the equitable estate which he had acquired under the writing and becomes a trespasser or tenant at will against whom his repudiated vendor may maintain ejectment. Whittier v. Stege, 61 Cal. 238; Fisher v. Chaffee, 49 Cal.App.2d 97, 100, 121 P.2d 51. These decisions leave no doubt as to the remedy of an aggrieved vendor for the forfeiture of all claims of the defaulting vendee under a contract for the sale of realty where time of payment is made of the essence. This doctrine, practice and procedure have been constantly approved. Bishop v. Barndt, 43 Cal.App. 149, 157, 184 P. 901; Oursler v. Thacher, 152 Cal. 739, 93 P. 1007; Andrews v. Karl, 42 Cal.App. 513, 183 P. 838. Under such a contract action to quiet title is the appropriate remedy. St. Clair v. Joos, 90 Cal. App. 311, 316, 265 P. 968; Mayer v. West, 96 Cal.App. 31, 273 P. 849.

[7] Appellant has cited decisions (Elliott v. Title Insurance & Trust Co., 64 Cal. App. 508, 222 P. 175; Robert Marsh & Co., Inc., v. Tremper, 210 Cal. 572, 292 P. 950; Ebbert v. Mercantile Trust Co., 213 Cal. 496, 2 P.2d 776; Ross v. McDougal, 31 Cal. App.2d 114, 122, 87 P.2d 709; Grimes v. Steele, 56 Cal.App.2d 786, 133 P.2d 874) for the purpose of establishing that the contract is void under Section 1670, Civil Code, and that its provision for forfeiture of the contract and of all moneys paid thereunder is not justified by section 1671.[1] None of the cited authorities arises out of a contract for the purchase and sale of real property with time of deferred payments of its essence. Those cases have to do with attempts to enforce the forfeitures which are condemned under the general equity rule which abhors a forfeiture. See Ballard v. MacCallum, 15 Cal.2d 439, 444, 101 P.2d 692, where the Chief Justice distinguishes the cited cases from those arising out of contracts such as that now before us.

[8] The contention that there was a waiver of the right to declare a forfeiture by entering into an escrow agreement is based upon some fancied situation not present in the case at bar. There was no escrow agreement as such, but after continued defaults had been made and repeated demands to cure them had been ignored the escrow was established for the purpose of enabling the defendants to comply with their contract with the assurance of receiving title upon the payment of the moneys due.

[9] The contention that forfeiture cannot be declared because appellant in his answer offered to pay all that was due is inane. The declaration in the answer that Mr. Ulrich "hereby offers to pay to plaintiffs the sums that he is now in arrears upon * * * upon the furnishing * * * of a good and sufficient deed to said property with a certificate of title," has no more virtue than his broken promises in the contract of purchase. The only valid offer to be made by a defaulting vendee is that accompanied by a tender of the moneys due. Were it otherwise, defaulting contractees might protract their nonmeritorious contentions indefinitely to the disadvantage of one who has been wronged by the wilful occupancy of his property by a defaulting vendee who has maliciously scorned his own solemn obligations.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.

[1] Civil Code, § 1670. "Contract fixing damages, void. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Civil Code, § 1671. "Exception. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

LAURENZI v. VRANIZAN et al.

S. F. 17010.

Supreme Court of California.

Jan. 30, 1945.

Rehearing Denied March 1, 1945.

1. Appeal and error ⇐989

On plaintiff's appeal from judgment granting defendants' motion for nonsuit, question for determination is whether trial court, considering alone evidence for plaintiff, properly concluded there was no evidence legally sufficient to support a verdict for plaintiff.

2. Landlord and tenant ⇐170(4)

In action for injuries sustained by pedestrian on sidewalk against owner, lessees and sublessees of abutting property based on allegation of combining to maintain nuisance, evidence that, insubleasing premises to produce company, owner and lesses permitted use of premises and sidewalk in front thereof for storage and sale of produce in violation of ordinance, presented jury issue as to whether nuisance existed.

3. Landlord and tenant ⇐170(1)

A landlord permitting lessee or sublessee to create and maintain a nuisance on sidewalk as result of ordinary use of premises by tenant or from purposes for which they were let is liable to person injured thereby.

4. Landlord and tenant ⇐170(4)
Municipal corporations ⇐821(6)

In action against city and owner, lessees, and sublessees of abutting property for injuries sustained when pedestrian fell on sidewalk allegedly due to dangerous construction thereof which existed with knowledge and consent of city, owner's uncontradicted testimony that he constructed sidewalk in compliance with city's specifications was insufficient to carry case to jury as to any of defendants.

5. Appeal and error ⇐1056(1)
Landlord and tenant ⇐170(4)

In action for injuries sustained by pedestrian on sidewalk against lessees and sublessees of abutting property based on allegation of combining to maintain nuisance, exclusion of evidence as to affirmative action or consent by lessees in creation or maintenance of alleged nuisance by permitting sublessee to carry on produce business on sidewalk was prejudicial error.

6. Municipal corporations ⇐788(1)

Plaintiff seeking to fix liability on municipality under statute for defect in sidewalk must establish notice, actual or constructive, to municipality of condition of sidewalk and also notice of dangerous character of such condition and failure to remedy it within reasonable time after notice. Gen.Laws 1937, Act 5619, § 2.

7. Municipal corporations ⇐791(1)

To charge city with constructive notice of defect in public sidewalk, some element of conspicuousness or notoriety so as to put city authorities upon inquiry as to defect and its dangerous character must be shown in order to establish city's liability for accident caused thereby. Gen. Laws 1937, Act 5619, § 2.

8. Municipal corporations ⇐791(1)

Where city is charged with constructive notice of defect in public sidewalk on basis of duty to inspect, it must appear that reasonable inspection would have disclosed defect. Gen.Laws 1937, Act 5619, § 2.

9. Municipal corporations ⇐791(1)

That inspector of city bureau of engineering, on his rounds, failed to see alleged sidewalk defect which caused injury to pedestrian, was not conclusive that city did not have notice of defect, as respects city's statutory liability. Gen.Laws 1937, Act 5619, § 2.

10. Municipal corporations ⇐791(1)

A city is presumed to have notice of existence of sidewalk defects which are conspicuous, as respects liability for injury to pedestrian resulting therefrom, but rule is otherwise if defects are minor. Gen. Laws 1937, Act 5619, § 2.

11. Municipal corporations ⇐821(11)

In action against city for injury to pedestrian who fell on sidewalk, testimony that there was hole in sidewalk 2 to 2½ inches deep and at least 3 inches wide and several inches long, that hole had existed for four or five years, and testimony of inspector of city bureau of engineering that he would consider such a hole hazardous and as requiring correction, made jury question whether defect was conspicuous and serious or minor. Gen.Laws 1937, Act 5619.

12. Municipal corporations ⇐818(9, 11)

Exclusion of evidence of previous accidents and subsequent repairs was not

error in action for injury to pedestrian resulting from alleged sidewalk defect, because evidence of such prior accident was not confined to accidents caused by particular hole causing pedestrian's injury, and evidence of subsequent repairs would tend only to prove knowledge as to the accident and not prior knowledge required by statute. Gen.Laws 1937, Act 5619.

13. Release ⇐37

The rule that a release of one of several joint tort-feasors releases all does not apply to a covenant not to sue, since such agreement does not have effect of a "release."

See Words and Phrases, Permanent Edition, for all other definitions of "Release".

14. Release ⇐37

Where pedestrian injured as result of alleged sidewalk defect sued owner, lessees and sublessees of abutting property, and city, for negligent construction, failure to repair, and maintenance of nuisance on sidewalk, evidence of payment received by pedestrian from sublessees in consideration for covenant not to sue was admissible to reduce pro tanto amount of damages recoverable from other defendants. Gen. Laws 1937, Act 5619.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action for personal injuries by Laurence Laurenzi against George Vranizan and others. From a judgment granting defendants' motion for a nonsuit, plaintiff appeals.

Affirmed in part and reversed in part.

Prior opinion, Cal.App., 144 P.2d 642.

Albert Picard and Francis McCarty, both of San Francisco, for appellant.

John J. O'Toole, City Atty., Henry Heidelberg, Deputy City Atty., Myrick & Deering and Scott, James Walter Scott, and A. B. Bianchi, all of San Francisco, for respondents.

SHENK, Justice.

Plaintiff has appealed from a judgment for the defendants in an action to recover damages for personal injuries sustained by plaintiff under the following circumstances:

On July 1, 1940, at about the hour of 4:25 a. m., plaintiff was walking in a northerly direction on the easterly sidewalk of Front Street, between Washington and Jackson Streets, in San Francisco, and more particularly in front of the premises known as 522 Front Street. The building abutting the sidewalk at this point was owned by the defendant George Vranizan. Vranizan leased the building to the defendants Charles, John G. and Joseph Vinci, partners doing business under the name of Oregon Restaurant. Approximately eight years prior to the date above mentioned, Vincis subleased a portion of the building to the defendants Louis Ferro and A. Vannucci, doing business as the L. Ferro Produce Co. On this early morning the sidewalk in front of the building was wet. There were crates of vegetables stacked from the curb line a distance of 3 or 4 feet towards the property line, and crates of peas and beans stacked from the property line toward the curb for about the same distance, leaving a space of 3 to 4 feet in the middle of the sidewalk between the crates of produce. There were carrot tops scattered on the sidewalk. It was dark but there was one light burning in front of the Ferro premises. As Laurenzi was going past those premises, he slipped, skidded a few inches on the sidewalk, and his heel wedged in a hole in the sidewalk as he reached for a crate near the curbline. The wedging of his heel caused him to pivot around, cracking the heel bone, and he fell with his foot under his body, facing the Ferro store, sustaining the injuries complained of. The hole in the sidewalk was described by the plaintiff as about 2 to 2½ inches deep, 3 or 4 to 5 or 6 inches wide at the north end, 2 inches wide at the south end, and about 12 inches long. Plaintiff's witness Louis Ferro described the hole in the sidewalk as being about ½ inch deep and 1 or 1½ inches wide; he did not state the length. He also stated that he did not remember whether the hole was present when he first rented the premises from the Vincis, but did remember that a hole had been there for a period of four or five years. Plaintiff admitted that he had passed the Ferro premises daily for two weeks prior to the accident, as often as four times a day, but that he had not previously noticed the hole in the sidewalk.

The complaint contained three counts. The first was a cause of action against

all of the defendants, including the defendant city and county of San Francisco under the Public Liability Act of 1923 (Stats.1923, p. 675; Deering's Gen.Laws, 1937, Act 5619), for negligent use and maintenance of the sidewalk in a state of disrepair. The second was a cause of action against all of the defendants except the city for conspiring to maintain and for maintaining a nuisance by virtue of the vegetable matter on the sidewalk in alleged violation of city ordinances. By the third count the plaintiff sought to hold all the defendants on account of the alleged dangerous and defective construction of the sidewalk. The defendants filed separate answers containing denials and the affirmative plea of contributory negligence. The plaintiff subsequently dismissed the action as against the defendant L. Ferro Produce Co., and the trial proceeded against the remaining defendants.

The case was tried before a jury. At the conclusion of the presentation of plaintiff's evidence each of the remaining defendants made a motion for nonsuit, and each motion was granted. This appeal is taken from the judgment entered in favor of those defendants.

[1] Under the familiar rule governing nonsuits, the question is whether the trial court, considering alone the evidence in plaintiff's favor, properly concluded that there was no evidence legally sufficient to support a verdict for him. This contention must be considered with respect to the remaining defendants: the owner of the property abutting the sidewalk, the sublessors, and the city and county of San Francisco.

The Defendant Vranizan, Owner.

[2, 3] The demurrer of this defendant, owner of the building, was sustained as to counts one and two, without leave to amend, and he filed his answer to count three of the complaint. The plaintiff contends the ruling on the demurrer as to counts one and two was erroneous. The plaintiff sought to introduce evidence that in leasing to L. Ferro Produce Co., the owner and the sublessors consented to and permitted the use of the premises and sidewalk in front of the store for the storage and sale of produce. He also sought to introduce evidence of ordinances prohibiting the use of the sidewalk for such purposes. The trial court excluded the offered evidence. Whether a nuisance was thereby created was a question for the jury under proper instructions. If the plaintiff could show that the owner acted affirmatively in the creation or maintenance of a nuisance, or authorized or permitted such a nuisance, or such a nuisance resulted from the ordinary use of the premises by the tenant, or from the purposes for which they were let, the owner would be liable. Rider v. Clark, 132 Cal. 382, 387, 64 P. 564; Meloy v. City of Santa Monica, 124 Cal.App. 622, 627, 12 P.2d 1072. The plaintiff was entitled to go to trial on the tendered issues and any defense thereto, and the trial court erroneously sustained the defendant Vranizan's demurrer to counts one and two charging negligent maintenance and nuisance.

[4] In the third cause of action it was charged that at the time of the accident the sidewalk was in a dangerous condition; that such dangerous condition was caused by dangerous construction of the sidewalk, and that it existed since its construction to and including the first day of July, 1940, with the knowledge and consent of the defendant city and county of San Francisco. Vranizan testified that he constructed the sidewalk in 1908 in compliance with the city's specifications. His was the only testimony in the record with reference to the construction of the sidewalk. The action of the trial court in granting the motions of all of the defendants for a nonsuit as to the third cause of action was therefore proper, there being no substantial evidence to sustain the allegations of that count.

The Defendants Vinci, Sublessors.

[5] The plaintiff sought to introduce the same evidence as to the defendants Vinci, tenants of Vranizan and the lessors under the sublease to L. Ferro Produce Co., under which he contended that the owner and the sublessors authorized and permitted the creation and maintenance of the alleged nuisance on the sidewalk, and which was ruled out by the trial court. The remarks and conclusions pertinent to the disposition of the rulings on the owner's demurrer to the first and second counts are applicable here. The trial court erred prejudicially in precluding the introduction of evidence as to affirmative action or consent on the part of the sublessors in the creation or maintenance of the alleged negligent condition or nuisance. The issues in this connection also were properly for the jury's determination. The court

therefore erroneously granted these defendants' motion for nonsuit as to those issues.

The Defendant City and County of San Francisco.

The remaining question is whether the plaintiff produced evidence sufficient to bring the city and county of San Francisco within the provisions of the Public Liability Act.

The plaintiff alleged the filing and rejection of a claim against the city, and notice to the city of the alleged dangerous or defective condition of the sidewalk. The granting of the city's motion for nonsuit was erroneous if there was evidence of a dangerous or defective condition, also of notice or knowledge on the part of the city that a dangerous or defective condition existed, that the city had reasonable time after such notice or knowledge within which to remedy the condition, and that injury to the plaintiff resulted by reason thereof. Stats.1923, p. 675, § 2.

It was in evidence that the hole in the sidewalk was 2 to 2½ inches deep, 3 or 4 to 5 or 6 inches wide at the north end, 2 inches wide at the south end, and about 12 inches long, and that it had existed for four or five years. The plaintiff passed over this particular sidewalk at least four times a day for approximately two weeks prior to the accident, but had not previously noticed the hole. The Inspector of the Bureau of Engineering of the city and county testified that it was his duty to inspect sidewalks, that his district included the sidewalk in question, that he inspected this sidewalk in December of 1939, six months prior to the plaintiff's injuries, that at that time he saw nothing in the condition of the sidewalk to cause him to send a notice to the owner to repair it, and that he perceived no condition which was a hazard to pedestrians. He also testified, however, that if he had seen a hole of the dimensions in evidence and as pictured in the photographs shown to him, he would have considered it hazardous and would have sent a notice to repair.

[6-8] It is established that in order to fix liability on a municipality under the statute it is necessary that the plaintiff establish not alone notice, actual or constructive, to the municipality of the condition of the sidewalk, but also notice of the dangerous character of such condition (Whiting v. City of National City, 9 Cal.2d 163, 69 P.2d 990), and the failure to remedy it within a reasonable time after such notice or knowledge. Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286. There was no evidence of actual notice to the city and county. In Nicholson v. City of Los Angeles, 5 Cal.2d 361, it was said at page 364, 54 P.2d 725 at page 726: "Constructive notice ordinarily involves, as an essential element, actual notice of facts or circumstances which are sufficient to put a prudent person on inquiry as to the existence of the fact with respect to which he is charged with constructive notice. It is so provided in our Code definition. Civ.Code, § 19. * * * Consequently there must be shown, in order to charge the city with constructive notice under these principles, some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character. It is equally clear, we think, that, where the city is charged with constructive notice on the basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition; that is, that, had there been no neglect of duty there would have been actual knowledge on the part of the city officers."

[9-11] Here the fact that the inspector on his rounds actually failed to see the condition is not conclusive. He also admitted that if he had seen a condition of the sidewalk such as that testified to and pictured in the photographs, he would have considered it hazardous and as requiring a correction of the defect or condition. In view of that evidence, it cannot be said as a matter of law that the defect was such a minor defect to be insufficient to impose liability upon the city for injuries resulting therefrom. See Nicholson v. City of Los Angeles, supra; Whiting v. City of National City, supra; Balmer v. City of Beverly Hills, 22 Cal. App.2d 529, 71 P.2d 854. As was said in City of San Diego v. Perry, 9 Cir., 124 F. 2d 629, at page 631, citing the cases of Nicholson v. City of Los Angeles, supra, and Whiting v. City of National City, supra, "It thus appears that under the California law the City is presumed to have notice of the existence of defects which are conspicuous, and that the rule is otherwise if the defects are minor."

The issue of the city's liability on the evidence introduced in this case was there-

fore properly for the jury and the court erred in granting the city's motion for a nonsuit.

The issues raised by the affirmative pleas of contributory negligence under the facts in evidence were also for the jury.

[12] Contentions as to other rulings excluding evidence do not require discussion except to note that the rulings excluding offered evidence of previous accidents and of subsequent repairs were proper for the reason that the evidence of prior accidents was not confined to accidents caused by this particular hole in the sidewalk; and the evidence of subsequent repairs would tend only to prove knowledge after the accident and not the prior knowledge which the Public Liability Act requires. Helling v. Schindler, 145 Cal. 303, 312, 78 P. 710; Meyer v. San Francisco, 9 Cal.App.2d 361, 364, 49 P.2d 893; Gorman v. County of Sacramento, 92 Cal.App. 656, 665, 268 P. 1083.

[13, 14] The contention is made that the court erred in admitting evidence over objection that the sum of $3,175 was paid to the plaintiff by L. Ferro Produce Co. prior to the latter's dismissal from the action. The dismissal was made without prejudice, and, so the plaintiff claims, the consideration stated was received in return for a covenant not to sue. The question is not an issue on this appeal, but the plaintiff asks that the rule be declared at this time for the guidance of the court on a retrial. In Kincheloe v. Retail Credit Co., Inc., 4 Cal.2d 21, 46 P.2d 971, and Ellis v. Jewett Rhodes Motor Co., 29 Cal. App.2d 395, 84 P.2d 791, it was pointed out that the rule that a release of one of several joint tort feasors operates as a release of all does not apply to a covenant not to sue inasmuch as such an agreement does not have the effect of a release. The distinction is recognized in Restatement of the Law of Torts, section 885, where it is stated that although a covenant not to sue does not discharge another who is liable for the same harm, payments by one tort feasor on account of a harm for which he and another are each liable, diminish the amount of the claim against the other whether or not it was so agreed at the time of payment and whether the payment was made before or after judgment. Since the plaintiff can have but one satisfaction, evidence of such payments is admissible for the purpose of reducing pro tanto the amount of the damages he may be entitled to recover. See Butler v. Ashworth, 110 Cal. 614, 43 P. 4, 386; Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1, 128 A.L.R. 682; Solomon v. Dabrowski, 295 Mass. 358, 3 N.E.2d 744, 106 A.L.R. 464; Brandstein v. Ironbound Transportation Co., 112 N.J.L. 585, 172 A. 580, 104 A.L.R. 926; Young v. Anderson, 33 Idaho 522, 196 P. 193, and cases cited at p. 194, 50 A.L.R. 1056.

The judgment entered on the order granting the motions for nonsuit as to count three is affirmed. The judgment entered on the order granting the motions for nonsuit as to counts one and two is reversed. The judgment entered on the order sustaining the demurrer of the defendant Vranizan is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

Rehearing denied; SPENCE, J., not participating.



67 Cal.App.2d 717

FRANKLIN v. FRANKLIN.

Civ. 14604.

District Court of Appeal, Second District, Division 3, California.

Jan. 29, 1945.

Hearing Denied March 29, 1945.

1. Divorce ⇐169

A divorce decree constitutes a contract between the parties, where defendant defaults by reason of limited demands for relief made by plaintiff, to the effect that the matters embraced in the complaint may be settled and determined in accordance with prayer of complaint.

2. Divorce ⇐322

Even though interlocutory divorce decree contained provision that it should be a full and complete settlement of all property rights of parties, record did not show an agreement under which parties settled any matters in addition to those that were in issue, as shown by the record, which did not include claim to community property that might be acquired in the future.

3. Divorce ⇐172

A marriage exists until terminated by final divorce decree and an interlocutory decree does not effect any change in ownership of property acquired thereafter, during existence of marriage, except as to matters which were in issue.

4. Husband and wife ⇐209(2)

Prior to statutory amendment, wife was proper party plaintiff with her husband in action for personal injuries to wife, but she could not sue alone unless she was living separate and apart from her husband by reason of his desertion of her or under agreement in writing. Code Civ.Proc. § 370.

5. Property ⇐5½

The right to sue for damages for injuries to the person is a chose in action and therefore "property." Civ.Code, § 953.

See Words and Phrases, Permanent Edition, for all other definitions of "Property".

6. Property ⇐1

The word "property" may be properly used to signify any valuable right of interest protected by law.

7. Property ⇐1

The meaning to be given the word "property" depends upon the sense in which it is used, as gathered from the context and the nature of those things which it was intended to refer to and include.

8. Husband and wife ⇐249

"Property" within community property law must have certain attributes, including those of being susceptible of ownership in common, of transfer and survival. Civ. Code, §§ 137, 146, 161a, 164; Probate Code, §§ 201, 225, 228, 601.

9. Abatement and revival ⇐54

A claim for damages for personal injuries belongs exclusively to the person injured, and it does not survive him.

10. Assignments ⇐24(2)

A claim for damages for personal injuries is not subject to transfer by agreement or by operation of law, even though it becomes assignable when reduced to judgment.

11. Assignments ⇐24(1)

Wrongs done to the person, like those to reputation or feelings of injured party, constitute an exception to general rule that choses in action are assignable.

12. Divorce ⇐321½

Husband's cause of action for personal injuries sustained in motor vehicle accident subsequent to entry of interlocutory divorce decree was not "property" within community property law, and court did not have power to award wife a half-interest in the cause of action. Civ.Code, § 164.

13. Appeal and error ⇐77(1)

Order granting motion of plaintiff-wife that she be awarded a half-interest in husband's cause of action for personal injuries sustained subsequent to entry of interlocutory divorce decree, having been made before final decree, was not appealable.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action for separate maintenance and division of community property by Mary Franklin against Laurence J. Franklin wherein the defendant filed a cross-complaint for divorce and the plaintiff amended her complaint to pray for a divorce. From the divorce decree, defendant appeals.

Decree modified and as modified affirmed.

Donald Kolts and Oral R. Finch, both of Los Angeles, for appellant.

Krag & Sweet and Denair A. Butler, all of Alhambra, for respondent.

SHINN, Justice.

This is an appeal by defendant from a final decree which awarded plaintiff a divorce, and purported to award her a half interest in defendant's cause of action for personal injuries sustained subsequent to the entry of an interlocutory decree. The attempted division of the cause of action may not be sustained unless the cause of action itself was "property" acquired by the husband after marriage, within the meaning of section 164 of the Civil Code, and therefore community property.

Plaintiff, who had been married to defendant for fourteen months, sued for separate maintenance and a division of community property, alleged to consist of household furniture of the value of $100 and a Ford truck of the value of $350. Defendant answered and filed a cross-complaint for divorce upon the ground of cruelty. Upon the trial, plaintiff's complaint was amended to pray for a divorce, defendant offered no evidence, and a judgment was awarded plaintiff which set apart to her the

household furniture, ordered defendant to pay her $60, and awarded defendant the truck. The complaint charged cruelty willful neglect, and desertion. Findings were waived and the decree did not specify upon what ground or grounds the divorce was granted. Within a year after the interlocutory decree was entered defendant sustained personal injuries in a collision between an interurban car and a truck and brought suit against the railway and the trucking companies for damages. When a final decree became due, plaintiff, on notice, moved for a decree of divorce and that there be awarded to her, as her separate property, a half interest in defendant's cause of action for damages. Plaintiff's motion was granted and a decree was entered in accordance therewith.

The interlocutory decree ended with the following provision: "This judgment shall be a full and complete settlement of all of the property rights of the parties herein." It is insisted by defendant that the judgment constitutes a contract between the parties and that the quoted provision must be construed as a relinquishment by each of the parties of any and all further claims upon the other to an interest in community property then existing or which might be acquired thereafter. The argument finds some support in the circumstances surrounding the trial. Defendant was present with his attorney, he was suing for divorce upon a cross-complaint charging plaintiff with cruelty; with permission of court plaintiff amended her complaint from one for separate maintenance to one for divorce and proved her case. The decree recites that the action was tried as a default, no evidence having been offered by defendant under his answer or cross-complaint. The order for judgment shown by the clerk's minutes of December 17, 1942, stated that plaintiff was awarded an interlocutory decree which gave her the household furniture and the sum of $60 and defendant the truck. The record shows that on the same day a copy of the judgment was served upon defendant's attorney, although it was not signed until December 28, 1942.

[1, 2] The circumstances above related carry a suggestion that the parties arrived at some agreement with reference to plaintiff's demands, pursuant to which defendant abandoned his defense and cross-complaint and permitted the trial of the action as a default. The provision that the judgment constitutes a complete and final settlement of all of the property rights of the parties is not a usual one unless the court has given approval to a property settlement agreement of the parties which waives all possible future claims. There is ample support for the proposition that a decree of divorce constitutes a contract between the parties where the defendant defaults by reason of the limited demands for relief made by the plaintiff. Brown v. Brown, 1915, 170 Cal. 1, 147 P. 1168; London Guarantee & Accident Co. v. Industrial Acc. Comm., 1919, 181 Cal. 460, 184 P. 864, and cases therein cited. But the rule goes no further than to regard the judgment as an agreement between the parties to the effect that the matters embraced in the complaint may be settled and determined in accordance with the prayer of the complaint. It was held in Brown v. Brown, supra, that a default judgment of divorce, even when considered as a contract, will not prevent a plaintiff from claiming an interest in community property acquired after the beginning of the action and before final judgment, if there was no issue tendered in that action concerning such property. See also Hiltbrand v. Hiltbrand, 1936, 13 Cal.App.2d 330, 56 P.2d 1292. If plaintiff herein is concluded by the judgment from claiming an interest in after acquired community property, it could only be for the reason that the parties had reached such an agreement and intended and understood that it should be and was expressed in the recital that the judgment constituted a complete and final settlement of their property rights. Although the circumstances would indicate that some agreement had been made which led to the phraseology of the decree, it does not appear that defendant made an issue of it when the final decree was applied for, or tendered any evidence which would have justified the court in holding that the language in question amounted to a mutual waiver of claims to after acquired property. It is clear that this court cannot say that the record shows an agreement under which the parties settled any matters in addition to those that were in issue, as shown by the record. These did not include any claims to community property that might be acquired in the future.

Defendant's second point is that compensation received by a husband for personal injuries sustained between the entry of the interlocutory and the final decrees in favor of the wife does not constitute community property. No authority is to be found which supports this position.

[3] Plaintiff's contention that the *recovery of damages* for personal injuries to husband or wife, sustained during the existence of the marriage, is community property finds support in many of the cases. The marriage exists until terminated by a final decree, and an interlocutory decree does not effect any change in the ownership of property acquired thereafter, during the existence of the marriage, except as to matters which were in issue.

The arguments fail to distinguish between the mere cause of action, as a property right, and a judgment for money or the money itself when recovered on the claim. We are of the opinion that the husband's cause of action for damages for his personal injuries is not community property, even though the money, if recovered during the existence of the marriage, will be property of the community. The statement has been made in several cases that a cause of action for personal injury to either spouse arising during the existence of the marriage is community property, but it was in no instance necessary to a decision of the case. In no case which we have found has the court been called upon to determine the nature of the right to sue for damages for personal injuries as a property right, as distinguished from the proceeds of the recovery, nor, so far as we have been able to discover, has the question been decided, as between husband and wife, whether the *cause of action* of either constitutes community property.

[4] In McFadden v. Santa Ana, etc. Ry. Co., 1891, 87 Cal. 464, 25 P. 681, 682, 11 L.R.A. 252, it was held for the first time that in this state a recovery by way of damages for personal injuries to a wife is community property. In holding that it was error to instruct that the contributory negligence of the husband, which was relied upon as a defense to the joint action of the husband and wife, could not be imputed to the wife, the court there said: "The right to recover damages for a personal injury, as well as the money recovered as damages, is property, and may be regarded as a chose in action * * *; and, if this right to damages is acquired by the wife during marriage, it, like the damages when recovered in money, is, in this state, community property of the husband and wife (Civil Code, §§ 162–164, 169), of which the husband has the management, control, and absolute power of disposition other than testamentary." The true basis for the holding in that case and in later cases which have applied the same doctrine of imputed negligence was not that the cause of action itself is community property but that damages may not be recovered for the benefit of the community where the injuries were sustained as a result of the contributory negligence of the husband or wife. It is the ownership of the recovery, and not the mere right to sue, that is controlling. The above quoted statements were repeated, in substance, in Justis v. Atchison, etc., Ry. Co., 1910, 12 Cal.App. 639, 642, 108 P. 328, in holding that a married woman could not alone execute a valid release and satisfaction of a claim arising out of her personal injuries. There was no question in the case as to the right of the community to the proceeds of a settlement or recovery of damages. The husband, having the right of management and control of community property, necessarily had complete control of the claim and of any action brought for its recovery. Prior to the amendment of section 370 of the Code of Civil Procedure (Stats.1913, p. 217), the wife was a proper party plaintiff with her husband in a suit for her own personal injuries but could not sue alone unless she was living separate and apart from her husband by reason of his desertion of her or under agreement in writing. Joinder of husband and wife as plaintiffs was the practice at common law and it was followed in this state (Moody v. Southern Pacific Co., 1914, 167 Cal. 786, 141 P. 388; McKune v. Santa Clara V. M. & L. Co., 1895, 110 Cal. 480, 42 P. 980), although it was not a statutory requirement, and the fact that the wife was joined did not affect the husband's control of the action or the proceeds thereof. It is clear that the question whether the cause of action, itself, is community property was not involved in the Justis case.

The McFadden case was cited in Neale v. Depot Railway Co., 1892, 94 Cal. 425, 29 P. 954, in holding that a joint judgment for plaintiffs, husband and wife, was proper; in Lamb v. Harbaugh, 1895, 105 Cal. 680, 691, 39 P. 56, in holding that the wife could not sue alone; in Moody v. Southern Pacific Co., supra, 167 Cal. 786, 141 P. 388, where it was held that the husband was a necessary party plaintiff, and in Giorgetti v. Wollaston, 1927, 83 Cal.App. 358, 257 P. 109, and Solko v. Jones, 1931, 117 Cal.App. 372, 3 P.2d 1028, where it was held that the contributory negligence of the husband was available as a defense in an action for injury to the wife. In Re Strand, 1932,

123 Cal.App. 170, 11 P.2d 89, it was said that the right of action to recover for personal injuries sustained by either husband or wife is community property, prefacing a holding that the filing of a joint action by husband and wife to recover for injuries to the wife amounted to a waiver of the privilege of subdivision 1, section 1881 of the Code of Civil Procedure, under which a wife cannot be examined as a witness for or against her husband without his consent.

In all these cases the court was speaking of causes of action for the wife's injuries, whether the husband and wife were joined as plaintiffs, as was necessary before 1913, or the wife was suing alone, as she has had the right to do since that time. The determinative fact was that the suit was for the benefit of the community, for the reason that the money recovered would belong to the community and not to the wife separately. So far as third parties were concerned, it was immaterial whether the right to sue, as well as any amount that might be recovered, belonged to the community. If the decision in each case had been placed upon the sole ground that money recovered for the wife's injuries would belong to the community, the rulings would necessarily have been exactly the same. The references to the right to sue, as distinguished from the recovery, were unnecessary. We are not presuming to criticize anything that the courts have said upon the point, for it is clear that they have had in mind only that the actions were for the recovery of money for the benefit of the community and were under the husband's control. We are only emphasizing the importance of distinguishing between the breadth of the language used and the breadth of the point decided. As we have said, the question whether, as between husband and wife, a cause of action for personal injury is community property was not in issue in any of the mentioned cases and nothing that has been heretofore said as to the ownership of the cause of action was addressed to that question. In considering whether we should be influenced in deciding the question now before us by the statements above quoted and the later references to them, we are of the opinion that they mean no more than the precise statement of the court in Johnson v. Hendrick, 1919, 45 Cal.App. 317, at page 321, 187 P. 782, 785, where, in holding a joint judgment to be proper in a suit by husband and wife for the wife's injuries, it was said: "Prior to the amendment of section 370 of the Code of Civil Procedure in 1913 (St.1913, p. 217), in an action for injuries to the wife the husband was a necessary party. In such an action, since the amendment, the wife may sue alone, but she is not required to sue in that manner. All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as parties, except when otherwise expressly provided. Code Civ.Proc., § 378. *Money recovered for damages to the wife* in this state has always been held to be community property, because it was not owned by the wife before marriage, nor acquired afterwards by gift, devise, bequest, or descent. Civ.Code, § 162; Moody v. Southern Pac. Co., 167 Cal. 786, 141 P. 388. The husband therefore had an interest in the subject of the action and was a proper party plaintiff. The form of the verdict is correct." (Emphasis ours.)

[5-8] It may not be doubted that the right to sue for damages for injury to the person is a chose in action and therefore property (Civil Code, sec. 953; Haro v. Southern Pacific R. R. Co., 1936, 17 Cal. App.2d 594, 597, 62 P.2d 441), nor that the word "property" may be properly used to signify any valuable right or interest protected by law, as it has sometimes been defined. But the meaning to be given to the word depends upon the sense in which it is used, as gathered from the context and the nature of the things which it was intended to refer to and include. Ponsonby v. Suburban Fruit Lands Co., 1930, 210 Cal. 229, 291 P. 167. The word "property," as used in the code sections relating to community property, does not encompass every property right acquired by either husband or wife during marriage, other than by gift, bequest, devise or descent. The right to practice medicine and similar professions, for instance, is a property right but it is not one which could be classed as community property. And while money recovered for personal injuries to either husband or wife would be community property, we cannot see how the mere right to sue could belong to the community. It is implicit in the entire scheme of the community property laws that the property have certain attributes, namely, those of being susceptible of ownership in common, of transfer and survival. This is made clear by an examination of a few of the code sections. The respective interests of the husband and wife in community property are present, existing and equal in-

terests (Civil Code, sec. 161a). One-half of the community property is subject to the testamentary disposition of the husband or wife and in the absence thereof goes to the survivor (Prob.Code, sec. 201). Property which has been acquired as community property is subject to a different rule of succession from that relating to separate property in the event of the death of the owner, leaving no surviving spouse or issue (Prob.Code, secs. 201, 225, 228). It is to be separately inventoried and appraised in probate proceedings (Prob.Code, sec. 601), and is to be apportioned between the husband and wife in the event of a decree of separate maintenance or divorce (Civil Code, secs. 137, 146).

[9-11] A claim for damages for personal injuries belongs exclusively to the person injured and it does not survive him (De La Torre v. Johnson, 1927, 200 Cal. 754, 254 P. 1105); it is not subject to transfer by agreement (Morris v. Standard Oil Co., 1926, 200 Cal. 210, 252 P. 605; Cassetta v. Del Frate, 1931, 116 Cal.App. 255, 2 P.2d 533; 6 C.J.S., Assignments, § 33, p. 1081; 4 Am.Jur. 252, sec. 30) or by operation of law, even though it becomes assignable when reduced to judgment (Adams v. White Bus Line, 1921, 184 Cal. 710, 195 P. 389). Wrongs done to the person, like those to the reputation or feelings of the injured party, constitute the exception to the general rule that choses in action are assignable. Webb v. Pillsbury, 1943, 23 Cal.2d 324, 144 P.2d 1, 150 A.L.R. 504. These limitations are recognized in all jurisdictions where they have not been removed by statute. They cannot be ignored without disregarding sound precedent and attempting judicial legislation.

The decree purports to award plaintiff a half of the cause of action as her separate property. That is all she asked for. If she had been able to show that the decree was granted upon the ground of extreme cruelty she no doubt would have asked for three-fourths or more of the cause of action. Nave v. Nave, 1917, 35 Cal.App. 27, 169 P. 253. She could not sell or transfer such an interest nor compromise it nor enforce it by suit. She is a stranger to the pending action and must remain so. In the event of the death of defendant before judgment, the action would abate. Plaintiff could not be given some nebulous and artificial status which would enable her to exercise joint control over the claim or interfere with defendant's control. Defendant could not represent her or act for her with respect to her separate property. To say that the effect of the decree is to make defendant a trustee for plaintiff to the extent of half of the money to be recovered would be to admit that she has, and could have, no legal ownership of an interest in the cause of action. While defendant could have bound himself to pay, as a simple debt to his wife, a sum equal to a stated share of the amount to be recovered, he could not have constituted himself a trustee of an interest in the cause of action for the benefit of his wife and thus accomplish indirectly what he could not do directly, nor could the court do this for him. The limitations upon the right to transfer such a cause of action, or an interest in it, are well illustrated by the rule, which is supported by the great weight of authority, that it is not capable of transfer for the benefit of creditors. 4 Am.Jur. p. 350, sec. 25.

[12] The powers of the court were limited to making a division of the community property, and the cause of action was something that could not be partitioned, directly or indirectly, before it had been reduced to judgment. Only then or in the event of a settlement could it be said that defendant had acquired "property" which was subject to the community property laws.

[13] Defendant has appealed from the decree in its entirety and has attempted to appeal from the order granting plaintiff's motion. The order, having been made before judgment, is not appealable. There is no reason why the decree should be reversed except as to the attempted award of property.

The attempted appeal from the order is dismissed; the decree is modified by striking therefrom the provision awarding plaintiff a half interest in the cause of action described therein, and as modified is affirmed, without costs.

DESMOND, P. J., and PARKER WOOD, J., concur.

67 Cal.App.2d 763

ARQUES v. NATIONAL SUPERIOR CO. et al.

Civ. 12740.

District Court of Appeal, First District, Division 1, California.

Feb. 1, 1945.

1. Statutes ⇐231

The provisions of the codes must, as far as may reasonably be possible, be construed as though parts of the same statute, except in instances of conflict between titles or chapters. Pol.Code, §§ 4480–4482.

2. Trover and conversion ⇐17, 42

If property is wrongfully taken from one having a valuable interest therein arising from services rendered, and such party has a statutory right of possession in nature of a lien, he may maintain an action in trover against legal owner for damages sustained through conversion and demand reasonable compensation for labor or materials furnished. Civ.Code, § 3051.

3. Maritime liens ⇐25

The value of or agreed price for work or materials, if contracted for benefit of a vessel, constitutes a lien upon the vessel with priority in order enumerated in Harbors and Navigation Code. St.1937, p. 805, §§ 490, 491.

4. Maritime liens ⇐19, 60
Trover and conversion ⇐5

Where a towboat was changed into a purse seiner which, as changed, had never been navigated or been engaged in commerce, shipwright making repairs for purpose of making the change held a possessory lien upon the vessel and, when without warrant of law vessel was taken from his possession without his consent, a cause of action for conversion in the state court arose against those who were responsible for removal of the vessel. Civ.Code, § 3051; St.1937, pp. 805, 806, §§ 490–493; Act June 23, 1910, 46 U.S.C.A. § 971 note; 28 U.S.C.A. § 371.

5. Appeal and error ⇐996

On appeal, findings will not be disturbed if they are supported by evidence from which inferences reasonably upholding them may be deductible, and in such cases conclusion of trial court is as binding as where a conflict arises from direct evidence.

6. Trover and conversion ⇐40(4)

In action for conversion of a vessel against which plaintiff had a possessory lien, evidence supported findings that corporate defendants and their representative in superintending installation of engine in vessel were responsible for removal of the vessel from plaintiff's shipyard. St.1937, p. 805, §§ 490, 491; Civ.Code, § 3051.

7. Trover and conversion ⇐42

In action for conversion of vessel against which plaintiff has a possessory lien, damages are limited to amount secured by lien plus compensation for loss of time and expenses incurred.

8. Evidence ⇐351

The purpose of Uniform Business Records as Evidence Act is to enlarge operation of business records exception to the hearsay rule. St.1941, p. 1788.

9. Evidence ⇐351

The common-law business records exception to hearsay rule is based on assumption that records kept in general course of business usually are accurate, and may be used, in case of necessity, as evidence of matter recorded.

10. Evidence ⇐351

The Uniform Business Records as Evidence Act was properly applied to case decided after effective date of the act, notwithstanding complaint was filed prior to such date, since procedural legislation is not subject to general rule that statutes should not be retroactive. St.1941, p. 1788.

11. Constitutional law ⇐106, 169

The Legislature may change procedure or remedies and make changes applicable to pending actions, unless vested rights are destroyed or obligations of contracts impaired.

12. Statutes ⇐267(1)

Where law affects only remedy or procedure, all rights of action will be enforceable under new procedure without regard to whether they accrued before or after such change in the law and without regard to whether suit had been instituted or not, unless there is a saving clause as to existing litigations.

13. Evidence ⇐354(2)

In shipwright's action for conversion of vessel against which shipwright had possessory lien, a "composition book" containing entries made by shipwright or un-

der his direction was properly admitted under Uniform Business Records as Evidence Act, where shipwright testified to aggregate amount due and referred to the "composition book," and hours worked, materials used, and cost thereof were written in each day or the following day. St.1941, p. 1788; Code Civ.Proc. § 1953f.

14. Damages ⇐6

In action for breach of contract, that amount of damage may not be susceptible of exact proof does not bar recovery, and same rule applies in action for conversion, so that failure to ascertain damages accurately does not relieve a party at fault if amount fixed is less than what the evidence shows.

15. Trover and conversion ⇐62

In action for conversion of vessel against which plaintiff had a possessory lien, where there was proof to sustain a judgment for $4,403.79, but no proof to warrant a judgment for $4,500, $4,500 judgment would be reduced to $4,403.79. Civ.Code, § 3338.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by D. J. Arques against the National Superior Company and others for the conversion of a vessel. From a judgment for plaintiff, defendants appeal.

Modified and as modified affirmed.

William B. Acton, of San Francisco, for appellants.

Erwin C. Easton and George Olshausen, both of San Francisco, for respondent.

WARD, Justice.

This appeal is from a judgment for plaintiff in an action for the conversion of the vessel "St. Mary." The historical background is set forth in Balestrieri v. Arques, 49 Cal.App.2d 664, 665, 666, 667, 122 P.2d 277, 278, an action for declaratory relief, in which Balestrieri was named as plaintiff and respondent, and Arques as defendant and appellant. We quote the facts from the opinion in that case:

"The vessel in question was originally a towboat which belonged to one Coughlin and was named the 'Oregon.' In 1933, she ran upon a submerged pile in the Oakland Estuary and stove a hole in her bottom. She was patched and towed to the mud flats in Richardson Bay where she lay for some time. In 1934 she was taken to the shipyard of defendant in Sausalito and was repaired. The repairs were completed and a bill was presented but Coughlin was unable to make payment. Some time passed and in the spring of 1935, Coughlin and defendant agreed that the vessel should be sold. Plaintiff learned that the vessel was for sale and he inspected it with the thought that it might be converted into a purse seiner. Discussions took place between plaintiff, defendant, Coughlin and others at defendant's shipyard. Defendant represented that the vessel could be made into a purse seiner and Coughlin told plaintiff that if plaintiff could finance the necessary work he would transfer to plaintiff a half interest in the vessel. Plaintiff brought a representative of a marine engine company to the shipyard. Further discussions were had and said representative recommended that an engine costing about $18,000 should be installed. During said discussions, neither defendant nor Coughlin made any mention of the repairs which had been made by defendant for Coughlin in 1934 below the water line of said vessel. At one point in the discussions plaintiff asked Coughlin and defendant if Coughlin owed any money on the boat and Coughlin answered 'that he didn't owe a dime on the boat—there was no lien.' Defendant made no reply. Thereafter plaintiff entered into an agreement with Coughlin and the latter transferred to plaintiff a half interest in the boat with the knowledge of defendant.

"In June, 1935, plaintiff, defendant and Coughlin met at the shipyard and a written agreement was entered into by the three men by which defendant agreed to do certain work on the hull of the boat for $4,300, of which $1,000 was to be paid on the execution of the agreement, $1,000 on July 1, and the balance was to be paid by notes over a period of time. The work was to be completed within thirty days after delivery of the engine. The engine was delivered on August 16. The two $1,000 payments were made as agreed. While the work was progressing plaintiff and Coughlin incorporated the Sardine Fishing Company and transferred the vessel to said corporation.

"On September 20, 1935, and after the time agreed upon for the completion of the work had expired, a dispute arose when

defendant made a claim for certain alleged 'extras.' The agreed work had not then been fully completed. Plaintiff was advised that the vessel could not leave the shipyard and that defendant would not complete the agreed work until the bill for extras had been approved. Plaintiff had arranged for other work to be done on the boat in San Francisco and was anxious to get all work completed as the fishing season had begun on August 15. Plaintiff offered to arbitrate the matter and to put up a bond to protect defendant against any valid claim but plaintiff refused to approve the bill for the alleged extras.

"On September 23, 1935, plaintiff advised defendant that he was coming over to take the vessel to San Francisco on the afternoon high tide. A heated discussion followed plaintiff's arrival at the shipyard, but plaintiff finally took the boat during defendant's temporary absence. Thereupon defendant's counsel filed a libel in admiralty covering all claims for the 1935 repairs. Plaintiff filed a bond for the release of the vessel and at the time of the approval thereof, mention was first made to plaintiff of an alleged claim for 1934 repairs.

"Defendant then caused the arrest of plaintiff on a charge of grand theft upon the theory that plaintiff had wrongfully taken the vessel from the possession of defendant in violation of defendant's alleged possessory lien. People v. Cain, 7 Cal.App. 163, 93 P. 1037. Plaintiff was held to answer and was subsequently tried by a jury in the Superior Court of Marin County. The jury found him guilty but recommended leniency. The trial court granted probation upon condition that plaintiff give a bond securing defendant 'against any detriment or loss for or on account of any valid claim of possessory lien which Donlon J. Arques may have had for money due him on the day the "St. Mary" was taken from his possession, for work done or materials furnished said vessel.'"

In the above case the court said that it was "unnecessary to discuss plaintiff's contention that no possessory lien could have resulted from the making of repairs to the vessel under the circumstances"; that it appeared that Arques was by his conduct estopped to assert a lien based upon repairs made and materials furnished in 1934; that there was a failure to assert such claim of possessory lien. Other facts than those set forth above will be given as the points in the present appeal require.

[1] Relative to the first claim for repairs the trial court herein, as in the previous case, held that Arques was "estopped to assert or claim such prior lien (if any)." The purpose of the present action is not to enforce a possessory lien but to recover damages for its breach. The present case involves the balance due on the 1935 contract and for extras. This issue requires a determination of the major question: Did plaintiff have the right to hold the property until reasonable charges for alteration and repair had been paid? Harbors and Navigation Code, sec. 490, St. 1937, p. 805, based upon former Civil Code, section 3060, provides that: "Debts amounting to at least fifty dollars, contracted for the benefit of vessels, are liens in the cases provided in section 491." Section 491, similar to section 813, Code of Civil Procedure, with the exception of a few words which do not affect the applicability of the section to this case, provides: "All vessels are liable for: (a) Services rendered on board at the request of, or under contract with, their respective owners, masters, agents, or consignees. (b) Supplies furnished in this State for their use, at the request of their respective owners, masters, agents, or consignees. (c) Work done or materials furnished in this State for their construction, repair, or equipment. * * * Demands for these several causes constitute liens upon all vessels, have priority in the order enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued." Civil Code, section 3051, provides in part: "Every person who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the protection, improvement, safekeeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service." Except in instances of conflict between titles (Political Code, sec. 4481) or chapters (Political Code, sec. 4482), the provisions of the codes must, as far as may reasonably be possible, be construed as though parts of the same statute (Political Code, sec. 4480). Weber v. McCleverty, 149 Cal. 316, 86 P. 706. "There is a well-recognized

rule of statutory construction that the Codes blend into each other, and are to be regarded as constituting but a single statute." Proctor v. Justice's Court, 209 Cal. 39, 43, 285 P. 312, 313.

[2, 3] If property is wrongfully taken from one having a valuable interest therein arising from services rendered (Civil Code, sec. 3051), and such party has a statutory right of possession in the nature of a lien, he may maintain an action in trover against the legal owner for damages sustained by reason of the conversion and demand reasonable compensation for labor or materials furnished. 16 Cal.Jur., p. 361, sec. 59. The value of or agreed price for the work or materials, if contracted for the benefit of a vessel (Harbors and Navigation Code, sec. 490), constitutes a lien upon the vessel, with priority in the order enumerated in Harbors and Navigation Code, sec. 491.

[4] Appellants contend that respondent did not have a possessory lien but only the usual maritime lien, enforceable in admiralty. It may be admitted that Civil Code section 3051 does not specifically refer to floating vessels. Former Civil Code sections 3055, 3056 and 3060 have been superseded by Harbors and Navigation Code sections 492, 493 and 490 respectively, St. 1937, pp. 805, 806. It is also contended that the Act of Congress of June 23, 1910, 46 U.S.C.A. § 971, note, completely established the federal maritime lien, making it independent of possession. The Ship Lien Act referred to contains a provision that a maritime lien for furnishing repairs, supplies or other necessities to any vessel upon the order of an owner or his representative may be enforced by a suit in rem. 46 U.S.C.A. § 971 note.

The Judicature Act of 1789, 28 U.S.C.A. § 371, 1 Stat. at L. 76, Ch. 20, giving the United States courts jurisdiction in admiralty liens, may be said to work hand in hand with state courts if jurisdiction may be obtained in the latter courts. The original act provides in section 9 "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

"* * * every structure adapted to be navigated from place to place for the transportation of merchandise or persons" is a vessel. Harbors and Navigation Code, sec. 21, St.1937, p. 793; Political Code, sec. 17.

In Olsen v. Birch & Co., 133 Cal. 479, 65 P. 1032, 85 Am.St.Rep. 215, a case involving a vessel which had never been in commission or in active use in navigation, it was indicated that a vessel temporarily laid up for repairs is still considered engaged in commerce. In the present case the vessel had not been temporarily laid up but had been taken out of service as a towboat and towed to mud flats. She was subsequently taken to plaintiff's shipyard and converted into a purse seiner. In that capacity she had never been in commission; had never been ready for safe navigation; had not had her trial trip, and consequently was not used at the time of seizure by Balestrieri in the trade and commerce of sardine fishing in the customary way by operating nets. In the Olsen action, brought to foreclose liens upon a vessel constructed in San Francisco, the following points were raised, at page 481 of 133 Cal., at page 1032 of 65 P., 85 Am.St.Rep. 215: "[1.] That the law is invalid, as in conflict with section 2, art. 3 of the constitution of the United States, which declares that the jurisdiction of the federal courts shall extend to all cases of admiralty and maritime jurisdiction; and, [2.] That jurisdiction of the state courts is forbidden by section 711, Rev.St.U.S. [28 U.S.C.A. § 371]. This statute declares that 'the jurisdiction of the federal courts of cases of admiralty and maritime jurisdiction is exclusive, saving to suitors in all cases the rights of a common-law remedy where the common law is competent to give it.'" The opinion, written with facility of expression by Mr. Justice Temple, evidences such knowledge of the problem involved and the history of legislation thereon that we feel justified in quoting from it at length at pages 481, 482, 483, 484 of 133 Cal. at page 1032 of 65 P.:

"The statutes here called in question are certain sections of the Code of Civil Procedure. (Secs. 813 et seq.) The matter is the more interesting because (as is well known to the writer of this opinion) these sections were carefully revised by the late Stephan J. Field after and in view of the decisions in The Moses Taylor, 4 Wall. 431, 18 L.Ed. 397, and The Hine v. Trevor, 4 Wall. 555, 18 L.Ed. 451; and in the report of the so-called 'Code Revisers,' which was written by Judge Field, the claim was made that for the first time these sections had been made valid. But I think we need not enter very fully into this discussion. The

code provisions are certainly not invalid, although a suit might be brought under them of which the courts of the state would have no jurisdiction. If the claim sued upon was one arising from a maritime contract, and the owners were unknown, or if the owner could not be found, and the summons was only served upon the master, mate, or other person in charge of the vessel, a serious question would be presented. But here the owner has appeared and answered, and the action is against him by name, and the claim asserted did not arise upon a maritime contract; and it may be added the suit is not a proceeding in rem. And, of course, the statute giving the right to a lien would be perfectly valid, although no action could be brought under it in the state courts.

"* * * Maritime contracts have reference to navigation upon the sea, and in some way to vessels actually being used in commerce, or at least in navigation. * * *

"Evidently there is here a misapprehension as to the basis of admiralty jurisdiction. It does not extend to ships merely because they are ships, but to commerce and navigation, and to ships only because they are, and while they are, used in commerce and navigation. A ship while building, is not an instrument of commerce, nor is she while out of commission, and being cared for to preserve her for possible future use. * * *

"But this suit is not a proceeding in rem. Had the contract been maritime, a proceeding in rem could have been had in the district court. Nevertheless, if a common-law remedy could have been made available, such remedy could have been afforded by the state court. Here the action is against the owner, and such owner has appeared and answered. The vessel was not seized, and there was actual service of summons. The main difference between an action in rem and an action in personam is indicated by the two phrases. One is against the thing as the defendant, and the judgment is that the thing is indebted. And, furthermore, the res is taken possession of and held by the court, and its jurisdiction depends upon such possession and holding. Here, the judgment is against the owner, and the sale of the property, if one is had, will be like an ordinary sale under execution.

"Such proceedings are said to be quasi in rem, which phrase has become quite common since Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. It is there said that such proceedings are not strictly in rem, because they are not against the thing as debtor. The subject is discussed by Map. Proc. Rem, c. 56. And the right to maintain such suits in the state courts has been upheld by the supreme court of the United States. Leon v. Galceran, 11 Wall. 185, 20 L.Ed. 74; Johnson v. [Chicago & P.] Elevator Co., 119 U.S. 388, 7 S.Ct. 254, 30 L. Ed. 447; The Glide, 167 U.S. 606, 17 S.Ct. 930, 42 L.Ed. 296."

The conclusions in the Olsen case are to some extent based upon William v. The Sirius, D.C., 65 F. 226. The Sirius, a British vessel, had been engaged in commerce but was sold in San Francisco. It was not enrolled as an American vessel, however, and was not in commission. The court held that the employing of a watchman did not constitute a maritime contract.

In Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 20 S.Ct. 824, 44 L.Ed. 921, it was held that a bill in equity to foreclose a common law lien upon a raft for towage services is not an invasion of admiralty jurisdiction, but is a proceeding to enforce a common law remedy and within the saving clause of The Judicature Act. It was also held that the action was in personam and not in rem.

Whether a contract for work on a vessel is a contract for construction, reconstruction or merely repair is a question dependent upon a number of factors. In the present case the work on part of the vessel—the installation of an engine—had proceeded to the extent that the vessel was nearly ready for a series of tests. As we will subsequently see, California has held that a shipwright has the legal right of retaining possession of a vessel for "repair" work. United States of Mexico v. Rask, 118 Cal. App. 21, 4 P.2d 981.

The towboat herein, the "Oregon," had ceased to be navigable as a commissioned ship. The necessary operation to change it into a purse seiner required more than slight repair. The change was not only in identity of name but of kind of vessel. The claim did not arise from a maritime contract. The purse seiner St. Mary had never been in commission; it had never been navigated or been engaged in commerce in its intended sphere of activity. The vessel was not seized. The alleged owner has appeared and answered and the judgment is against him and others. It is true that in some cases in which appeared

one or two of the basic facts present in this case, it was held that, under certain circumstances, the jurisdiction in lien questions rests with the federal courts. In re Burton S. S. Co., 3 F.2d 1015; The Portland, 9 Cir., 273 F. 401; New Bedford Dry Dock Co. v. Purdy, Claimant of the Steamer "Jack-O-Lantern", 258 U.S. 96, 42 S. Ct. 243, 66 L.Ed. 482; The George W. Elder, D.C., 196 F. 137; Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97. The main contention on this phase of the appeal is that the right to enforce any maritime lien under state law was superseded by the provisions of The Ship Lien Act of 1910, 46 U.S.C.A. § 971, note. Prior to 1910 some confusion existed in matters affecting maritime liens dealt with under that act. It has been held that it superseded state statutes making a difference between home and foreign ports (In re Burton S. S. Co., supra) and eliminated an artificial distinction between repairs and supplies. Dampskibaselskabet Dannebrog v. Signal Oil & Gas Co., 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 1197. Its purpose was not to destroy the common law lien but rather clarification by simplifying and unifying maritime liens. It did not repeal The Judicature Act of 1789 directly or impliedly in so far as it relates to the common law remedy of a possessory lien. No authority has been called to our attention holding that the common law remedy is not available in the state courts.

That Civil Code section 3051 is applicable to ships was definitely decided in this state over twenty years subsequent to the passage of the 1910 act. Concurrent remedies do not necessarily conflict but a recovery under one is generally a bar to resort to the other. Since the maritime lien was dismissed, we are not confronted in this case with a concurrent remedy.

In the United States of Mexico v. Rask, supra, an independent nation was the owner of a patrol boat, the "Tecate," which was operated for the protection and enforcement of customs and revenue laws. The Tecate was delivered by a duly authorized agent to respondent Rask to be overhauled and repaired. After the work had been completed, a controversy relative to a balance due for labor and materials furnished by Rask resulted in a claim and delivery action by the United States of Mexico. The sheriff of San Diego County, upon the giving of a bond, turned the boat over to the agents of Mexico. The major question in that case was whether the California court had any jurisdiction over liens of the nature there involved. After holding that the foreign government had waived its sovereign immunity and, upon the issues presented by its pleadings, impliedly consented to the jurisdiction of the state court, the Rask case decided that the judicial power of the federal government extended to all kinds of cases of maritime and admiralty jurisdiction "to the exclusion of state courts in actions strictly in rem" 118 Cal.App. at page 41, 4 P.2d at page 990, but the rule does not cover jurisdiction of state courts not strictly in rem "involving liens upon vessels where such lien existed under the common law," 118 Cal.App. at page 41, 4 P.2d at page 990, which lien was dependent upon possession. 118 Cal.App. at page 42, 4 P.2d at page 990. The Rask case after a discussion of The Judicature Act of 1789 and a review of numerous citations determined, at page 47 of 118 Cal.App., at page 992 of 4 P.2d, that "It therefore conclusively appears that a common-law lien existed in favor of a shipwright who furnished labor and materials used in the repair of a vessel, which lien was dependent upon his possession of the ship. By section 3051 of the Civil Code this common-law lien has been written into the statute law of California. It therefore follows that the courts of California have jurisdiction in this case" and that, at page 49 of 118 Cal.App., at page 993 of 4 P.2d,

"As a lien at common law existed in favor of a shipwright furnishing materials and labor used in the repair of a vessel dependent upon its possession, the state courts have jurisdiction in this case.

"The common-law lien being written into the statute law of California, respondent had a right to retain the possession of the patrol boat until it was released by payment or by judicial process and the giving of a bond as provided by law.

"The provisions of section 813 et seq. of the Code of Civil Procedure do not provide an exclusive remedy which respondent must follow in this case."

The Rask case held that the Knapp case was still the law to be followed. Appellants urge that a different conclusion would have been reached had the Knapp case been decided after the passage of the 1910 act. It is also contended that in the Rask case the court held that no maritime lien was involved therein, and that what was

there said with reference to section 3051 was dicta. A careful reading of the case indicates that nothing said therein upon the subject here involved was irrelevant to the questions presented. On the contrary, those questions required a decision on whether a common law lien existed in favor of the shipwright. The case holds that, where the law of the state confers such lien, a shipwright has a common law lien, dependent upon possession. It is then held that ships may be personal property. Civil Code, sec. 3051; 23 Cal.Jur. 360, sec. 9. This holding is not subject to the criticism that it is obiter dictum. The quotations herein from the case sufficiently answer appellants' charge in that respect. Further, even if the quoted portions of the Rask case could be properly characterized as dicta, we are convinced that they embody correct principles of law.

If appellant be correct—that a different conclusion would have been reached in the Knapp case had it been decided after the 1910 act—then it would have been necessary in the Rask case to hold that the 1910 act impliedly repealed the 1789 act relative to the common law remedy of a possessory lien. The latter case was decided some twenty years or more after the passage of the 1910 act, and was based in part upon federal decisions, including The City of Miami, D.C., 265 F. 427, in which case the court said, at page 428 of 265 F.: "I do not think that the Act of June 23, 1910, c. 373, § 5 (36 Stat. 604; U.S.Comp.St. § 7787 [46 U.S.C.A. § 975 note]), which repeals only such state statutes as 'purport to create rights of action to be enforced by proceedings in rem against vessels,' affects the Massachusetts statute. The latter confers a possessory lien, something essentially different." In Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 123, 124, 44 S.Ct. 274, 277, 68 L.Ed. 582, the court said: "By reason of the saving clause, state courts have jurisdiction in personam, concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties. Judiciary Act of Sept. 24, 1789, c. 20, § 9, 1 Stat. 73, 77; Judicial Code, § 24, par. 3 [28 U.S.C.A. § 41(3)]; Leon v. Galceran, 11 Wall. 185, 20 L.Ed. 74; Schoonmaker v. Gilmore, 102 U.S. 118, 26 L.Ed. 95; Chappell v. Bradshaw, 128 U.S. 132, 9 S.Ct. 40, 32 L.Ed. 369; De Lovio v. Boit, Fed.Cas. No. 3,776, 2 Gall. 398, 475. The 'right of a common law remedy,' so saved to suiters, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 644, et seq., 20 S.Ct. 824, 44 L.Ed. 921; Rounds v. Cloverport Foundry & Machine Co., 237 U.S. 303, 35 S.Ct. 596, 59 L.Ed. 966. A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction. The Hine v. Trevor, 4 Wall. 555, 18 L.Ed. 451; The Glide, 167 U.S. 606, 17 S.Ct. 930, 42 L.Ed. 296. But otherwise the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit."

Respondent herein held a possessory lien upon the vessel and when, without warrant of law, the vessel was taken from his possession without his consent, a cause of action for conversion arose against those who were responsible for the removal of the vessel. This conclusion suggests for consideration the next subject, namely, is the evidence sufficient to support the findings against defendants Meyer, The National Superior Company and The National Supply Company?

It is admitted that Meyer, as the representative of the corporate defendants in superintending the installation of the engine, informed Balestrieri that certain asbestos work should be performed in San Francisco. The purpose in taking the boat from Arques' place to San Francisco was to perform that work, which could have been performed at the Arques' yard. Meyer informed the Chief of Police that he had no right to interfere with Balestrieri; that he was exceeding his authority. Arques instructed Meyer "to leave the boat there." Arques testified: "And I told him that I was the operator of the yard, I had nothing to do with that job, but as the owner of the shipyard that the California lien had to prevail and without the lien we were sunk —any shipyard is sunk if we didn't have it. He said he didn't care anything about the California lien; I remember that very well; that the California lien meant noth-

ing at all. I said, 'It means everything to me.' * * * Q. Did Meyer go back to the boat? A. He went back to the boat as soon as Mr. Balestrieri threw off the stern line. You see there was a strong flood tide running at the time that boat was taken. * * * Mr. Meyer had the control—the engine control—and took the wheel. * * * Q. State whether or not you saw Mr. Meyer when he went up to the bridge. A. He went up immediately." There is evidence from which an inference may be drawn that Meyer was in charge of the vessel during its trip to San Francisco.

It is suggested by appellants that there is no evidence to substantiate the finding that they converted the vessel "to their own use." They took the vessel for no other persons' use except their own. The installation of asbestos was for their benefit.

It is also claimed that there is no evidence to support the finding of violence. To the question: "Now there was no act of violence committed by Mr. Meyer that afternoon, was there?" Arques testified: "I consider it violence when he says he is going to take a thing forcibly just the same as if he is going to take my purse. I call that violence. The fact he intends to take it out of my place is violence, and it leads to violence and it can't be anything else but tragedy, and that is avoided just by a hairline. The minute that boat is moved, that is violence. When they threatened, that is violence, just the same as if they carried it out, according to my way of thinking. * * * if a man says he is going to take something that belongs to you, that is violence, because it can't lead to anything else but violence."

[5, 6] There is evidence to show concerted action between Balestrieri and Meyer in obtaining the vessel against the will and consent of Arques, and of cooperation in sailing it away from the place so Arques could not claim physical possession. Whether this court would have made findings including Meyer as a party to the conversion is not the question to determine. On appeal, findings will not be disturbed if they are supported by evidence from which inferences reasonably upholding them may be deducible. In such instances the conclusion of the trial court is as binding as where a conflict arises from direct evidence. "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45." Mah See v. North American Accident Ins. Co., 190 Cal. 421, 426, 213 P. 42, 44, 26 A. L.R. 123. See, also, Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992; Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886; Matsuda v. Luond, 52 Cal.App.2d 453, 126 P.2d 359.

[7] The complaint alleges damages in the sum of $25,000. In an action for conversion, damages are limited to the amount secured by the lien plus compensation for loss of time and expenses incurred. The lien, eliminating the original Coughlin contract (Balestrieri v. Arques,) supra, secured two separate amounts—that due under the contract and the bill for extras.

The contract balance was $2300. A small amount had been paid thereon and applied to interest. The aggregate amount due for extras was $3,503.79, making a total of approximately $5,803.79. The work was completed under the direction of another shipwright at a cost to defendants of approximately $1400. Judgment was entered in the sum of $4500.

[8, 9] Appellants first contend that there is no legal evidence or proof of the sum of $4500 awarded Arques by the trial court in that there is no proper foundation laid for admitting in evidence a book referred to as a composition; that it is not a book of original entries and that the accounts appearing in the book were not made contemporaneously with each trans-

action. Supporting these contentions there are some decisions rendered prior to the adoption of the Uniform Business Records as Evidence Act (Stats. 1941, Ch. 482, p. 1788). Arques, who participated in the work as superintendent or mechanic, was familiar with wage hire and prices of materials. He testified to the aggregate amount due and referred to the "composition book" containing entries made by him or under his direction. Hours worked, materials used and the cost thereof were written "day by day, or if I skipped a day, I wrote it the next day." This is not the best method of bookkeeping but no item has been called to our attention that suggests a definite inaccuracy. Code of Civil Procedure, section 1953f, provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." As was said in Loper v. Morrison, 23 Cal.2d 600, 608, 145 P.2d 1, 5: "The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. The common law exception is based on the assumption that records kept in the general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded"; and in People v. Caldwell, 55 Cal.App.2d 238, 254, 130 P.2d 495, 503: "In the case of the conduct of the business and affairs of an establishment, it is presumed that the regular course of business of such establishment is followed (Code Civ.Proc., § 1963, subd. 20), and that the books and records of an establishment truly reflect the facts set forth in such books. Code Civ.Proc., § 1953f." See, also, People v. Jones, 61 Cal. App.2d 608, 143 P.2d 726; Doyle v. Chief Oil Co., 64 Cal.App.2d 284, 148 P.2d 915.

[10-13] The findings and conclusions of law in this case are dated November 30, 1943, and the judgment December 3rd of the same year, although the complaint was filed prior to the adoption of the Uniform Business Records as Evidence Act. The application of the act to the facts herein is constitutionally appropriate. Legislation designed solely as procedural is not subject to the general rule that statutes should not be retroactive. "The retrospective application of a statute may be unconstitutional if it is ex post facto, that is, applying to criminal matters; or if it deprives a person of a vested right; or if it impairs the obligation of a contract. But a statute which merely effects a change in civil procedure may have a valid retrospective application." Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 122, 47 P.2d 716, 717. "It is a well-settled rule of law that the Legislature may change rules of procedure, or remedies, and that such changes may be made applicable to pending actions, provided, of course, that under the guise of a mere change of procedure or substitution of remedies vested rights are not destroyed or the obligation of contracts impaired (Buck v. Canty, 162 Cal. 226, 121 P. 924; Aikins v. Kingsbury, 170 Cal. 674, 151 P. 145; Bassford v. Earl, 172 Cal. 653, 158 P. 124), and so long as a reasonably efficient remedy remains ([Kerckhoff-Cuzner] Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648; Lantz v. Fishburn, 17 Cal. App. 583, 120 P. 1068). As said by Judge Cooley in his work on Constitutional Limitations, 'The bringing of suit vests in a party no right to a particular decision.' Cooley's Const. Lim. (8th Ed.) p. 789. When a law only affects the remedy or procedure, 'all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law and without regard to whether the suit had been instituted or not, unless there is a saving clause as to existing litigation.' People ex rel. Foote v. Clark, 283 Ill. 221, 119 N.E. 329." City of Los Angeles v. Oliver, 102 Cal.App. 299, 315, 316, 283 P. 298, 305; see, also, San Bernardino County v. Industrial Accident Comm., 217 Cal. 618, 20 P.2d 673.

Up to this point the subject of damages has been considered solely from the standpoint of the admissibility of the evidence. Appellants also contend that from this evidence "there is no legal evidence or proof of $4,500 or any other sum." As noted heretofore, there is proof legally sufficient to sustain a judgment for $4,403.79, but respondent has failed to call our attention to items warranting a judgment for $4,500.

[14] In an action for a breach of contract, the fact that the amount of damage may not be susceptible of exact proof does not bar recovery. Long Beach Drug Co. v.

United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386. The same rule applies in an action to establish a trust and for damages for breach of a contract of joint adventure. Elsbach v. Mulligan, 58 Cal.App. 2d 354, 136 P.2d 651. Likewise this rule applies in an action for conversion, so that the failure to ascertain damages accurately does not relieve a party at fault if the amount fixed is less than what the evidence shows. Under such circumstances the judgment may be permitted to stand. Paine v. Bank of Ceres, 59 Cal.App.2d 242, 138 P.2d 396.

[15] In the present case, however, it is not future damages or even approximate damages that are to be ascertained, but a definite sum limited to the amount secured by the lien, plus compensation for loss of time and expenses incurred in pursuit of the property. Civil Code, sec. 3338. The judgment should be reduced to the sum of $4,403.79. The trial court is directed to change the findings and conclusions of law to conform to the lesser amount. As so modified, the judgment is affirmed, each side to pay its respective costs on appeal.

PETERS, P. J., and KNIGHT, J., concur.



67 Cal.App.2d 752

COLLIER v. LANDRAM et al. (two cases).
Civ. 7082, 7083.

District Court of Appeal, Third District, California.

Jan. 31, 1945.

1. Executors and administrators ⇐451(4)

In sisters' actions against estate to recover reasonable value of services rendered to decedent, findings that decedent did not agree to pay for such services were construed to mean that there was neither an actual nor an implied promise by decedent to pay for such services.

2. Executors and administrators ⇐451(4)

Findings that decedent did not agree to pay for services rendered by her sisters were not in conflict with further findings as to reasonable value of sisters' services since under former findings value of work performed was immaterial.

3. Executors and administrators ⇐221(2)

Services rendered a decedent during her lifetime by her sisters for whom decedent provided a home were presumed to have been performed gratuitously, without expectation of financial reward.

4. Work and labor ⇐4(2)

Where one, who is not related to another by close ties of blood, performs services which are accepted by other, who receives benefit of work, there is an implied promise to pay reasonable value of such services.

5. Work and labor ⇐28(1)

One who asserts existence of either an express or an implied promise to pay for services performed has burden to prove that agreement by a preponderance of evidence.

6. Appeal and error ⇐1033(8)

Where, under findings which were fully supported by the evidence, claimants were not entitled to recover against their sister's estate for services rendered sister before her death claimants could not complain of inadequacy of judgments in their favor.

7. Executors and administrators ⇐205(2)

Awards of $400 and $200 respectively to decedent's two sisters for their services to decedent during her lifetime, during which period decedent furnished sisters with a home, were not so grossly inadequate as to constitute an abuse of discretion on part of trial judge.

8. Judgment ⇐343
New trial ⇐75(1)

A new trial may be granted or a judgment may be set aside on the ground of inadequacy of the compensation awarded.

9. Work and labor ⇐29(1)

A trial judge possesses sound discretion in fixing reasonable value of services performed under an implied agreement to pay, even in absence of expert testimony as to value, based upon all circumstances surrounding transaction, including nature and duration of services performed.

10. Appeal and error ⇐1004(3)

Ordinarily judgment of court which is based upon conflicting evidence fixing

reasonable value of services performed will not be disturbed on appeal on ground that it is either excessive or inadequate, except for a clear abuse of discretion.

11. Limitation of actions ⇐46(5)

Statute of limitations does not commence to run against the claim for reasonable value of continuous services performed until death of promisor, when promisor requested that such services be rendered as long as she lived. Code Civ. Proc. §§ 337, 339.

12. Limitation of actions ⇐50(2)

Where compensation for services rendered a decedent during decedent's lifetime was payable monthly and decedent had not requested that services be rendered as long as decedent lived, limitation period commenced to run at end of each month. Code Civ.Proc. §§ 337, 339.

13. Appeal and error ⇐878(6)

Where administrator did not appeal from judgment against estate, District Court of Appeal could not question amounts awarded to plaintiffs, even though, under the findings, trial court was not justified in making any award.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Separate actions by Sara B. Collier and Lillian Collier against Hugh K. Landram as special administrator with general powers of the estate of Mary Collier, deceased, and estate of Mary Collier, deceased, to recover the reasonable value of services performed by plaintiffs which actions were consolidated for trial. From alleged inadequate judgments for plaintiffs, plaintiffs appeal.

Affirmed.

Gilbert Moody, of Turlock, for appellants.

Preston, Braucht & George, of Merced, for respondents.

THOMPSON, Justice.

Two suits for the reasonable value of services performed by sisters of Mary Collier, deceased, were consolidated for the purpose of trial. In spite of the fact that the court found the deceased did not agree to pay either of the plaintiffs "the reasonable or any other value for such services," judgments were rendered in their favor. Sara B. Collier was awarded the sum of $400 and costs, and Lillian Collier was given the sum of $200 and costs. From those judgments the plaintiffs perfected appeals. The administrator of the estate has not appealed.

The appellants contend that the findings are not supported by the evidence, and that the amounts of the judgments are inadequate.

Mary Collier and the appellants were elderly unmarried sisters. They had two other living sisters and a brother. The deceased owned an 82 acre ranch in Merced County, upon which there was a dwelling house where she resided. She also owned 160 acres of farming land located about one mile from her home, and another 53 acre grazing ranch in the same vicinity, together with some money and other personal property. The ranches were leased for farming purposes. The appellants were several years younger than their sister Mary. Each of these sisters inherited from the estates of their parents property of equal value. Sara and Lillian had evidently consumed their resources. There is substantial evidence they were without established homes or property. Lillian had been a teacher, but was out of employment. Each appellant secured a pension under the Old Age Security Act. St.1929, p. 914. In April, 1933, Sara sustained a broken limb and was taken to the County Hospital. She was subsequently removed to the home of her sister Mary where she resided for nine years until Mary's death. In December, 1935, Lillian went to Mary's home for the Christmas holiday, where she remained for six years until Mary's death. Lillian's health was then not good. Both of the claimants were furnished a home and maintenance at the expense of Mary until her death. During the time they resided at Mary's home, each appellant assisted in the housekeeping and in duties incidental to the home premises. During that period of time, Mary employed a housekeeper who assisted in the household work and care of Mary. No person, other than the three sisters and the hired housekeeper, lived in that home.

Mary Collier died at the age of 86 years on March 8, 1942, possessed of an estate of the approximate value of $29,000. Upon proceedings duly had in Merced County, the defendant, Hugh K. Landram, was appointed and qualified as special administrator. Sara B. Collier and Lillian Collier

each filed a claim against the estate for her personal services, which was rejected. These suits were then commenced for the reasonable value of services alleged to have been performed "at the request of Mary Collier". The answers denied that said services were performed at the request of the deceased; that the deceased agreed to pay any sum whatever for said services, and denied that the services were of any value beyond the sums which were paid by the deceased for the maintenance and support of the plaintiffs. The answers also alleged that the actions were barred by the provisions of Sections 337 and 339 of the Code of Civil Procedure. The court adopted findings to the effect that Sara B. Collier performed services of the value of $400 and not more, and that Lillian Collier performed services of the value of $200 and not more, but that Mary Collier did not agree to pay the reasonable or any other value for said services. The court also found that the actions were not barred by the statute of limitations. Judgments were, however, rendered in favor of each plaintiff in the respective sums previously mentioned. From those judgments appeals were perfected. The administrator failed to appeal.

[1, 2] The findings that the deceased, Mary Collier, did not agree to pay for said services are adequately supported by the evidence. Those specific findings must be construed to mean that there was neither an actual nor an implied promise on the part of Mary Collier to pay her sisters for their services. Those findings are not in conflict with the further findings that their services were reasonably worth the specified sums for which judgments were rendered. The value of the work performed is immaterial if there was no implied agreement to pay for such services. In announcing his decision the judge said in that regard: "The court could well give them nothing. I think that Mary never agreed to pay anything, and perhaps Sara and Lillian never expected to get anything."

[3] The only statement of the deceased regarding payment for services of either plaintiff was testified to by Lillian with respect to her sister Sara's services. It does not amount to a promise to pay for that service. Lillian said, in response to a question as to a conversation she had with Mary Collier in 1934, that "she [the deceased] expressed herself as being very grateful for what Sara had done for her and she said as soon as she got financially fixed she intended to pay Sara well for what she had done for her." The evidence as a whole, read in the light of all the circumstances of the case, may be reasonably construed to support the findings of the court that no agreement, expressed or implied, was made to pay for the services, and, on the contrary, that the services of the plaintiffs were gratuitously performed without the expectation of financial reward. Both appellants were elderly ladies. They were ill when they went to live with their sister Mary. They were without established homes or resources. They asked their sister Mary for no financial compensation, and they received none during the several years they resided with her. The court found that no agreement to pay for their services was made. They were close blood relatives of the deceased. The presumption, under such circumstances, is that the services were performed gratuitously through kindness, courtesy, consideration and affection for their sister, without expectation of financial reward. Newbert v. McCarthy, 190 Cal. 723, 214 P. 442; 27 Cal.Jur. 205, sec. 11.

It is not claimed Lillian was promised by her sister Mary to be paid for her services. She first went to Mary's home in December, 1935, to spend the holiday season. Sara testified that she agreed to pay Lillian $15 which she afterward reduced to $12 per month, if Lillian would remain. Sara did not consult with her sister Mary about that payment of compensation. She did say that she talked with their brother, who approved that arrangement. Sara said, "I had to be very careful in handling it wisely and that is all I felt I could pay her out of the bank account."

[4, 5] It is true that when one who is not related to another person by close ties of blood performs services which are accepted by another who receives the benefit of the work, there may be an implied promise to pay the reasonable value of such services. Newbert v. McCarthy, supra; 27 Cal.Jur. 200, secs. 5 and 6. But between parties who are closely related by blood, such as sisters, the preceding presumption may not be indulged, as we have previously said. In the absence of evidence to the contrary, such services are presumed to have been rendered gratuitously without expectation of financial remuneration. The burden is on one who asserts the existence

of either an expressed or an implied promise to pay for services performed, under such circumstances, to prove that agreement by a preponderance of the evidence. There is ample evidence in this case to support the foregoing presumption and findings of the court that there was no agreement, expressed or implied, to pay for the services performed by the appellants.

Under circumstances quite similar to those of the present case, a judgment in the Newbert case, supra, in favor of the estate of a deceased sister was affirmed on appeal. Quoting with approval from Murdock v. Murdock, 7 Cal. 511, the court said [190 Cal. 723, 214 P. 443]: "'All the circumstances of the case must be considered, to ascertain what were the expectations of both parties existing while the relation continued.' It is 'incumbent upon the plaintiff "to show that at the time, it was expected by both parties that he should receive such compensation, or that the circumstances under which the services were performed, were such that such expectation was reasonable and natural."' To authorize compensation, therefore, for services rendered by one relative to another, it is necessary that the circumstances be such as to reasonably warrant the inference that it was the expectation of both of the parties that compensation should be made by the recipient of the services."

In 27 California Jurisprudence 205, section 11, it is said, regarding the presumption of an intention to pay for services performed by one sister for another, in the absence of an agreement to do so: "Where there is a blood relationship between the parties, it may well be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services. Where, for example, the parties are sisters, the natural inference is that the services are spontaneous acts of courtesy and kindness prompted by the affection of one for the other and not by the expectation of remuneration."

[6, 7] It is true that the awards of $400 to Sara and $200 to Lillian, which were rendered, are inconsistent with the findings that no agreement to compensate the services was made. If there was no implied agreement to pay for the services, regardless of the reasonable value of such services, the plaintiffs were not entitled to recover judgments for any amounts whatever. But we are not concerned with the validity of the judgments in that regard, because they are not challenged on that account. The administrator has not appealed. The appellants may not complain of the inadequacy of the judgments since they are not supported by the findings and would be invalid because we must assume there was no agreement to pay for the services regardless of their value. Under such circumstances, the appellants are not aggrieved by the inadequacy, if any such deficiency exists, of the amounts awarded. Moreover, we are unable to say, from all the circumstances of the cases, that the amounts awarded to plaintiffs are so grossly inadequate as to constitute an abuse of discretion on the part of the trial judge.

[8-10] A new trial may be granted or a judgment may be set aside on the ground of inadequacy of the compensation awarded. Reilley v. McIntire, 29 Cal.App.2d 559, 562, 85 P.2d 169; 20 Cal.Jur. 104, sec. 67. But a jury or trial judge possesses a sound discretion in fixing the reasonable value of services performed under an implied agreement to pay for the same, even in the absence of expert testimony of the value (Nylund v. Madsen, 94 Cal.App. 441, 271 P. 374), based upon all of the facts and circumstances surrounding the transaction, including the nature and duration of the services performed. 71 C.J. 162, § 135. Ordinarily the verdict of a jury or the judgment of a court which is based upon conflicting evidence fixing the reasonable value of services performed will not be disturbed on appeal on the ground that it is either excessive or inadequate, except for a clear abuse of discretion. Estate of Isenberg, 63 Cal.App.2d 214, 146 P.2d 424; Estate of Neff, 56 Cal.App.2d 728, 133 P.2d 413; 4 C.J. 874, § 2850.

[11, 12] It has been held that the statute of limitations does not commence to run against a claim for the reasonable value of continuous services performed until the death of the promissor, when "the decedent requested the plaintiff to care for him, assist him in his business and act as companion and nurse to him as long as he lived." Reeves v. Vallow, 16 Cal.2d 95, 104 P.2d 1017, 1018. In the present case it is not contended such request was made to perform services until "the death" of Mary Collier. The only evidence of the duration of services to be performed related only to the work of Lillian. Sara testified that she employed her sister Lil-

lian for the agreed compensation of $12 per month, which would indicate that her compensation was due and payable, if at all, at the end of each month, and not at the time of the death of her sister Mary. Under such circumstances, we assume the statute would commence to run at the end of each month. But in view of our conclusion that no expressed or implied agreement to pay for services performed was made by Mary Collier, as the trial court determined, it is immaterial whether the statute of limitations barred the claims in whole or in part, or not at all.

[13] Since the administrator has not appealed we may not question the amounts of compensation awarded to plaintiffs even though we assume that under the findings the court was not justified in making any award whatever.

The judgments are affirmed.

ADAMS, P. J., and PEEK, J., concur.



GATTI et al. v. HIGHLAND PARK BUILDERS, Inc.*

Civ. 7086.

District Court of Appeal, Third District, California.

Jan. 31, 1945.

Hearing Granted March 29, 1945.

1. Contracts ⇐107

Where statute primarily designed for protection of the public prescribes a penalty for violation thereof, such penalty is the equivalent of an express prohibition that a contract made contrary to the statute is void and no action may be brought to enforce it.

2. Contracts ⇐107

The rule, that contracts made contrary to statute designed for protection of public and prescribing penalty for violation thereof are void, is subject to the qualification that the interests of the public generally must require such legislative interference and the legislation must be reasonably necessary for the accomplishment of the legislative purpose.

3. Constitutional law ⇐68(1)

Where the police power is invoked to regulate a lawful business, it is a judicial question whether such regulation is a valid exercise of that power.

4. Constitutional law ⇐81

The police power of the state is an indispensable prerogative of sovereignty and is not lightly to be limited.

5. Constitutional law ⇐81

The exercise of the state's police power and its application must be determined by consideration of the question of whether an invocation of that power when applied to the existing conditions of a particular case is reasonably necessary to promote the public health, safety, morals or public welfare.

6. Constitutional law ⇐47

Neither the declaration in the statute as to its purposes nor the sincerity of purpose of the Legislature determines whether the means provided in the statute are reasonably designed to accomplish those purposes, since that question is a proper inquiry for the courts.

7. Constitutional law ⇐70(1)

Where the question as to the reasonableness of the statute is debatable, the determination by the Legislature is conclusive.

8. Constitutional law ⇐45

The power of the court in determining whether statute constitutes reasonable exercise of police power should be exercised with caution and then only when it clearly appears that the statute attacked as invalid is entirely beyond the limits which bound the police power.

9. Constitutional law ⇐48

The burden of showing the unreasonableness of a statute is cast upon the party attacking its validity.

10. Licenses ⇐7(1)

Statute requiring that individuals holding contractors' licenses obtain an additional license to act in the capacity of partnership or joint venture is not unreasonable and invalid as applied to a partnership composed of two individuals each of whom had individual licenses and who were members of another partnership which had a license. St.1939, p. 384, §§ 7025, 7028–7030.

* Subsequent opinion 166 P.2d 265.

11. Licenses ⇐39

A partnership which did not have a contractor's license for the partnership entity could not maintain action to recover on a contract made by the partnership notwithstanding that the two individuals composing the partnership each had individual licenses and were members of another partnership which had a license. St.1939, p. 384, §§ 7025, 7028–7030.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Albert Gatti and Charles D. Moore against Highland Park Builders, Inc., for labor furnished, wherein defendant filed counterclaim for breach of contract. From a judgment for plaintiffs, defendant appeals.

Reversed.

Smallpage & Macomber, of Stockton, for appellant.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for respondents.

PEEK, Justice.

This is an appeal by the defendant corporation from a judgment of the trial court in favor of plaintiffs.

Plaintiffs, as individuals, by their amended complaint, alleged that within two years last past defendant became indebted to them for labor furnished to defendant at its special instance and request upon a written contract and oral modifications thereof; that no part of the sum alleged to have been owing had been paid, and that at all times mentioned in said complaint plaintiffs and each of them were licensed building contractors within the meaning of Chapter 9, Articles 1 to 6, inclusive, of the Business and Professions Code.

Defendant's amended answer admitted a written agreement with plaintiff Gatti but denied that the contract was modified or changed between plaintiffs and defendant, or that any agreement, oral or written, was ever made with the plaintiff Moore; that the contractual relationship between Gatti and Moore was unknown to defendant except as disclosed by documents filed in the action and the testimony of Gatti previously received in evidence, and that upon the date of the filing of plaintiffs' complaint all monies owing under said contract with Gatti had been paid. By way of an offset it was alleged that plaintiffs were obligated to pay defendant the damage caused by plaintiffs' alleged breach of the contract and failure to complete the work. A separate counterclaim was set forth wherein it was charged that plaintiffs breached their contract by abandoning the construction work, thereby damaging the defendant in the amount therein specified. As a separate defense defendant alleged upon information and belief that from and after June 1, 1943, a partnership existed between the plaintiffs but that at no time did such partnership have issued to it a contractor's license by this state.

Upon conclusion of the hearing the trial court found in favor of plaintiffs and entered judgment accordingly. Defendant's appeal is now before us upon a settled statement. Such statement as regards the oral proceedings discloses the following facts relative to the sole question presented to this court: Prior to March 15, 1942, both Gatti and Moore had issued to them individual licenses as contractors under the provisions of the Business and Professions Code; that on March 15, 1943, Gatti and defendant executed a written contract whereby Gatti agreed to perform certain carpenter work for defendant; that at this time Moore was foreman for Gatti; that on June 1, 1943, plaintiffs discussed conducting the construction work herein involved on a partnership or joint venture basis and agreed with the consent of defendant that thereafter the work would be so conducted; that all of the work performed by plaintiffs prior to June 1, 1943 has been fully paid; that on August 23, 1943, a builder's and contractor's license was issued in the names of Albert Gatti, Chas. D. Moore and Delbert Moore; that Delbert Moore is not a party to this action and has no interest in the proceeds of the venture herein involved; that no license was ever issued in the names of Albert Gatti and Chas. D. Moore, either as a partnership or as joint venturers under the provisions of the Business and Professions Code, Chapter 9, Articles 1 to 6, inclusive, and that the work in question was performed by plaintiffs at defendant's special instance and request under a written contract and oral modifications thereof.

The Business and Professions Code sections pertinent to a determination of this appeal provide that no person (as the word is used in Section 7025, St.1939, p. 384, which includes individual or other business

organization) acting in the capacity of a contractor may maintain any action for the collection of compensation for such work without alleging and proving he was a duly licensed contractor at all times during the performance of the contract. Section 7028 provides that it shall be unlawful for any person to engage in such business without a license while section 7030 states that any one acting without a license or conspiring with any person to violate any provision of the act is guilty of a misdemeanor. It is then provided in section 7029 that it shall be unlawful for two or more individuals holding individual licenses to act jointly in the capacity of a contractor without first obtaining an additional or joint license. And lastly, section 7068, St.1941, p. 2604, provides that the board shall require such knowledge of the building, safety, health and lien laws of this state, and general principles of the contracting business as the board deems "necessary for the safety and protection of the public."

The sole issue raised by appellant is that plaintiffs at no time had a contractor's license issued to them, either as a partnership or a joint venture in accordance with the provisions of the Business and Professions Code, and therefore cannot recover.

[1] In support of such contention it is argued that as the statute makes it a crime for individual licensees to jointly submit a bid or otherwise act in the capacity of a contractor without first having secured an additional license to act as a partnership or joint venturers, the contract in question is illegal, and that plaintiffs, therefore, are precluded from maintaining their action in that to establish their case they must place reliance upon a void transaction. As a general rule it may be said that when it appears there has been a violation of a statute primarily designed for the protection of the public with a penalty prescribed for the violation thereof, such penalty is the equivalent of an express prohibition—that a contract made contrary to such statutory requirements is void and no action may be brought to enforce it. Berka v. Woodward, 1899, 125 Cal. 119, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31; Citizens State Bank, etc., v. Gentry etc., 1937, 20 Cal.App. 2d 415, 67 P.2d 364; Wise v. Radis, 1925, 74 Cal.App. 765, 242 P. 90.

[2, 3] This rule, however, is subject to the qualifications that in order to justify a legislative body in interposing its authority, the interest of the public generally must require such interference and the legislation so enacted must be reasonably necessary for the accomplishment of such legislative purpose. Where the police power is so invoked to regulate a lawful business it is always a judicial question whether such regulation is a valid exercise of that power. Mattei v. Hecke, 99 Cal.App. 747, 279 P. 470.

Therefore it may be said that if, as respondents contend in support of the judgment, the provision in question, section 7029, is invalid as an unreasonable exercise of the police power of the state, plaintiffs have complied completely with all valid sections of the act and the judgment must be sustained.

[4-9] In considering the constitutional question so raised we must assume that by virtue of the enactment of the Contractor's License Act by the legislature it has been declared as a policy of this state that the business of a builder and contractor is of such a nature as to warrant regulation under the police power and that such legislation having as its object the prohibition of persons engaging in such business without the qualifications set forth in section 7068 et seq. is a proper exercise of such power. The power to so prohibit inexperienced contractors rests upon the duty of the legislature to protect the public from the acts and injuries which might follow from the activities of such inexperienced persons. The police power of the state is an indispensable prerogative of sovereignty and one that is not to be lightly limited even though at times (as in the present case) it may seem harsh. It is not, however, illimitable. Its exercise and application must be determined by a consideration of the question of whether or not any invocation of that power when applied to the existing conditions of a particular case is reasonably necessary to promote the public health, safety, morals or public welfare. Wholesale Tobacco Dealers v. National, etc., Co., 1938, 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486. Neither the declaration in the statute as to its purposes nor the sincerity of purpose on the part of the legislature determines whether the means provided in the statute are reasonably designed to accomplish those purposes. Wholesale T. Dealers v. National, etc., Co., supra. That question is a proper inquiry for the courts. The soundness of the enactment rests solely with the legislature, and

the province of the courts to determine the reasonableness of such legislation is confined within the limitations previously mentioned, but if the question be reasonably debatable the determination by the legislature is conclusive. It therefore follows that the power of the courts should be exercised with caution and then only when it clearly appears that the statute attacked as invalid is entirely beyond the limits which bound the police power and thereby infringe upon rights secured by the fundamental law. 5 Cal.Jur. sec. 117, p. 714. Under such circumstances it is proper that when the charge is made as in the present case that an act is unreasonable the burden of showing its unreasonableness be cast upon the party attacking its validity. In re McCoy, 10 Cal.App. 116, 101 P. 419.

[10, 11] Respondents' contention is merely that as both of them had individual licenses at all times during the course of the contract, and prior to the conclusion thereof had secured a partnership license with a third party, they had complied with all of the valid portions of the act; that the requirement of an additional license to act in the capacity of a partnership or joint venture was neither reasonable nor necessary for the "safety and protection of the public" in that plaintiffs had demonstrated their qualifications to act as contractors when they qualified for and were issued individual licenses. As authority for such conclusion the case of Hardwick v. Board of School, etc., 1921, 54 Cal.App. 696, 205 P. 49, is cited. We have no complaint with the decision in the cited case as a general statement of the law in relation to the factual situation therein presented, but we do not believe it to be of appreciable assistance as regards the issue now before us.

It is not enough for respondents to say that their experience and rudimentary knowledge of the contracting business, sec. 7068, which was sufficient to qualify them originally for individual licenses is all that the state can require.

That requirement is but one of the elements provided in the act as necessary for original qualifications as a contractor. Other portions thereof (Articles 4, 5 and 7) set forth various matters which might well form the basis of legitimate inquiry by the licensing agency as a condition precedent to the issuance of the additional partnership or joint venture license required by section 7029. However, it is not for this court to rationalize the validity of such requirements. If respondents would evade such regulatory provisions it is they who must show that such provisions are clearly beyond the limits of legislative police power. It, therefore, follows that as respondents have not made sufficient showing in this regard they have not sustained the burden of proof necessary to overcome the presumptions of validity which attach to such regulatory enactments.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.



67 Cal.App.2d 872

TIESO v. TIESO.

Civ. 12783.

District Court of Appeal, First District, Division 2, California.

Feb. 8, 1945.

1. Divorce ⇐249(2), 255

The fact that property settlement agreement had been approved in interlocutory decree did not merge the agreement in the decree so as to make the decree res judicata of the terms of the agreement and preclude reformation of the agreement except by modification of the decree itself. Code Civ.Proc. § 473.

2. Divorce ⇐249(2)

Provisions of property settlement agreement may be so incorporated in divorce decree as to derive independent effect from the decree itself, but such rule is not applicable where decree merely refers to and approves the agreement without either setting out the terms of the agreement, incorporating the agreement by reference, or ordering the performance of its terms.

3. Husband and wife ⇐281

Where divorce decree merely approves property settlement agreement without being in such form as to justify construction that it orders performance of its terms, the only method of enforcing the

agreement is by independent action in contract.

4. Reformation of Instruments ⇐6

Where property settlement agreement was merely approved by interlocutory divorce decree, provision of agreement regarding liability for wife's share of taxes on community income could only be enforced by action on contract and court of equity had jurisdiction to reform it. Code Civ.Proc. § 473.

5. Reformation of Instruments ⇐45(18)

Evidence sustained judgment reforming property settlement agreement so as to place obligation on husband, instead of wife, of paying wife's share of taxes on community income received in 1942.

6. Trial ⇐105(2)

Hearsay evidence admitted without objection is sufficient to support a finding.

7. Appeal and error ⇐1009(3)

A mere conflict of testimony as to mistake on basis of which reformation of instrument is sought does not necessitate denial of relief but decision of trial court on weight of conflicting evidence is conclusive on appeal.

8. Appeal and error ⇐1009(1)

Whether a failure to discover a mistake in a written document is inexcusable negligence so as to bar a party from right to reformation is question of fact for trial court.

9. Reformation of Instruments ⇐25

The mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it carelessly.

Appeal from Superior Court, San Francisco County; Theresa Meikle, Judge.

Action by Ann E. Tieso against Charles Tieso for modification of a property settlement agreement. From an adverse judgment, the defendant appeals.

Affirmed.

Frederick C. Dewar and J. Emmet Chapman, both of San Francisco, for appellant.

Alan H. Critcher, of San Francisco, for respondent.

DOOLING, Justice pro tem.

Defendant appeals from a judgment reforming a property settlement agreement entered into by the parties at a time when they were husband and wife. The agreement which was executed on October 29, 1942, provided for the division of their community property and for the payment of $150 per month by the husband to the wife for the period of three years. The agreement contained the following provision: "The first party (wife) agrees to cooperate with second party (husband) in filing such income tax returns for the year 1942 on the community basis for such part of his income which was earned between January 1, 1942, and the date hereof, and to pay her community share of such taxes." The judgment appealed from decreed the reformation of this provision by adding the words "second party" to the last clause of the sentence quoted to make it read: "and the second party to pay her community share of said taxes."

The effect of the reformation is to place the obligation upon the husband instead of the wife to pay the wife's "community share" of the income taxes on the community income received in 1942.

On November 4, 1942 the wife secured an interlocutory decree of divorce from the husband. That decree contained the following language referring to the property settlement:

"The court further finds that the parties hereto entered into an agreement in writing, bearing date Oct. 29th, 1942, settling their property rights, and providing for the support and maintenance of plaintiff by defendant for a period of three years from November 1, 1942, at the rate of $150.00 per month, payable as in said agreement provided * * *

"It is further ordered, adjudged and decreed that said agreement concerning the property rights of the parties hereto and the support and maintenance of plaintiff by defendant as provided for therein be and the same is ratified, approved and confirmed, and defendant is hereby ordered to pay to plaintiff the sum of $150.00 per month for three years from November 1, 1942 * * *."

Appellant at the opening of the trial of the present action moved to dismiss it on the ground of lack of jurisdiction of the court for the reason "that the instant

action is in effect an action to vacate or modify such Interlocutory Judgment of Divorce and that the time for relief under section 473 of the Code of Civil Procedure had not elapsed at the time of the filing of the instant action * * * and that at such time plaintiff had a full and adequate remedy at law."

[1] The denial of this motion is urged as error. Although not elaborated in his briefs, the basis of appellant's argument must be the assumption that the approval of the agreement in the interlocutory decree has merged the agreement in the decree so as to make the decree res judicata of the terms of the agreement. If this assumption is correct it may be conceded that the agreement so merged in the decree could only be reformed by a modification of the decree itself. An examination of the authorities satisfies us that in this case there has been no such merger.

[2, 3] While the provisions of a property settlement agreement may be so incorporated into a divorce decree as to derive independent effect from the decree itself (Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Lazar v. Superior Court, 16 Cal.2d 617, 107 P.2d 249), this is not true where the decree merely refers to and approves the agreement without either setting out the terms of the agreement in the decree, incorporating the agreement by reference or ordering the performance of its terms. Plummer v. Superior Court, 20 Cal.2d 158, 124 P.2d 5. Where the decree merely approves the agreement without being in such form as to justify the construction that it orders the performance of its terms the only method of enforcing the agreement is by an independent action in contract. Griffith v. Superior Court, 1 Cal.2d 381, 384, 35 P.2d 317; Robertson v. Robertson, 34 Cal.App.2d 113, 93 P.2d 175; Sanborn v. Sanborn, 3 Cal.App.2d 437, 39 P.2d 830; Roberts v. Roberts, 83 Cal.App. 345, 256 P. 826; Queen v. Queen, 44 Cal.App.2d 475, 112 P.2d 755.

An examination of the interlocutory decree here in question shows that it neither incorporates the terms of the agreement by express recital nor by reference; and it contains no order for the performance of any of its terms with the exception of the order for the payment of $150 per month for the period of three years. The provision of the agreement reformed by the judgment here appealed from can neither be found in nor read into the interlocutory decree of divorce.

The interlocutory decree here in question is not distinguishable in this particular from the decree before the court in Queen v. Queen, supra. In that case the court said, 44 Cal.App.2d at pages 479, 480, 112 P.2d at page 757:

"A property settlement, although merely referred to in the decree as such, may, under circumstances not necessary to enumerate herein (Wallace v. Wallace, 136 Cal.App. 488, 29 P.2d 314), become res judicata, but it must be sufficiently certain and definite or a reasonable means of ascertaining its terms must be available from the pleadings or evidence (Moran v. Moran, 3 Cal.2d 342, 44 P.2d 546; Armstrong v. Armstrong, 132 Cal.App. 609, 23 P.2d 50; Wallace v. Wallace, supra; Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53; Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520; Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540) before it may be enforced and constitute an estoppel between the parties. 1 Freeman on Judgments, p. 126; 14 Cal.Jur., p. 954. Plaintiff could not have the same rights on the judgment in a divorce case, which while purporting to confirm a property settlement lacks the necessary details thereof, as on a judgment setting forth the terms of the agreement.

"* * * Without incorporating the agreement therein (Moran v. Moran, supra), or referring specifically to its terms, or introducing it in evidence, the decree simply directs that it be performed. * * * The decree in the divorce action could not furnish a basis for execution or for contempt proceedings. Lazar v. Superior Court [16 Cal.2d 617], 107 P.2d 249. The approval in the decree of the agreement is insufficient to be relied upon in the present proceeding as an adjudication of its terms. However, independent of the decree it may be a valid agreement."

[4] Similarly the approval in the decree of the agreement herein reformed did not amount to "an adjudication of its terms," but "independent of the decree, it may be a valid agreement." Since the provision reformed could only be enforced by an action on the contract and could not be enforced by any proceeding under the interlocutory decree we are satisfied that a court of equity had jurisdiction to reform it.

There is nothing in Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697; Klebora v. Klebora, 118 Cal.App. 613, 5 P.2d 965; or Greenwood v. Greenwood, 101 Cal.App. 736, 282 P. 433, which have been cited by appellant, inconsistent with this conclusion. In each of those cases the rights considered by the court were clearly adjudicated by the divorce decree, and none of them involved the effect of the approval of a property settlement or touched in any way upon the question here presented.

The testimony was conflicting as to the manner of negotiation of the property settlement and the understanding of the parties concerning the provision reformed. The testimony of Mr. Isaacs, who acted as the attorney for the respondent in the divorce action, was that the terms of the settlement were agreed upon by negotiation between himself and appellant's then attorney, Mr. Drobisch. According to Mr. Isaacs' testimony he insisted at all times that appellant should pay the income tax on the 1942 community income, Mr. Drobisch finally said that he would recommend this to his client and later stated to Mr. Isaacs that his client had agreed to this proposal. The written agreement in the form in which it was executed was actually prepared by Mr. Drobisch. Respondent testified that she left the negotiations entirely in the hands of her attorney. Mr. Isaacs further testified that when he examined the written agreement he did not notice the mistake in the provision for the payment of income tax and "that would never have appeared in it if I had." Mr. Issacs also testified without objection that after demand was made on respondent to pay a portion of the income tax for 1942 he telephoned to Mr. Drobisch and told him: "You understood he was to pay all the tax up to the interlocutory decree"; and that Mr. Drobisch replied: "Certainly, and Charlie knows that too."

[5, 6] This testimony was sufficient to support the judgment. From it the court was entitled to find that Mr. Isaacs, acting with full authority of respondent, and the appellant reached an agreement that appellant should pay all of the 1942 income taxes and that through a mutual mistake the written agreement actually executed did not so provide. While Mr. Isaacs' testimony of Mr. Drobisch's statements concerning his client's agreement and understanding might have been excluded as hearsay, it was admitted without objection and is sufficient to support the finding that appellant agreed and intended to contract to pay all of the 1942 tax. Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 518, 55 P.2d 859; Weiss v. Bank of America, 57 Cal.App.2d 892, 895, 135 P.2d 584.

[7] Appellant and Mr. Drobisch both gave testimony in conflict with that of Mr. Isaacs. It is urged that for this reason the evidence was not clear and convincing. There is nothing in the point. It is settled that "a mere conflict of testimony as to the mistake does not necessitate a denial of the relief," the decision of the trial court upon the weight of the conflicting evidence being conclusive on appeal. Hercules Gasoline Co. v. Security Ins. Co., 122 Cal.App. 499, 502, 503, 10 P.2d 128, 130; Home & Farm Co. v. Freitas, 153 Cal. 680, 684, 96 P. 308; Sullivan v. Moorhead, 99 Cal. 157, 161, 33 P. 796; California Packing Corporation v. Larsen, 187 Cal. 610, 613, 614, 203 P. 102.

[8, 9] Finally appellant claims that respondent is barred from relief by her attorney's negligence in not noticing the mistake in the agreement as written. Whether the failure to discover a mistake in a written document is inexcusable negligence so as to bar a party from the right to reformation is a question of fact for the trial court. "It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly." California Packing Corporation v. Larsen, 187 Cal. 610, 614, 203 P. 102, 104; Los Angeles R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 27, 87 P. 1029; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 597, 598, 116 P.2d 465.

Judgment affirmed.

NOURSE, P. J., and GOODELL, J., concur.

67 Cal.App.2d 780

BAKER v. NORTHWESTERN MUT. LIFE INS. CO.

Civ. 14561.

District Court of Appeal, Second District, Division 3, California.

Feb. 1, 1945.

Hearing Denied March 30, 1945.

1. Insurance ⇐360(3)

An insurance company must pay or apply dividends in accordance with the contract with insured.

2. Insurance ⇐360(3)

Where insured elected to have annual dividend applied toward payment or reduction of premiums, such direction was binding on insurer when not revoked.

3. Insurance ⇐360(3)

Where insured directed that dividends on life policy should be applied to payment of premiums, and some dividends were more than enough to pay accrued quarterly premiums, insurer could not apply the surplus toward partial satisfaction of outstanding loans against the policy, but properly held the surplus in a suspense account without interest until due date of next quarterly premium, to which the surplus was applied.

4. Insurance ⇐360(3)

Where insured directed dividends to be applied to payment of premiums, but some dividends were more than enough to pay current quarterly premiums, such excess dividend balances were not "loans" and insurer was not obliged to pay interest thereon until they were applied to the next quarterly premium. Civ.Code, § 1912.

See Words and Phrases, Permanent Edition, for all other definitions of "Loan".

5. Insurance ⇐370

In action on life policy, record established that balance of cash surrender value after deducting policy loans was insufficient to pay quarterly premiums under automatic premium loan provision, and hence policy lapsed.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Grace H. Baker against the Northwestern Mutual Life Insurance Company on life policy. From a judgment for plaintiff, defendant appeals.

Reversed.

Hurt & Hurt, of Los Angeles, for appellant.

Arthur G. Baker and A. F. Mack, Jr., both of Los Angeles, for respondent.

FOX, Justice pro tem.

This is an appeal by the defendant from a judgment in favor of the plaintiff who was the sole beneficiary under a policy of life insurance issued by defendant on the life of Garrett O. Wigell. The action was defended upon the ground that the policy lapsed prior to the death of the insured and this is the sole issue in the case. The exact question is whether there were sums in defendant's hands which it should have so applied as to leave available a sufficient amount to pay the quarterly premium which fell due June 30, 1933.

The policy was issued on March 31, 1920. It was originally written on an annual premium basis, said premiums to be paid in every year during the lifetime of the insured. It provided that annual dividends should be paid or applied as directed by the insured. The insured paid premiums on an annual basis until March, 1924. Premium payments, however, were changed to a quarterly basis commencing with the premium due on the 31st of March of that year. Thereafter all quarterly premiums were paid to and including the one due on March 31, 1933. Pursuant to written request of the insured, the Automatic Premium Loan Provision of the policy was put into effect January 22, 1931. That provision (10b) reads as follows: "Upon request of the Insured, and Assigns if any, made prior to default in premium payment and remaining unrevoked, the premiums thereafter falling due and not paid will be charged as a premium loan with interest at the rate of six per cent. per annum, provided the then cash surrender value be sufficient to cover such loan. Any premium loan may be repaid at any time." Various premium loans were thereafter made by the defendant. The insured also obtained certain policy loans (cash loans) from the company.

On June 30, 1933, the cash surrender value of the policy was insufficient to pay the quarterly premium then due, after deducting the amount of the policy loans

and premium loans together with the interest thereon as computed by the company. It thereupon applied a portion of the cash surrender value to payment of the said obligations and the balance to the purchase of term extension insurance, which term expired February 20, 1934. The insured was notified of this action by letter dated September 21, 1933. He was advised to notify the General Agent or the Home Office if he desired to apply for reinstatement of the policy. He made no such request. He died on June 1, 1937.

Cash dividends were apportioned to the policy annually on its anniversary date, March 31st. The dividend provision of the policy and the options given the insured with respect to dividends is as follows: "This Policy while in force except under the extended term insurance provision shall participate in the surplus of the Company. The Company will annually determine and account for the divisible surplus accruing hereon until all such surplus found to have arisen from this Policy shall have been returned. Any such dividend of surplus may at the option of the Insured: (a) be withdrawn in cash; or (b) be applied towards the payment of premium hereon; or (c) be applied to the purchase of a participating paid-up addition to this Policy; or (d) be left to accumulate, subject to withdrawal, at such a rate of interest not less than three per cent., credited annually, as may be determined by the Company. Unless the Insured shall otherwise elect in writing dividends will be paid in cash." In the application signed by the insured, a copy of which was attached to the policy, it was provided that "Cash dividends, until otherwise directed shall be (1) Applied toward reduction of premium." From 1925 to 1930, inclusive, there remained a small balance of each of said six dividends after paying therefrom the quarterly premiums due on March 31st—the date the respective dividends were payable. The company held each of such balances for three months in a suspense account, without interest, until June 30 of each year, when the next quarterly premium became due, and then applied each such balance in part payment of the quarterly premium due at that time.

Plaintiff contends that the company should have applied these balances (the excess of the annual dividend over the quarterly premium) in reduction of the indebtedness of the insured to the company, thus reducing the interest accumulation on said indebtedness. The effect of this proposition may be stated another way, viz., that the company should have allowed the insured interest at six per cent on these balances from March 31st until it was necessary to apply the same on the next quarterly premium which fell due on June 30th. If this had been done the amount on hand would have been sufficient to pay the premium in question. The company, however, contends that it had no authority to apply said balances on the insured's indebtedness to it and that it was not obligated to pay interest on said balances but merely to hold them for the benefit of the insured until such time as they were applied on the next quarterly premium. In our opinion the position of the company must be sustained.

[1, 2] The law seems to be clear to the effect that dividends must be paid or applied by an insurance company in accordance with the terms of the contract with the insured. Eckstein v. Northwestern Mut. Life Ins. Co., 1937, 226 Wis. 60, 275 N.W. 916; Williams v. Union Central Life Ins. Co., 1934, 291 U.S. 170, 54 S.Ct. 348, 78 L.Ed. 711, 92 A.L.R. 693; Meilander v. Penn Mut. Life Ins. Co., 1938, 59 Ohio App. 171, 17 N.E.2d 398; Gardner v. Nat'l Life Ins. Co., 1931, 201 N.C. 716, 161 S.E. 308. Under the provision of the policy herein quoted, the insured had four options with respect to dividends. He had elected when he made application for the policy to have the annual dividend applied toward the payment or reduction of the premium. This unrevoked direction to the company by the insured was binding on it. The Eckstein case, supra, involved the question as to whether or not the company was bound to use dividends so as to prevent a forfeiture where the insured had given a specific direction as to their use. Charles Eckstein had obtained a policy of insurance from defendant for $2500. The quarterly premium of $16.80 was payable on the 18th of March, June, September and December. In September, 1923, Eckstein changed premium payments to a semi-annual basis. He also elected that dividends should be applied to purchase nonforfeitable participating paid-up additions to the policy. Thereafter, in March, 1925, he elected to take dividends in cash, and in 1931 he elected to leave dividends with defendant at interest, subject to withdrawal on demand. Eckstein obtained loans of $641 on the policy. He failed to pay the semi-annual

premium due September 18, 1933, on time or within the grace period. Defendant sent notice of lapse and amount of term paid-up insurance in force under the policy provisions and suggested the possibility of reinstatement. The insured knew there was a balance of $58.75 of dividend accumulations, plus a small item of accrued interest. This amount was more than sufficient to have paid the semi-annual premium due in September. The insured, however, gave no direction for such use of dividend accumulations and the company therefore did not so apply the said accumulation. The plaintiff contended that the company should have so used the dividend accumulation as to prevent a forfeiture of the policy. In holding against the plaintiff's contention the court had this to say (page 920 of 275 N.W.): "On this branch of the case, we are dealing with a plain contract by the terms of which the rights of the contracting parties are fixed. The defendant contends that it had neither the power nor the duty to use the dividend accumulations in the payment of premiums or in the purchase of extended term insurance. It is clear that, under the terms of the policy, the defendant had no right to use or apply the dividend accumulations in payment of premiums or in the purchase of extended term insurance without express direction of the insured. Had defendant, of its own accord, done either, it would have remained liable to pay the accumulations, with interest, upon demand of the insured."

Incidentally, the defendant in the Eckstein case is the same company that is defendant in this case and the policy gave the insured the identical options with respect to dividends as those quoted herein.

In the Gardner case, supra, the insured in his application had directed that dividends should be left "with the company at interest unless otherwise directed." No other direction was given by him. On May 11, 1930, a semi-annual premium became due. It was not paid and the policy lapsed. On that same date a dividend of $25.30 was declared on the policy. This sum was retained by the company, at interest, in accordance with the election of the insured. The insured died on August 24, 1930. If this dividend had been applied by the defendant to the purchase of term insurance, the policy would have been extended beyond the date of the death of the insured, and would have been in force on said date. The plaintiff contended that the company should have done this. In holding against plaintiff's contention, the court said [201 N.C. 716, 161 S.E. 310]: "If in violation of the contract with the insured, with respect to this dividend, the defendant had so applied it, it would have nevertheless been liable to the insured for the amount of the dividend, with interest, when called upon by him for its payment. There is no principle of law or equity upon which the defendant can be held liable to the plaintiff because after the death of the insured within the time for which the policy would have been extended, if the insured had directed that the dividend be applied to the purchase of extended insurance, it appeared that such application would have been to the interest of the plaintiff, as beneficiary in the policy."

The court in the Eckstein case relied upon the Williams case, supra. There the defendant issued a policy of life insurance on the life of plaintiff's husband for $10,000, dated July 26, 1927. A premium of $449.10 was payable annually on June 10, of each year and was paid to and including June 10, 1930. The premium due June 10, 1931 was not paid when due and was not paid during the grace period. The reserve or loan value of the policy was then $910. Loans on the policy with interest thereon amounted to $898.88, leaving a net or surrender value of the policy in the sum of $11.12. The policy was a participating one and a dividend of $74.80 was declared in favor of the insured on June 10, 1931. The policy contained four options as to the disposition of dividends, but insured had not exercised any of them. The policy did, however, contain provision for automatic disposition of dividends if no other option had been elected, among them the following: "or if the policy shall lapse, the dividend then due shall be paid in cash."

If the dividend had been applied in reduction of the amount advanced against the policy and the balance then applied to the purchase of extended term insurance, the policy would have remained in effect beyond the date of the death of the insured, on October 15, 1931. On this point Mr. Chief Justice Hughes, speaking for the court, said [291 U.S. 170, 54 S.Ct. 351]: "It is the contention of the petitioner that, on the lapse of the policy, the dividend of $74.80 should have been applied in reduction of the amount advanced against the surrender value of the policy, thus raising

what remained of that value from $11.12 to $85.92, a sum sufficient to extend the insurance until after the death. But the policy gave no warrant for an application of the dividend to the reduction of advances against the policy. As this Court pointed out in Board of Assessors v. New York L. Ins. Co., 216 U.S. 517, 522, 30 S.Ct. 385, 386, 54 L.Ed. 597 [601], such advances being against the surrender value do not create a 'personal liability' or a 'debt' of the Insured, but are merely a deduction from the sum that the company 'ultimately must pay.' While the advance is called a 'loan' and interest is computed in settling the account, 'the item never could be sued for' and in substance 'is a payment, not a loan.' Id. *The company had no right, without agreement with the insured, to apply a dividend, payable in cash, to the reduction of the advance against the policy.*" (Italics added.)

[3] Under these principles, where the provisions of the policy are clear as they are in this case, the company had no authority or right to apply the surplus dividend toward the partial satisfaction of the loans against the policy in view of the specific direction of the insured as to the use that should be made of said dividends. For us to hold otherwise would be to make a new contract for the parties.

[4] There was no obligation on the part of the company to pay interest on these dividend balances until they might be applied on the next quarterly premium. These amounts were not loans, for "A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." Civ.Code, sec. 1912. Hence interest could not be charged upon any loan theory. Nor is there any implication in the options (or elsewhere in the policy) with respect to the use or disposition of dividends which would indicate that the company should pay interest on dividend balances where the insured had directed that "Cash dividends, until otherwise directed shall be (1) Applied towards reduction of premium." If it had been intended that interest should be paid on dividends then the insured should have exercised option (d) which provides that dividends "(d) be left to accumulate, subject to withdrawal, *at such a rate of interest* not less than three per cent., credited annually, as may be determined by the Company." (Italics added.) Of the four options given the insured with respect to the use or application of dividends this is the only one where interest is mentioned.

The dividends by direction of the insured were to be used by the company for a particular purpose. It carried out this direction promptly in March and June of the years 1925–1930, inclusive, and in our opinion was not obligated either expressly or impliedly to pay interest on these dividend balances.

[5] It must now be determined whether or not, excluding interest credit on the aforesaid dividend balances, the quarterly premium of $63.40 due on June 30, 1933, could have been paid by an automatic premium loan within the terms of the contract. If the cash surrender value of the policy exceeded the amount of the premium loans and the cash loans by a sum sufficient to pay that premium the company should have so applied it and the premium would have been thereby paid. It is plaintiff's contention that the amount was sufficient. It was stipulated that the policy had a cash surrender value of $1800.90 on June 30, 1933. The parties disagree as to the total of the sums chargeable against the cash surrender value, and, therefore, as to the amount of the excess of the cash surrender value above these total charges that was applicable to payment of the quarterly premium that fell due on that date. In the computation that follows we have taken as the basis for our calculations plaintiff's figures and not those of defendant. Plaintiff's exhibits, however, do not disclose directly the specific amount of indebtedness which she claims was chargeable against the policy on June 30, 1933. Since that is the controlling date plaintiff's figures must be adjusted to it. It does appear, however, from plaintiff's exhibit 2 that the balance due on account of premium loans on March 31, 1933, was $131.48
Interest on this sum for three months (from March 31, 1933, to June 30, 1933) at six per cent is... 1.97

The unpaid balance then on premium loans on June 30, 1933, was... $133.45

This exhibit also shows that the "Net Cash loan indebtedness" (which is distinct from the indebtedness for premium loans) against said policy on September 30, 1933, was $1628.11. Interest at six per cent per annum accumulates at the rate of 1.5% quarterly. By dividing $1628.11 by 1.015 the amount of indebtedness on policy loans

on June 30, 1933, is found to have been $1604.05. In arriving at the "net cash loan indebtedness" on September 30, 1933, plaintiff credited thereon six items of interest totaling $4.08. These six interest items which plaintiff claims credit for represent interest at six per cent upon the aforesaid dividend balances (that is to say, the balances that remained after payment of the current quarterly premium and which were held by the company for application upon the next quarterly premium), for a period of four months (i.e. for the quarter immediately following the declaration of dividends on March 31st of each year for the years 1925 to 1930, inclusive, plus the 31 days grace period for payment of premiums) and, in addition, interest on these six interest items until September 30, 1933. Plaintiff's proposition works out in this way, as revealed by her Exhibit No. 2. On March 31, 1925, there was a dividend balance of $13.90 after paying the quarterly premium then due. Interest on this amount at 6% for 4 months (i.e., from March 31, 1925, to July 31, 1925, when it was applied on the June 30, 1925, premium) is $.28. This item of $.28 at 6% compound interest amounts to $.45 on September 30, 1933, according to her computations. By like process, plaintiff figures the interest on the dividend balance for 1926 to be $.46 which, at compound interest, amounts to $.70 by September 30, 1933. In like manner she figures the interest on the dividend balance for 1927 to be $.49, which accumulates to $.70; the interest on the dividend balance for 1928 to be $.51, which accumulates to $.69; the interest on the dividend balance for 1929 to be $.60, which accumulates to $.77, and the interest on the 1930 dividend balance to be $.64, which accumulates to $.77. The total of these accumulated amounts is $4.08. Since, however, this total of $4.08 represents accumulations to September 30, 1933, it must also be adjusted to the controlling date of June 30, 1933. This results in an adjusted figure of $4.02. Since under the principles herein set forth plaintiff was not entitled to claim interest on the said dividend balances she was therefore not entitled to take credit for said interest item. In order, therefore, to find the "net cash loan indebtedness" against the policy on *June 30, 1933,* we must add $4.02 to plaintiff's previously adjusted cash loan figure of $1604.05
making a cash loan indebtedness on said date of $1608.07
To this must be added the premium loan indebtedness on said date of 133.45

Total indebtedness as of June 30, 1933 ..... $1741.52
The cash surrender value of the policy on June 30, 1933, was..... $1800.90

Balance of cash surrender value available to pay premium due June 30, 1933 ..... $ 59.38

This amount was insufficient to pay the quarterly premium of $63.40 due on said date and the policy, therefore, lapsed. The policy not having been reinstated and the term insurance having expired prior to the death of the insured the plaintiff is not entitled to recover on the policy.

The views herein expressed make it unnecessary to consider other questions discussed by counsel.

The judgment is reversed.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., disqualified; NOURSE and PETERS, JJ., pro tem., participating in their stead; CARTER, J., dissenting.



67 Cal.App.2d 806

Ex parte RISNER.

Civ. 3876.

District Court of Appeal, Second District, Division 1, California.

Feb. 5, 1945.

1. Divorce ⇐269(1)

Failure of wife, suing for divorce, to obey court's lawful judgment requiring her to pay alimony pendente lite and attorney's fees to husband was "contempt of court." Code Civ.Proc. § 1209, subd. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt of Court".

2. Divorce ⇐269(10)

The affidavit, constituting basis for judicial action in proceeding for contempt in failing to pay alimony pendente lite, as ordered by court in divorce action, need only show making of alimony order and

contemnor's failure to pay alimony. Code Civ.Proc. § 1211.

3. Divorce ⇐269(11)

In contempt proceeding against wife for nonpayment of alimony pendente lite to husband, as ordered by court in wife's divorce action, husband need not prove anything more than making of alimony order and wife's disobedience thereof in refusing to pay amount which court found she was able to pay when order was made. Code Civ.Proc. § 1209, subd. 5.

4. Divorce ⇐269(11)

At hearing of proceeding against wife for contempt in failing to pay alimony pendente lite to husband, as ordered by court in wife's divorce action, husband made prima facie case by producing original alimony order and proving wife's failure to make payment according to its terms. Code Civ.Proc. § 1209, subd. 5.

5. Divorce ⇐269(11)

In proceeding against wife for contempt in disobeying court's order to pay alimony to husband pending wife's divorce action, burden was on wife to show legitimate excuse for disobedience of order, such as her inability to make required payment. Code Civ.Proc. § 1209, subd. 5.

6. Habeas corpus ⇐106

In habeas corpus proceeding for release from custody under commitment for civil contempt outside court's presence, as in disobeying order requiring petitioner to pay her husband alimony and attorney's fees pending her divorce action, only inquiry permissible is with reference to jurisdiction of court which made order. Code Civ.Proc. § 1209, subd. 5.

7. Courts ⇐1

"Jurisdiction" is power to hear and determine matter in controversy, and question whether court erred or improperly exercised power is not involved.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

8. Divorce ⇐269(13)

An order punishing wife for contempt in disobeying court's order to pay alimony to husband pending wife's divorce action is not subject to attack for error in court's exercise of jurisdiction or irregularities of procedure after acquisition of jurisdiction. Code Civ.Proc. § 1209, subd. 5.

9. Habeas corpus ⇐85(1)

In habeas corpus proceeding for release from custody under commitment for contempt of court, District Court of Appeal will indulge every intendment or presumption in favor of correctness and regularity of contempt proceedings. Code Civ. Proc. § 1209, subd. 5.

10. Habeas corpus ⇐106

In habeas corpus proceeding by one committed to jail for contempt of court, reviewing court may not inquire as to correctness of findings constituting basis for conviction of contempt or question fact findings recited in order of commitment.

11. Habeas corpus ⇐106

In habeas corpus proceeding for release from custody under commitment for contempt of court in disobeying order thereof, sufficiency of evidence to sustain charge or support findings as to existence of facts, such as petitioner's ability to comply with order, will not be considered. Code Civ.Proc. § 1209, subd. 5.

12. Habeas corpus ⇐79

Where no record of oral testimony, taken at hearing on order to show cause why wife should not be punished for contempt of court in disobeying order to pay husband alimony pending wife's divorce action, is before District Court of Appeal in wife's habeas corpus proceeding for release from custody under commitment for contempt, facts on which order of commitment was based, as recited therein, must be taken as true. Code Civ.Proc. § 1209, subd. 5.

13. Divorce ⇐269(2)

The court in which wife instituted divorce action had jurisdiction to make order committing her to county jail for contempt in disobeying such court's order requiring her to pay husband alimony pendente lite and attorney's fees.

Proceeding in habeas corpus by Nellie Haney Risner for release from custody under a commitment for contempt of court in disobeying an order requiring petitioner to pay alimony pendente lite and attorney's fees to her husband, Rudolph Risner, in her divorce action against him.

Writ discharged, and petitioner remanded to custody.

Fred M. Riedman, of Long Beach, for petitioner.

Fred N. Howser, Dist. Atty., and John Barnes, Deputy Dist. Atty., both of Los Angeles, for respondent.

YORK, Presiding Justice.

Petitioner was adjudged guilty of contempt of court and sentenced to serve five days in the county jail of Los Angeles County for disobedience of an order, which was made on November 6, 1944, in connection with a divorce action instituted by her against her husband, Rudolph Risner, requiring her to pay to him the sum of $225, as and for alimony pendente lite and attorney's fees.

By the instant proceeding in habeas corpus, petitioner claims that the order holding her in contempt was in excess of the jurisdiction of the court which rendered it and that she is being unjustly deprived of her liberty. In the oral presentation of the matter before this court, petitioner contended that she "was held guilty of contempt because she paid the moneys which were ordered to her husband to his attaching creditor. Her husband owed a debt and the county of Los Angeles filed an action against him."

In accordance with section 1211, Code of Civ.Proc., respondent made an affidavit in support of the order to show cause why petitioner "should not be adjudged guilty of contempt of court for willfully disobeying" the order made in the divorce action for the payment of alimony pendente lite and attorney's fees. Said affidavit—a printed form—recites the making of the said order on November 6, 1944, together with the provision therein for the payment by petitioner of $225 forthwith for the purpose of attorneys' fees and support of party; that "plaintiff herein has paid nothing to date, contrary to said order"; that petitioner was in court at the time and place said order was made. Regarding petitioner's ability to pay the sum ordered, the said affidavit avers "Adverse party admitted in Court, at the time the order was made, that she had then $350.00 cash in the bank"; that she was employed at Douglas Aircraft, Long Beach Plant, at $50 per week and had no other income; that "the foregoing award of $225.00 was based upon the statement by plaintiff herein that she had disposed of the family automobile for $450.00 and that she had the sum of $350.00, the remainder of the proceeds of said sale."

Upon this affidavit, which is not attacked by petitioner herein as being insufficient, the order to show cause in re contempt was duly and regularly made. No counter-affidavit was filed by petitioner, but when the order to show cause in re contempt came on for hearing on December 1, 1944, both parties appeared in person and by their respective counsel, and oral testimony was presented from which the court found (quoting from the order of commitment) as follows:

"That the plaintiff did not, forthwith, or at any time after the order of November 6, 1944 was made, plaintiff being present in court when said order was made, pay the said sum of $225.00 to said defendant, but that she obtained the sum of over $225.00 from the bank where the cash was deposited, on the morning of the 13th day of November, 1944; that she did not then pay the said sum of $225.00 to the defendant, as ordered by the court, and that she held said funds in her own possession until the 18th day of November, 1944, when the sum of $200.00 of said money in plaintiff's possession was garnished by the Sheriff of Orange County, State of California, and taken from plaintiff's possession in an action filed after the above order of November 6, 1944, was made, and that said action was one by the County of Los Angeles, as plaintiff, against the defendant herein, to recover sums due the County of Los Angeles for hospital services rendered said defendant in the Los Angeles County General Hospital; that said plaintiff from the 6th day of November, 1944, when said order was made, until the 18th day of November, 1944, when said garnishment was served upon plaintiff, had the ability to comply with said order of November 6, 1944, and to pay the said sum of $225.00 to defendant herein, as ordered by said Court, but that said plaintiff did wilfully fail, neglect and refuse to pay said sum of $225.00, or any part thereof, to the defendant, as ordered by the said Court, and that because of plaintiff's said conduct and wilful disobedience of said order of November 6, 1944, plaintiff is adjudged guilty of contempt of this Court and is hereby sentenced to five (5) days in the County Jail; that said plaintiff is hereby remanded to the Sheriff of Los Angeles County, State of California, to serve said sentence."

From the foregoing it is clear that petitioner was adjudged guilty of contempt of court, not because she paid the money to the sheriff in the garnishment proceeding, but rather because she waited from November 6, 1944, until November 13, 1944, before she procured the money from the bank, and that she thereafter held it in her possession until November 18th, when it was levied upon by the sheriff, as aforesaid.

[1] Petitioner's failure to obey the lawful judgment of the court was a contempt of court, as defined by subdivision 5, section 1209, Code of Civ.Proc., to-wit:

"The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * * 5. *Disobedience* of any lawful judgment, order, or process of the court."

[2-4] The court in the divorce action found upon petitioner's own admissions that she had the ability to pay her husband $225.00, part of the proceeds from a sale of community property, and ordered her to pay it. It is only necessary that the affidavit which constitutes the basis for judicial action in such a proceeding should show the making of the order for alimony and the fact that petitioner had failed to make payment as so ordered. It is not necessary for the respondent husband, on the hearing of the contempt proceeding for non-payment of alimony, to prove anything more than the making of the order and disobedience of it by petitioner in refusing to pay the amount which the court found she had the ability to pay when the order was made. In re Rasmussen, 56 Cal.App. 368, 371, 205 P. 72. Respondent made a prima facie case at the hearing by producing the original order and by proof of petitioner's failure to make payment according to its terms. In re McCarty, 154 Cal. 534, 98 P. 540.

[5] As was stated in Re Rasmussen, supra [56 Cal.App. 368, 205 P. 73]: "The husband (contemnor) had the opportunity of presenting to the court any legitimate excuse he might have had for disobeying the order of the court. If his excuse was that since the making of the original order, he has become unable to pay the alimony required by it, it was incumbent upon him to prove that fact. He is in the best position to show why, for any reason, he has not obeyed the order, and it is his duty to do so as a matter of defense. In re McCarty, supra [154 Cal. 534, 98 P. 540]. This burden the petitioner in the present case did not sustain, and the trial court has found against him, in the judgment of contempt, upon this issue."

It was held in Rappaport v. Superior Court, 39 Cal.App.2d 15, 22, 102 P.2d 526, 529, that: "In order to sustain an order for contempt, two essential facts must appear, namely: (1) there must be notice or actual knowledge of the order, for the disobedience of which citation for contempt has issued; and (2) the act ordered to be done must be within the power of the contemnor to perform. 5 Cal.Jur. 913, sec. 20."

[6, 7] In a proceeding in habeas corpus in a case of this character (a civil contempt committed outside the presence of the court), "the only inquiry that can be made is with reference to the jurisdiction of the court which made the judgment of which the imprisonment is a part." In re Selowsky, 189 Cal. 331, 332, 208 P. 99, 100, citing Ex parte Joutsen, 154 Cal. 540, 544, 98 P. 391, and 1 Bailey on Jurisprudence, sec. 311. As stated by this court in Re Wood, 34 Cal.App.2d 546, 551, 93 P.2d 1058, 1061: "Jurisdiction has been defined as being the power to hear and determine the matter in controversy, and if the power existed the question of whether the court erred or the power was improperly exercised is not involved and errors of the court therein constitute no defense whatever."

[8-11] "The order punishing the petitioner because of the latter's contemptuous conduct is not subject to attack on the ground of error on the part of the court in the exercise of its jurisdiction (In re Morford, 137 Cal.App. 662 [31 P.2d 406]), or irregularities of procedure subsequent to the acquisition of jurisdiction (Ex parte Selowsky, 189 Cal. 331 [208 P. 99]). Furthermore, the court will indulge every intendment or presumption in favor of the correctness and regularity of the contempt proceedings. (Ex parte Pillsbury, 69 Cal. App. 784 [232 P. 725].) Nor, in habeas corpus proceedings, may the court inquire as to the correctness of the findings which constitute the basis of the conviction of contempt (Ex parte Von Gerzabek, 63 Cal. App. 657 [219 P. 479]; In re Wilson, 123 Cal.App. 601 [11 P.2d 652]), or question the findings of fact which are recited in the order of commitment. (5 Cal.Jur. 958,

n. 2; Ex parte Von Gerzabek, supra; Ex parte Ewell, 71 Cal.App. [744] 236 [P. 205]; In re Heegstra, 12 Cal.App.2d 464 [55 P.2d 558]; In re Ellery, 22 Cal.App.2d 274 [70 P.2d 690].) The court will not consider the sufficiency of the evidence to sustain the charge or to support the findings as to the existence of facts—e.g., ability of the petitioner to comply with the violated order." 4 Cal.Jur. 10-Yr. Supp. 33, sec. 51.

[12] No record of the oral testimony taken upon the hearing on the order to show cause in re contempt is before this court on this proceeding. "The order of commitment recites the facts upon which it was based and those facts must be taken as true." In re Foss, 123 Cal.App. 542, 544, 11 P.2d 676, 677, citing Ex parte Ewell, 71 Cal.App. 744, 236 P. 205.

[13] The record in the instant proceeding does not disclose a lack of jurisdiction in the trial court to make the order of commitment adjudging petitioner guilty of contempt.

For the reasons stated, the writ is discharged and the petitioner is remanded to custody.

DORAN and WHITE, JJ., concur.



67 Cal.App.2d 828

LOWE et al. v. RUHLMAN et al.

Civ. 12729.

District Court of Appeal, First District, Division 1, California.

Feb. 6, 1945.

Hearing Denied April 5, 1945.

1. Deeds ⇐160

A condition subsequent, created by deed granting life estate conditioned upon grantee's occupancy of premises as his permanent abode without permitting any other person to share with him such occupancy, was not breached by occasional presence overnight on premises of grantee's wife, who maintained her own home at which grantee spent a couple of nights a week.

2. Contracts ⇐318

The law does not favor forfeitures and a forfeiture will be enforced only where no other interpretation is reasonably possible. Civ.Code, § 1442.

3. Deeds ⇐160

Where life estate in realty was conditioned upon grantee's occupancy of premises as his permanent abode without permitting any other person to share such occupancy, permanent physical residence of another person was prohibited and occasional presence of grantee's wife on premises did not violate the condition, notwithstanding statutory provision that residence of wife follows that of her husband. St.1943, p. 901, §§ 243, 244.

4. Domicile ⇐2

A person may have a residence separate from his domicile.

5. Appeal and error ⇐882(3)

The practice of trying a case on one theory and then urging a different theory on appeal is improper because unfair to litigants and to trial court, and reviewing court may be justified in refusing to pass upon point based on new theory of case.

6. Wills ⇐88(2)

An instrument granting a life estate in realty to commence upon grantor's death was not void, on ground that it was testamentary in character and had not been executed as a will, because grantee's right of possession did not accrue until grantor's death. Civ.Code, §§ 767, 773.

7. Deeds ⇐9

A grantor may reserve to herself a life estate and grant a freehold to commence in the future. Civ.Code, §§ 767, 773.

8. Wills ⇐88(2)

The fact that document granting a life estate in realty to commence upon grantor's death reserved to grantor during her life time a right of revocation did not render document testamentary in character.

9. Wills ⇐88(2)

An instrument granting a life estate in realty to commence upon grantor's death was not testamentary in character on ground that it did not effect an immediate transfer of a life interest.

10. Deeds ⇐3

An instrument granting a life estate in realty to commence upon grantor's death

was valid notwithstanding failure to dispose of remainder by same instrument.

11. Wills ⇐88(1)

An instrument granting life estate in realty to commence upon grantor's death and providing that grantee might occupy premises rent free and without obligation to make expenditures for taxes, insurance, or repairs was not testamentary in character on theory that it imposed on legatees of property under grantor's will duty to make repairs and pay taxes.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Helen M. Lowe and another against Albert J. Ruhlman and others to obtain a determination that the named defendant's life estate in certain property had terminated because of his alleged breach of a condition subsequent. From an adverse judgment, the plaintiffs appeal.

Judgment affirmed.

See also 60 Cal.App.2d 524, 141 P.2d 222.

Frank J. Fontes, of San Francisco, for appellant Elsa K. Dernham.

Albert Picard, of San Francisco, for appellant Helen M. Lowe.

Albert D. Elledge, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiffs, Helen M. Lowe and Elsa K. Dernham, who are legatees of certain real property under the will of Josephine Wester, brought this action against Albert J. Ruhlman and others for the purpose of having it determined that Ruhlman's life estate in the property had terminated by reason of Ruhlman's alleged breach of a condition subsequent. The trial court determined that there had been no breach of the condition. From the judgment denying plaintiffs' prayer to quiet their title against Ruhlman this appeal is taken.

For many years prior to 1936 Josephine Wester and Albert Ruhlman were business associates. Ruhlman had been married in 1894 but thereafter became estranged from his wife. In 1936 he and Josephine Wester were living together on the property in question, a residence in San Francisco owned by Josephine. The complaint alleges that "on or about October 9, 1936 one Josephine Wester, being then the owner in fee of the realty hereinafter referred to, made, executed and delivered to defendant Albert J. Ruhlman" the document which forms the basis of Ruhlman's claim to a life estate in the property. Thus there is no issue over the execution and delivery of the document. Because of the nature of the contentions of the parties this document should be set forth in full. It reads:

"Subject to the conditions and reservations hereinafter contained, Josephine Wester, hereinafter called the 'Grantor' does hereby grant to Albert J. Ruhlman, hereinafter called the 'Grantee,' an estate for the term of his natural life in and to those certain premises in the City and County of San Francisco, State of California, situated on the east side of Arguello Boulevard, north of Clay Street, known and designated as 'No. 126 Arguello Boulevard.'

"The right of the grantee to the use and occupancy of said premises shall commence upon the death of the grantor, and said grantee shall thereupon have the right and privilege of residing upon and using said premises as his dwelling place rent free and without obligation to make expenditures for taxes, insurance or for such repairs as may be necessary to maintain said premises in tenantable condition.

"The life estate hereby granted, including each and all of the rights and privileges of the grantee hereunder, shall continue only as long as, and upon condition that, the said grantee hereinabove named shall personally reside upon, occupy and use said premises as his permanent abode or residence and shall permit no person or persons to share with him such use and occupancy except only any one or more of those who shall have succeeded by devise or descent to the grantor's interest in said property, their spouses and children.

"The grantor further reserves the right during her lifetime to revoke this deed in its entirety, either by a written declaration to that effect executed by said grantor, or by the sale or other disposition of said premises, that is to say, by any act whereby during her lifetime she shall have parted with the ownership thereof.

"In witness whereof said grantor has executed this conveyance this 9th day of October 1936.

"Josephine Wester."

Josephine Wester died September 13, 1939. Prior to that date she had not at-

tempted to revoke the above instrument. Upon her death she devised the property to plaintiffs. The complaint alleges that upon the death of Josephine, Ruhlman went into "possession, use and occupancy" of the premises and remained in such possession until the time of trial. This allegation is admitted by the answer. The evidence shows that sometime after the death of Josephine and prior to October 29, 1942, Ruhlman divorced his first wife, and on the last mentioned date married Lila Eva Ruhlman. The complaint was framed and the case was tried on the theory that after his marriage Ruhlman occupied the premises in question with his wife; that his wife was not one of those designated in the deed who could occupy the premises; that such use and occupancy by the wife with Ruhlman's consent violated the condition subsequent in the deed and resulted in a forfeiture of Ruhlman's life estate.

[1] The finding of the trial court that there had been no breach of the condition subsequent is amply supported. The evidence shows that prior to her marriage to Ruhlman in October of 1942 Mrs. Ruhlman, who had been married before, had lived for over 34 years in a large home in San Mateo which now belongs to her. She did not want to live in San Francisco and preferred to maintain her home in San Mateo. Defendant maintained his home in San Francisco, where his business was located. Defendant testified that after his marriage in October, 1942, and up to the time of trial (November, 1943), he spent a couple of nights a week with his wife at her San Mateo home, but that he spent over 75 per cent of his time in his San Francisco home; that his wife would occasionally visit him in his San Francisco home and occasionally would spend the night there. Defendant estimated that in the year prior to trial his wife had stayed with him in San Francisco not more than a total of ten days, and never more than two days consecutively. His wife is registered as a voter in San Mateo. Defendant had a housekeeper at his San Francisco home who did the cleaning and cooking, and returned to her own home at night. This housekeeper became ill in February of 1943, and shortly thereafter died. After February, defendant's daughter did most of the cleaning while defendant did the shopping, took care of the laundry, etc. Occasionally his wife would come to San Francisco and cook his dinner. Defendant frankly testified that he ultimately intended to make his home with his wife at her house in San Mateo, but was keeping up his San Francisco residence until his difficulties with plaintiffs were settled.

[2] It is clear that there has been no breach of the condition contained in the deed. The exact words of the deed are that the life estate shall continue only as long as "the said grantee * * * shall personally reside upon, occupy and use said premises as his permanent abode or residence and shall permit no person or persons to share with him such use and occupancy * * *." It is quite obvious that the phrase "such use and occupancy" refers back to "permanent abode or residence," and that to constitute a violation of the condition defendant would have to share his residence with a member of the prohibited class who made the house his or her "permanent abode or residence." It is equally clear that Mrs. Ruhlman did not make the San Francisco home her "permanent abode or residence." It must be remembered that the law does not favor forfeitures and that a forfeiture will be enforced only where no other interpretation is reasonably possible. Section 1442 of the Civil Code provides: "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." See cases collected 6 Cal. Jur. p. 362, § 218. Even without the benefit of this salutary rule of construction it is quite obvious that the condition here under construction was not intended to apply to the intermittent use of the premises by one of the prohibited class, but only intended to apply to one of the prohibited class making the home his or her "permanent" home in the sense that one normally speaks of a particular house being his permanent home or residence.

[3, 4] Plaintiffs urge that under the provisions of §§ 243 and 244 of the Government Code, St.1943, p. 901 (formerly § 52 of the Political Code) the residence of a wife follows that of her husband and there can be but one residence which is that of the husband. It is therefore argued that, regardless of what Mrs. Ruhlman actually did or intended, as a matter of law, her residence followed that of her husband. The statement of the contention contains its own refutation. It is obvious that the condition in the deed was aimed at preventing a member of the prohibited class from making the San Francisco house his or her permanent abode or residence in the

sense that such person was prohibited from physically occupying the house as his or her permanent home. The sections of the Government Code referred to above define the concept of "domicile" rather than the concept of "residence" as that term is used in the deed. It is elementary that a person may have a residence separate from his domicile. See cases collected 9 Cal.Jur. p. 832, § 2. Those sections have no application at all to the problem here presented.

[5] Plaintiffs also contend that the document of October 9, 1936, is void and did not create any legal life estate in defendant at all. This contention was not raised by the pleadings, nor was it urged in the trial court. In fact, it is contrary to the theory upon which the pleadings are based and upon which the case was tried. The theory below was that the life estate created by the document of October 9, 1936, was forfeited by the breach of the condition subsequent when defendant got married and permitted his wife to stay on the premises with him. The assumption below was that the life estate was validly created and lasted until terminated by the alleged breach. Now plaintiffs urge that the life estate was void ab initio. This all too frequent practice of trying a case on one theory and then urging a completely different theory on appeal has frequently been condemned by the courts as being manifestly unfair to the litigants and to the lower court. See cases collected 2 Cal.Jur. p. 234, et seq., §§ 67 and 68. This court would be justified for this reason alone in refusing to pass upon the point. However, inasmuch as there is no merit in the contention, and inasmuch as the parties have briefed the point, the ends of justice will best be served by disposing of the point so as to put the contention at rest and thus prevent future litigation.

[6, 7] The contention is that the document of October 9, 1936, is testamentary in character, and since it was not executed as a will, it is ineffective for all purposes. In this connection reliance is placed upon the fact that under the document Ruhlman's right of possession did not accrue until the death of Josephine Wester. A reading of the document quoted above demonstrates that what the grantor did was to give to the grantee a life estate in the property, use and occupancy by the grantee to commence on her death, thereby reserving to herself a life estate. It is well settled that in this state, contrary to the early common law rule, a grantor may reserve to herself a life estate and grant a freehold to commence in the future. This is expressly recognized by §§ 767 and 773 of the Civil Code. See cases collected 9 Cal.Jur. p. 280, § 148; 9 Cal.Jur. p. 332, § 194.

[8] Plaintiffs also point out that the grantor reserved to herself the right to revoke the deed any time prior to her death, it being urged that this makes the document testamentary in character. This contention is without merit. If a document purports to make a present conveyance of a future interest, the reservation of the power to revoke it does not destroy its effect as a present conveyance nor make the document testamentary in character. Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 P. 242; Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St.Rep. 43; see discussion and cases collected 9 Cal.Jur. p. 103, § 10; 9 Cal.Jur. p. 328, § 192.

[9-11] Plaintiffs also contend that, when read as a whole, the document does not purport to effect an immediate transfer of a life interest. A reading of the document demonstrates that this contention is unsound. Emphasis is placed upon the fact that the document "grants no remainder after the so-called life estate." This is of no importance. There is no principle of law that requires the disposition of the remainder interest in property by the same document creating the life estate, or that prohibits the disposition of a life estate by deed and the remainder by will. Plaintiffs also call attention to the fact that the document refers to the duty of her legatees to make repairs and pay the taxes, and urge that this demonstrates that the document is testamentary in character because it imposes duties on the legatees. That is not a proper interpretation of the document. It is clear that the reference to taxes and repairs measures the extent of the grantee's rights in the property and grants no rights or imposes no duties on legatees. The clause in question simply grants to the grantee a life estate free from the burden of paying taxes or repairs—it measures the extent of the estate that the grantor parted with, and the extent of the remainder interest retained by her. The deed is valid.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

67 Cal.App.2d 837

PEOPLE v. DAVIS.

Cr. 2340.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1945.

1. Bail ⇐42

Under statute providing that appealing defendant may be admitted to bail as matter of discretion in certain cases, discretion is conferred upon trial court where conviction was had and not upon the appellate courts. Pen.Code, § 1272.

2. Bail ⇐42
Criminal law ⇐1148

The discretion lodged in trial court to admit to bail a convicted defendant should not be arbitrarily exercised, and abuse thereof will be controlled by an appellate court. Pen.Code, § 1272.

3. Criminal law ⇐1148

The trial court's exercise of discretion with regard to admitting to bail a convicted defendant will not be disturbed except for manifest abuse or where some extraordinary circumstance has occurred since the trial which tends to show his innocence. Pen.Code, § 1272.

4. Bail ⇐44

An application for bail pending appeal from conviction of grand theft accompanied by affidavit showing that accused had never been convicted of crime before and that members of his family were of good reputation would be denied where report of probation officer recited that accused had been employed for some eleven years and that almost from the start of his employment had systematically stolen merchandise from his employer. Pen.Code, §§ 1247k, 1272; Rule 32(b) of the Rules on Appeal.

Application from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

George W. Davis was convicted of grand theft, and he applied for an order admitting him to bail pending his appeal from the conviction.

Application for bail pending appeal denied.

Edgar C. Levey and Walter H. Duane, both of San Francisco, for appellant.

Edmund G. Brown, Dist. Atty., and James F. Brennan, Deputy Dist. Atty., both of San Francisco, for respondent.

PETERS, Presiding Justice.

Petitioner, George W. Davis, has been convicted of grand theft. His appeal is now pending. By this application he seeks from this court an order admitting him to bail pending the appeal. Such an application was first made to the trial court, and was there denied. That court also denied his petition for probation. The application recites the conviction and the taking of the appeal, and then alleges that the denial of bail by the trial court was unjustified and an abuse of discretion. In this connection it is averred that petitioner has been a resident of San Francisco all his life; that prior to his present difficulties he was a man of good repute; that he is married and his family and other relatives live in San Francisco; that all of them are persons of good reputations; that the criminal charge of which petitioner stands convicted was his first offense; that from the time of his arrest to the date of his conviction he was admitted to bail and during such period did not violate the conditions of his bail; that petitioner has been found guilty of stealing from his employer $9,399.65. In connection with the present application there also has been filed an affidavit of merits which, it may be conceded, demonstrates that the appeal is not frivolous. The district attorney opposes the application, urging that the trial court acted well within its discretion in refusing bail. The report of the probation officer which was before the trial court, and upon which the district attorney relies, recites that petitioner had been employed by a dry goods company as a salesman from 1933 to 1944; that almost from the start of his employment he had systematically stolen goods and merchandize from his employer and resold them to retail merchants who were customers of his employer; that his thefts totaled over $40,000. It also appears that after his conviction petitioner restored $4,128.14 to his employer by way of restitution.

The showing thus made falls far short of that required. Section 1272 of the Penal Code provides that:

"After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:

"1. As a matter of right, when the appeal is from a judgment imposing a fine only.

"2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor.

"3. As a matter of discretion in all other cases."

Rule 32(b) of the Rules on Appeal (see section 1247k, Penal Code) provides: "An application to the reviewing court for bail or to reduce bail on an appeal pending therein shall be made on such notice to the district attorney and the attorney general as the court may determine, and shall include a showing that proper application for bail or a reduction of bail was made to the superior court and that such court unjustifiably denied the application."

[1-4] It always has been the law in this state that the discretion referred to in section 1272 of the Penal Code, supra, is a discretion conferred upon the trial court where the conviction was had, and is not a discretion conferred upon the appellate courts. Ex parte Turner, 112 Cal. 627, 45 P. 571; Ex parte Smith, 89 Cal. 79, 26 P. 638; Ex parte Brown, 68 Cal. 176, 8 P. 829; People v. Marshall, 59 Cal. 386; People v. Hall, 131 Cal.App. 486, 21 P.2d 455; In re Ephraim, 73 Cal.App. 104, 237 P. 801; Frankfort v. Superior Court, 71 Cal. App. 357, 235 P. 60; People v. Eiseman, 69 Cal.App. 143, 230 P. 669; People v. Schwarz, 79 Cal.App. 98, 248 P. 1043. Of course, such discretion should not be arbitrarily exercised, and an abuse thereof will be controlled by an appellate court. Ex parte Smallman, 54 Cal. 35; Ex parte Hoge, 48 Cal. 3. The discretion being vested in the trial court where the conviction was had, its exercise by that court will not be disturbed except in an instance of manifest abuse, or where some extraordinary circumstance has occurred since the trial, such as the illness of the defendant, or after discovered evidence which tends to show his innocence. In re Burnette, 35 Cal.App.2d 358, 95 P.2d 684; People v. Yant, 26 Cal.App.2d 124, 78 P.2d 1042; In re Albori, 95 Cal.App. 42, 272 P. 321; In re Pantages, 209 Cal. 535, 291 P. 831; see many cases collected and commented on 3 Cal.Jur. § 9, p. 1034; § 10, p. 1036. Rule 32(b) above quoted in no way changes the rule of these cases. No showing of any intervening circumstance has been here made.

The rule in other jurisdictions, as contended by petitioner, may be that such applications will be granted almost as a matter of course. Particularly is that so in jurisdictions where the only method by which execution may be stayed is by admission to bail. But in this state execution may be stayed by a writ of probable cause, the issuance of which writ is governed by entirely different rules than those governing applications for bail after conviction.

The application for bail pending appeal is denied.

KNIGHT and WARD, JJ., concur.



67 Cal.App.2d 812

OLDS v. GENERAL ACC. FIRE & LIFE ASSUR. CORPORATION, Limited, et al.

Civ. 12581.

District Court of Appeal, First District, Division 1, California.

Feb. 6, 1945.

Rehearing Denied March 8, 1945.

Hearing Denied April 5, 1945.

1. Limitation of actions ⇐14

Contract provisions shortening the normal statute of limitations are valid between the parties, if reasonable, and one year is not, as between the parties, an unfair period of limitations. Code Civ.Proc. §§ 336–338.

2. Limitation of actions ⇐1

Statutes of limitation, in their conclusive effect, are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. Code Civ.Proc. §§ 336–338.

3. Limitation of actions ⇐1

The theory of statutes of limitation is that, even when one has a just claim, it is unjust not to put adversary on notice to defend within period, and that right to be free of stale claims in time comes to pre-

vail over right to prosecute them. Code Civ.Proc. §§ 336–338.

4. Insurance ⇐146(3)

The primary function of insurance is to insure, and, when claims are honestly made, care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits.

5. Insurance ⇐622(1)

Provision, in automobile liability policy, that no action shall be brought to "recover" for any "loss under this policy" unless brought within one year after right of action accrues, was a limitation upon assured's right of action, but not a limitation on right of injured person to sue on judgment recovered against assured. St.1919, p. 776.

See Words and Phrases, Permanent Edition, for all other definitions of "Loss Under this Policy" and "Recover".

6. Insurance ⇐622(1)

Provision in automobile liability policy limiting right of action thereon to one year from time right of action accrues, if intended to be applicable to injured party, was invalid as in conflict with statute conferring rights on such injured party. St. 1919, p. 776.

7. Insurance ⇐591½

The cause of action created by statute in favor of injured party as against automobile liability insurer is not absolute, and, if insurer can defend against assured on ground that policy did not cover the loss, it may defend on the same ground against injured third person. St.1919, p. 776.

8. Insurance ⇐591½

Automobile liability policy provisions seeking to limit the statutory right created in injured party are ineffective to defeat the cause of action created by statute. St. 1919, p. 776.

9. Insurance ⇐246

After an accident has occurred, assured under automobile liability policy and insurer cannot enter into an agreement to cancel policy so as to cut off rights of injured person. St.1919, p. 776.

10. Insurance ⇐591½

Statute giving injured third person right to sue automobile liability insurer, after first securing judgment against assured, makes the injured person a third party beneficiary of the policy. St.1919, p. 776.

11. Insurance ⇐591½

Statute creating right of action in injured third person against automobile liability insurer, subject to terms of the policy, means that if, at time third party secures judgment, because of some act of assured the policy does not cover the accident, the third person has no greater rights than the insured and cannot recover. St. 1919, p. 776.

12. Insurance ⇐622(1)

Where automobile liability policy was in effect on date injured third person recovered judgment against assured, and on that date insurer would have had no defense to any action brought by assured and injured party's statutory right against insurer attached, policy provision requiring action thereon to be brought within one year did not affect injured party's right to bring action within period fixed by applicable statute of limitations. St.1919, p. 776; Code Civ.Proc. §§ 336–338.

13. Insurance ⇐629(1)

In action against automobile liability insurer to recover on judgment against assured, where complaint alleged that a purported assignee of such judgment, who was made a defendant, had no rights in the judgment and that a reassignment thereof had been made of plaintiff, and court found that plaintiff at time of commencement of action was owner of the judgment, assignee's reassignment and waiver did not establish plaintiff's lack of interest in judgment at time action was brought thereon, so as to require filing of a supplemental complaint after reassignment.

14. Insurance ⇐591½

The statutory rights acquired by injured third person against automobile liability insurer are assignable and such assignee may maintain the action against insurer. St.1919, p. 776.

15. Executors and administrators ⇐49

Action against automobile liability insurer, brought after obtaining judgment against insured, could be maintained by the personal representative of the deceased judgment creditor. St.1919, p. 776.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Walter K. Olds, executor of the last will and testament of William Kingston, deceased, against the General Accident Fire & Life Assurance Corporation, Limited, and another, on an automobile liability policy. From a judgment for plaintiff, the defendant insurance company appeals.

Affirmed.

Myrick & Deering & Scott and James Walter Scott, all of San Francisco (James Walter Scott, Jr., of San Francisco, of counsel), for appellant.

Jerome L. Schiller, of San Francisco, for respondent.

PETERS, Presiding Justice.

On November 3, 1932, the appellant company issued an automobile liability policy to Helmut Hardt covering a specified automobile. On October 23, 1933, Hardt, while driving the automobile in question, injured William Kingston. In March of 1934 Kingston sued Hardt for the injuries so received. In that action Hardt was defended by appellant company pursuant to the terms of the policy. In June of 1935 Kingston secured a judgment against Hardt for $7,500 and costs. The insurance company appealed, and the judgment was affirmed. Kingston v. Hardt, 18 Cal.App. 2d 61, 62 P.2d 1376. The judgment became final February 10, 1937. Prior to the date of the final judgment, and on October 18, 1936, Kingston died. Sometime after the date of the final judgment Hardt left this country. On January 10, 1938, the respondent, Walter K. Olds, was appointed executor of the last will and testament of Kingston. On March 8, 1938, one year and twenty-six days after the date of the final judgment, this action was commenced against appellant insurance company as insurer of Hardt. The main question presented on this appeal is whether this action is barred by a provision in the insurance policy requiring actions to recover losses thereunder to be brought within twelve months of the date of the final judgment against the assured. The trial court held that the provision in question was not applicable to actions brought by the injured third party, and gave judgment against the company for the face amount of the policy. From this judgment the insurance company appeals.

The policy in question is the usual automobile liability policy. Under the heading "Provisions" there are eleven express conditions lettered A through K. Provision A fixes the limits of the financial responsibility of the company; Provision B refers to "Additional Assureds"; Provision C contains certain "Exclusions"; Provision D deals with the duty of the assured to notify the company of accidents and to cooperate with the company in the defense of actions brought against the assured. Provision E is the one directly involved. It reads:

"E. Right of action. No action shall lie against the Corporation to recover for any loss under this policy, unless it shall be brought after the amount of such loss shall have been fixed or rendered certain by final judgment against the Assured after trial of the issue. In no event shall any such action lie unless brought within Twelve months after the right of action accrues as herein provided, except, however, in the event that any statutory provision provides for a definite minimum period, then the statutory minimum provision shall govern, irrespective of Provision I of this policy.

"Bankruptcy or Insolvency of Assured. The Corporation is bound to the extent of its liability under this policy to pay and satisfy and protect the Assured against the levy of execution upon any final judgment that may be recovered upon any claim covered by this policy as in the policy set forth and limited and an action may be maintained upon such judgment by the injured person or persons or such other party or parties in whom the right of action vests to enforce such liability of the Corporation as in the policy set forth and limited."

This last sentence is one of the few places in the policy where the rights of injured third persons are specifically referred to.

Provision F provides that if the company pays any loss under the policy, the company shall be subrogated to the rights of the assured to the extent of such payment. Provision G refers to the effect of the assured carrying other insurance, while Provision H provides how the policy may be canceled. Provision I, specifically referred to in Provision E above quoted, reads as follows:

"I. Statutory Provision. If any of the provisions or conditions of this policy shall conflict with or are inconsistent with the law of the State where this contract is en-

tered into, then such provisions and conditions shall be inoperative in such State and the State law shall prevail."

Provision J deals with waivers, while Provision K provides that the declarations of the assured are made a part of the policy and warranted by the assured to be true.

In addition to the provisions of the policy there is a statutory provision that must be considered in determining the proper solution of the problem here involved. Prior to 1919, injured third persons had no rights at all against the insurance company writing the policy covering the tort feasor. In that year the legislature enacted a statute giving the injured third person certain definite rights against the insurance company writing the policy carried by the negligent tort feasor. Stats. of 1919, p. 776, Chap. 367. This statute was in effect in 1932 when the present policy was written, and in 1933 when the accident occurred. So far as pertinent here it provides: "No policy of insurance against loss or damage resulting from accident to, or injury suffered by another person and for which the person insured is liable * * * shall be issued or delivered to any person in this state by any domestic or foreign insurance company, authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person or his heirs or personal representatives, in case death resulted from the accident, then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person, his heirs or personal representatives as the case may be, to recover on said judgment. Upon any proceeding supplementary to execution, the judgment debtor may be required to exhibit any policy carried by him insuring against the loss or damage for which judgment shall have been obtained." In 1935 (Stats. of 1935, p. 496, Chap. 145) the provisions of this statute were embodied substantially into the Insurance Code (Stats. of 1935 at p. 716), and are now to be found in §§ 11580 and 11581 of that code.

The specific problem we are here concerned with is whether Provision E, above quoted, operates so as to bar an action brought by the injured third person more than one year after such person secures a final judgment against the assured. In reality this presents two separate problems, the first, whether Provision E, properly interpreted, applies to actions by the injured third person; the second, if it does, then does such provision violate the statute of 1919 above quoted?

[1] We have no doubt that provisions in a contract shortening the normal statute of limitations are valid between the parties, if reasonable, and that one year is not, as between the contracting parties, an unfair period of limitation. Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. 2d 748, 117 P.2d 669; Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501; Beeson v. Schloss, 183 Cal. 618, 192 P. 292. We therefore start the discussion of both questions above referred to with the assumption that had Hardt paid this judgment his action against the company to recover his loss, under Provision E, would have been barred after one year from the date of the final judgment in the action of Kingston v. Hardt. That assumption, however, is not necessarily conclusive on the questions as to whether Provision E was intended to apply to actions by the injured third person against the insurance company, or whether the assured or the insurance company can contract legally to reduce the statutory right given the injured third person by the 1919 statute.

[2-4] Before discussing either the question of interpretation or the question of legality, the fundamental purpose of statutory or contractual limitation provisions must be kept in mind. In the recent case of Order of Railroad Telegraphers v. Railway Express Agency, 1944, 321 U.S. 342, 64 S.Ct. 582, 586, 88 L.Ed. 788, it is stated: "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to pre-

vail over the right to prosecute them." In determining whether Provision E bars the injured third person from asserting his statutory conferred right, the above mentioned fundamental policy must be kept in mind. In the instant case the insurance company knew of the claim and defended against it. It had full knowledge of the rendition of the judgment against Hardt and appealed from it. It has received the premium to cover this particular risk. To enforce the short contractual period of limitations against the injured third person, who had no freedom of contract, would not be within the policy or spirit above set forth. As Mr. Justice Traynor aptly stated in considering a somewhat similar problem: "While courts are diligent to protect insurance companies from fraudulent claims and to enforce all regulations necessary to their protection, it must not be forgotten that the primary function of insurance is to insure. When claims are honestly made care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits." Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 154 P.2d 399, 403.

[5] We turn first to the question of interpretation involved. It will be noted that the insurance policy is between Hardt and the company, its primary purpose being to insure Hardt against liability in the event he injures a third person. The provisions A through K, for the most part, are obviously intended to govern the respective rights of the contracting parties. Whenever the rights of third persons are affected, that fact is specifically noted. Thus the second paragraph of Provision E above quoted expressly confers upon "the injured person or persons" a right to maintain an action under certain circumstances against the company. There is nothing said in that paragraph that such action must be brought within one year from the date of the final judgment against the assured. To arrive at that interpretation there must be read into the second paragraph of Provision E, the first paragraph of that Provision. The exact words used in that first paragraph seem to exclude the thought that they were intended to apply to actions by third persons. The pertinent words are "No action * * * to recover for any loss under this policy" shall be brought against the company, etc. The words "recover" and "loss under this policy," in their normal connotation, would seem to refer to actions by the assured after he has paid the judgment. The injured third person does not suffer a "loss under this policy" nor is his action to "recover" such loss. He has suffered injuries as the result of the negligence of the assured. He has a final judgment against the assured. The only reason he can sue the insurance company on that judgment is by reason of the 1919 statute, and the provision of the policy inserted pursuant thereto, to the effect that the injured person may maintain an action "upon such judgment." That does not appear to be an action to recover a "loss" under the policy. The word "recover" adds further weight to the thought that the first paragraph of Provision E only applies to actions brought by the assured after he has paid a judgment against him. Such an action is obviously to "recover" for a "loss under this policy." But an action by the injured third person is not to "recover" a loss under the policy, but an action to be reimbursed for damages suffered, the amount thereof having been fixed by final judgment. According to Webster's New International Dictionary (2d Ed.), the primary meanings of the word "recover" are: "To get or obtain again; to get renewed possession of; to win back; to regain, as lost property, territory, appetite, health, courage." Manifestly, a person who has been injured does not fall within such definition—he does not get back or regain a loss under the policy. It would appear that, if the words of the first paragraph of Provision E be given their normal meaning, and keeping in mind the elementary rule that ambiguous provisions of an insurance policy should be construed against the insurance company, but one intent has been expressed by that provision, namely, that Provision E was intended as a limitation upon the right of Hardt, the assured, to recover for any loss he might suffer that was covered by the policy, and was not intended as a limitation on the rights of the injured third person given him by the statute of 1919 to sue the company on his judgment.

This interpretation is fortified by Provision I which provides that if the provisions of the policy shall "conflict with or are inconsistent with the law of the State * * * then such provisions and conditions shall be inoperative * * * and the State law shall prevail." When the statute of 1919 created the cause of action

in favor of the injured party against the insurance company, the state statute of limitations was of course impliedly a part thereof. If a statutory liability was thus created the period of limitations would be three years (§ 338, Code Civ.Proc.); if the action is upon an agreement in writing, on the theory that the injured person is a third party beneficiary, the period would be four years (§ 337, Code Civ.Proc.); while if the action is upon a judgment, the period would be five years (§ 336, Code Civ.Proc.). Obviously, a one-year contract provision is inconsistent with these statutory periods, and under the terms of the policy should give way thereto.

This difference in treatment between an action by the assured to recover a judgment paid by him, and an action by the injured third person to recover on his judgment, is based on logical differences in the relationships involved. When the assured is sued and a judgment secured against him, which he pays, he knows that he has suffered a loss and that he is insured against that loss. But when the injured third person sues the tort feasor he does not know, and has no legal way of knowing, whether the tort feasor is insured, or even if he does learn of that fact, he does not necessarily know with what company, or what the terms of the policy may be. He can learn these facts, legally, only after securing a final judgment against the tort feasor in proceedings supplementary to execution. Where, as in the instant case, the judgment debtor has not only left the state but also the United States, it would be practically impossible, legally, to ascertain the facts within the twelve-month-period. For this reason, while it is quite reasonable for the assured to be limited by the contract to one year after final judgment to bring his action, it would be quite unreasonable to limit the injured third person to that period. Thus the interpretation above suggested is not only in accord with the literal meaning of the actual words used in the policy, but is based on reasonable grounds of distinction in the rights of the two classes of persons.

[6, 7] Independently of the question of interpretation, and assuming that Provision E was intended to apply to actions on judgments brought by injured third persons, it is our opinion that any attempt by the assured and the company to limit the rights conferred on such third persons by the 1919 statute is invalid. The 1919 statute has been before the courts of this state for interpretation many times since it was passed. That statute, it will be remembered, conferred upon the injured third person the right to sue the company insuring the tort feasor, after first securing a final judgment against the tort feasor, regardless of the bankruptcy or insolvency of the tort feasor, but subject to the "terms and limitations" of the policy. The question that has been presented in most of the cases is what "terms and limitations" of the policy are applicable to the injured third person. It is now well settled that the cause of action created by the statute is not absolute, and that if the insurance company could defend against the assured on the ground that the policy did not cover the loss it may defend on the same ground against the injured third person. Thus, if the assured has made false representations in his application for the insurance, if the automobile is being used in violation of the terms of the policy, if an unlicensed person is operating the car, if the car is being used for an illegal purpose, if the assured fails to give reasonable notice of the accident or fails to cooperate with the insurance company in the defense of the action—in all such cases the insurance company may defend the action brought by the injured third person on these grounds. Hynding v. Home Accident Ins. Co., 214 Cal. 743, 7 P.2d 999, 85 A.L.R. 13; Western Mach. Co. v. Bankers Indemnity Ins. Co., 10 Cal.2d 488, 75 P.2d 609; Purefoy v. Pacific Automobile Indemnity Exchange, 5 Cal.2d 81, 53 P.2d 155; Valladao v. Fireman's Fund Indemnity Co., 13 Cal.2d 322, 89 P.2d 643; Sears v. Illinois Indemnity Co., 121 Cal.App. 211, 9 P.2d 245. These cases all establish the proposition that, as to such defenses, the injured third person stands in the shoes of the insured tort feasor, that he gets no greater rights than the tort feasor would have had had he paid the judgment and was bringing the action, and that, if the tort feasor could not recover, neither can the injured third person. In this sense the insured third person gets his statutory right subject to the "terms and limitations" of the policy. In such a case it is proper to deny relief to the injured third person because if any of the defenses above enumerated exist, the third person is not covered by the policy. It would be unfair to impose on the insurance company a risk it did not assume, and for which it received no premium.

[8] Concurrently with the above cited cases there have been a series of cases where the courts were dealing with an entirely different kind of defense on the part of insurance companies—a defense that arose after the cause of action had come into existence in favor of the injured third person—that is, after a final judgment had been secured against the insured tort feasor. Insurance companies have attempted by contractual provisions between themselves and the assured to limit the statutory right created by the 1919 statute. Quite uniformly, and quite properly, the courts have held that defenses based on such provisions are ineffective to defeat the cause of action created by the statute.

Thus the insurance companies attempted to insert in their policies a provision that the return of execution unsatisfied was a condition precedent to the bringing of the action by the injured third person. This was the situation in Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29, 255 P. 512. The court held that such provision was an unlawful limitation on the right created by the statute, and for that reason unavailable as a defense. In this connection the court stated, 201 Cal. at page 33, 255 P. at page 513: "The substantive law of this state cannot be enlarged, circumvented, defeated, or modified by any provision which the insurer may have elected to place in its contract in derogation of or in conflict therewith. The statute is founded upon principles of public policy, and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed, or defeated by the private agreements of two of the parties to a triparty contract. If appellant's contention be sound, then it could, with equal justification, require the question of the assured's bankruptcy to be adjudicated by a competent tribunal before it would be obliged to recognize his insolvency or bankruptcy, or impose other conditions precedent to the injured person's right of action in derogation of express provisions of the law's mandate. We see no merit in the contention. * * * The clause in the statute which provides that an 'action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person,' was not intended to defeat its purpose upon the theory that an action brought 'on the policy' binds the injured person to a repudiation or waiver of the benefits of the statute expressly adopted for his protection, but it clearly has reference to those matters concerning which the insurer and assured could legally contract." The above language was quoted with approval in Hynding v. Home Accident Ins. Co., 214 Cal. 743, 747, 7 P.2d 999, 1000, 85 A.L.R. 13, where the court stated: "We are satisfied that the position taken by us in this decision [the Malmgren case] is sound and reasonable * * *." At page 752 of 214 P. at page 1002 of 7 P.2d, 85 A.L.R. 13, the court stated: "The proviso that the action is subject to the terms and limitations of the policy, if it means anything, means that the right of action is not absolute, but that there are some defenses available to the company. Of course, no defense can be set up which defeats the statutory object * * *." The same rule has been applied in other cases, and in others the Malmgren case has been cited with approval. Marple v. American Automobile Ins. Co., 82 Cal.App. 137, 255 P. 260; Pigg v. International Indemnity Co., 86 Cal.App. 671, 261 P. 486; Bryson v. International Indemnity Co., 88 Cal.App. 100, 262 P. 790; Bias v. Ohio Farmers Indemnity Co., 28 Cal.App.2d 14, 81 P.2d 1057; National, etc., Co. v. Industrial Accident Comm., 29 Cal.App.2d 336, 84 P.2d 201; Van DerHoof v. Chambon, 121 Cal.App. 118, 8 P.2d 925. In the Pigg case, supra, the court expressly held that if the terms of the 1919 statute and the terms of the policy conflict, the terms of the statute control. In the Bias case, supra, 28 Cal.App.2d at page 16, 81 P.2d at page 1059, this court interpreted the Malmgren and Hynding cases, supra, as holding: "that the effect of the statute above referred to * * * is to create a contractual relationship which inures to the benefit of any person who might be negligently injured by the insured, as completely as if such injured person had been specifically named" therein. In the National, etc., Co. case, supra, it was held that the statutory provisions prevail even if contrary to the terms of the policy. In the Van DerHoof case, 121 Cal.App. at page 130, 8 P.2d at page 930 the court interpreted the Malmgren case as holding "that the statute creates a contractual relation in every indemnity insurance policy which inures to the benefit of any person who might be negligently injured by the assured. Then what was actually held in that case was that when a

person had complied with the statute of 1919, supra, and obtained a judgment against the assured who was negligent, that he had a right to sue the insurance carrier and that the requirements of the statute could not be defeated by some requirement in the policy contrary to the statute or not provided for by the statute."

[9] Of course, after an accident has occurred, the insured and the company cannot enter into an agreement to cancel the policy so as to cut off the rights of the injured person. Bachman v. Independence Indemnity Co., 112 Cal.App. 465, 485, 297 P. 110, 298 P. 57; Finkelberg v. Continental Casualty Co., 126 Wash. 543, 219 P. 12.

[10, 11] Now what is to be gathered from these various cases? As I read the cases the courts of this state have thoroughly settled the following three basic propositions:

First: The statute of 1919 conferred upon injured third persons the right to sue the insurance company on the policy after first securing a final judgment against the tort feasor. This right, in legal effect, subject to the condition precedent of securing a final judgment, makes the injured third person a third party beneficiary of the policy.

Second: This statutory right is subject to the "terms and limitations" of the policy, which means that if at the time the injured third party secures his final judgment, because of some act of the assured, such as his fraud, failure to give notice or to cooperate, etc., the policy does not cover that accident, the injured third person has no greater rights than the assured, and cannot recover.

Third: But if at the date the final judgment is secured the policy is in effect and the loss covered, the assured and the company cannot by policy provision in any way limit or place conditions upon the unconditional right of the injured third person to bring his action against the insurance company granted to him by the 1919 statute. Once the right of the injured third person attaches, the assured and the company cannot by policy provision adversely limit or place conditions on the exercise of that right.

[12] Now how do these rules apply to the instant case? On February 10, 1937, the judgment against Hardt became final. On that date Hardt's policy was in full force and effect. On that date the respondent could have sued the insurance company and it would have had no defense. On that date respondent's rights under the 1919 statute and under the terms of the last paragraph of Provision E inserted pursuant to the statute attached. What was the right conferred by the statute? If the statute alone governs, it was the right to sue the company on the judgment within a period of 3, 4 or 5 years, depending upon which statute of limitations is applicable. But, if appellant is correct in its interpretation of Provision E, Hardt and appellant have contracted that this statutory right must be enforced within one year. In other words, the insurance company is contending that by contract with Hardt it could lawfully reduce this statutory right of respondent good, under the statute for at least three years, to a much smaller right, namely, a right which must be enforced in one year. This falls directly within the prohibition of the Malmgren and other cases cited, supra. The injured third person has no freedom of contract as did Hardt. His right is given to him and limited by the statute. It would be most unfair and inequitable if the company and the assured could reduce, limit or circumvent that right by attaching limiting conditions to its exercise. If the company can provide the right must be exercised within one year, it can provide other limitations and conditions on the exercise of that right. Yet the Malmgren and other cases cited, supra, correctly held that this could not be done.

Both parties cite cases from other states where this question has been considered. The cases from other states are in hopeless conflict. Some hold that such contractual provisions are binding on the injured third person, while others hold that they are not. Some of them turn upon the wording of particular statutes or policies. No useful purpose would be served by citing or discussing these cases. We think the cases decided in this state interpreting the 1919 statute are conclusive on the question, and that under those cases the company and assured are powerless to contract so as to limit or restrict the right of the third person granted by the 1919 statute. For that reason it is our opinion that if Provision E be interpreted so as to apply to actions instituted by the injured third person, such provision would be invalid as in violation of the statute.

This determination of this question makes it unnecessary to consider respondent's further contention that by a so-called financial responsibility rider attached to the policy the liability of the company became absolute regardless of Provision E.

[13] Appellant makes another contention. It urges that respondent had no legal right to bring this action because, so it contends, Kingston had assigned the judgment to one Vernon Stewart on October 6, 1936. It contends that respondent had no right to bring the action either because it had been so assigned, or if it had been reassigned to respondent, then it urges that the statutory cause of action is not assignable, and that the assignment of the judgment automatically extinguished its liability.

The trial court found that on October 6, 1936, Kingston signed a document which by its terms assigned to Stewart for a recited consideration of $200, all of Kingston's right, title and interest in and to the judgment. The court also found, however: "That prior to the commencement of this action the said Vernon Stewart did execute to the plaintiff herein a release of any and all claims to the said judgment or any part thereof, and did waive any right to participate in the proceeds of the aforesaid judgment and did reassign to the plaintiff herein any right, title or interest the said Vernon Stewart may have acquired by reason of the document" above referred to. The court therefore found that respondent, as executor of Kingston's estate, was, "at the time of the commencement of this action and now is the owner and holder of said judgment."

The record amply supports these findings. Prior to the commencement of this action Stewart signed a comprehensive release by which he released to Kingston and to his estate all claims he might have, past, present or future. This document did not specifically refer to the Hardt judgment, but it is broad enough to include it if the parties so intended. Appellant, however, urges that it did not reassign to Kingston or to his estate any rights acquired under the assignment.

That the release was apparently intended to include the judgment is shown by the following facts: The complaint was filed by respondent on March 8, 1938. In that complaint Stewart was joined as a defendant. The complaint alleges: "That prior to the death of said William Kingston, the said William Kingston executed a purported assignment of said judgment or an interest therein aforementioned to the defendant Vernon Stewart. That prior to the commencement of this action said Vernon Stewart did execute to the plaintiff herein a release of any and all claims to said judgment or any part thereof and did reassign to plaintiff herein any right, title, or interest he may have acquired by reason of said assignment aforementioned."

It is thus obvious that respondent, as executor of Kingston's estate, on the date the complaint was filed, claimed to be the owner of the judgment, was challenging the validity of the purported assignment, and was urging that the release by Stewart had acted as a reassignment to Kingston's estate of any rights Stewart might have in the judgment.

Stewart filed no answer. On the second day of the trial, which took place in June of 1939, Stewart assigned to respondent his right, title, and interest in the judgment. In addition, Stewart's counsel appeared at the trial and waived any interest Stewart might have in the judgment.

Appellant argues that under these facts respondent's rights in the judgment did not accrue until the reassignment by Stewart in June of 1939, and that therefore when the action was filed respondent had no interest in the judgment. Appellant urges that respondent should have filed a supplemental complaint after the reassignment and that to fail to do so was prejudicial error.

The point is technical, and without merit. It is quite apparent that respondent when he filed the complaint claimed to own the judgment and joined Stewart as one who had asserted a claim to it. Stewart promptly renounced any claim to the judgment. The fact that such renunciation took the form of a "reassignment" and waiver does not, as a matter of law, determine that respondent's rights in the judgment accrued on that date. Respondent fully and fairly disclosed in his complaint that he and another were claiming rights in the judgment. One of the claimants admitted he had no rights. The insurance company's only interest is not to have to pay the judgment twice. It is fully protected against that contingency. To decree a forfeiture of respondent's rights because he accepted a "reassignment," without having his claimed existing rights litigated, would be inequitable and unfair and

would directly violate the reasoning and holding in Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 154 P.2d 399. The point is without merit.

[14] Appellant also urges that since Kingston assigned the judgment to Stewart, at that moment the rights of either Stewart or Kingston against the insurance company were cut off because the statute of 1919 gives no right to assignees to maintain an action on the judgment against the insurer. Aside from the fact that the record is susceptible of the interpretation that respondent was challenging the validity of that assignment and at no time has conceded its validity, and assuming there was an assignment to Stewart and a reassignment to respondent by the so-called release, respondent as assignee may maintain the action. This court has heretofore considered this very point, and in Bias v. Ohio Farmers Indemnity Co., 28 Cal.App.2d 14, 81 P.2d 1057; it held that the rights acquired by the injured third person under the 1919 statute are assignable, and that such assignee may maintain the action. Whatever may be the rule in other states under their particular statutes, in this state the assignee of the judgment may maintain the action against the insurance company.

[15] It is also well settled in this state that the personal representative of the deceased judgment creditor may maintain the action. Pigg v. International Indemnity Co., 86 Cal.App. 671, 261 P. 486; Bryson v. International Indemnity Co., 88 Cal.App. 100, 262 P. 790.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



67 Cal.App.2d 793

PEOPLE v. FEATHERSTONE.

Cr. 2323.

District Court of Appeal, First District, Division 1, California.

Feb. 2, 1945.

1. Criminal law ⇐507(7)

Where evidence disclosed that complaining witness who was a 15 year old boy objected and refused to take part with defendant in his attempted performance of an infamous crime against nature, complaining witness was not an "accomplice" whose testimony required corroboration. Pen. Code, §§ 26, subd. 1, 286, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Sodomy ⇐6

Evidence that defendant's acts had passed the stage of preparation and that an overt act was performed, namely, an effort to penetrate body of 15 year old complainant, established an attempt to commit infamous crime against nature. Pen.Code, § 286.

3. Criminal law ⇐757(4)

Generally, where question of an accomplice arises, trial court should instruct jury touching law of accomplices, and leave question whether witness is an accomplice for decision of jury as a matter of fact. Pen.Code, § 1111.

4. Sodomy ⇐6

If complaining witness in prosecution for attempt to commit infamous crime against nature was not an accomplice, corroboration of his testimony was not necessary. Pen.Code, §§ 286, 1111.

5. Criminal law ⇐757(4)

Where it is not disputed that a witness was an accomplice, trial court should state that fact positively to jury, but where evidence shows that witness was not an accomplice, defendant cannot successfully claim that court should have instructed that he was.

6. Criminal law ⇐757(4)

Requested instruction that where person on whom crime of sodomy was alleged to have been committed was over age of 14 years at time the crime was committed, he was an accomplice, and unless such testimony of the accomplice had been corroborated by independent evidence, jury should acquit defendant, was properly refused, where evidence showed that complaining witness was not an accomplice. Pen.Code, §§ 26, 286, 1111.

7. Criminal law ⇐741(1), 742(1)

Credibility and weight to be given testimony of all witnesses are for jury.

Appeal from Superior Court, San Francisco County; Lile T. Jacks, Judge.

Hornback Featherstone was convicted of an attempt to violate section 286 of the Penal Code, and he appeals.

Affirmed.

J. Maxwell Peyser, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

Defendant was charged by information with violation of Penal Code, § 286. Four prior convictions, three for similar offenses, and one for grand larceny, were also charged. Upon arraignment he admitted the prior convictions, and entered pleas of not guilty and not guilty by reason of insanity. The jury returned verdicts of guilty of "an attempt to violate section 286 of the Penal Code" and "sane at the time of the commission of the offense charged in the information."

The fifteen year old complainant met the appellant, a cook, at the latter's place of employment. The complainant had gone there to see a friend, who introduced him to appellant. Also present at the time were two boys employed as dishwashers. During the conversation which ensued appellant asked the complainant several times whether he knew anything about repairing radios, and asked him to help repair one. The complainant agreed to go to appellant's room, equipped as a bedroom, and the two tinkered with the radio for some time, following which, employing as a ruse that he was formerly a doctor in England, appellant persuaded the complainant to allow him to examine his foot, leg and hip. The latter had undergone an operation on one of his feet, and one leg was shorter than the other, as the result of which he walked with a limp. The sordid details of appellant's endeavors thereafter to commit with the complainant acts made punishable by said Penal Code section—all, as the complainant testified, without his consent and against his will—are revolting and not necessary to be set forth in detail. Suffice it to say that the appellant grabbed the complainant by the hips and attempted to commit the offense denounced in the Code section, and that the complainant protested, said, "don't do that" and "moved way from him." The defendant did not testify, and the cross-examination of the complainant seems to have left the boy's story intact.

Appellant contends that a motion for an advised verdict should have been granted; that the evidence is insufficient to sustain the judgment in that there is no corroboration of the complainant's testimony. Objection is also directed to the refusal to give certain instructions, based primarily upon appellant's theory that the complainant was an accomplice and that his testimony should have been corroborated. All of the points raised on appeal may be settled by determining whether in an offense of this character, where the lone witness is not an accomplice, corroboration is necessary.

Unless the testimony of an accomplice is corroborated by such other evidence as shall tend to connect the accused with the commission of the offense, a conviction may not stand. Penal Code, § 1111. Appellant cites a number of decisions wherein this Code provision was given application. Among them we find People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Reynolds, 26 Cal.App.2d 219, 79 P.2d 150; People v. Heath, 79 Cal.App. 20, 248 P. 1027. The real question in this case is—was the complainant an accomplice? "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Penal Code, § 1111.

[1, 2] The complainant was not under the age of fourteen, and therefore, if otherwise mentally competent, was capable of committing the offense. Penal Code, § 26, subd. 1. However, the uncontradicted testimony, which was believed by the jury, shows that he was imposed upon by appellant, not only in the matter of visiting the room but of permitting an examination of his hip. There is no evidence that by act or gesture he encouraged the appellant. On the contrary, the evidence discloses that he objected and refused to take part with the appellant in the performance of an infamous crime against nature. Penal Code, § 286. No definite rule may be laid down as a test in all cases to determine whether the facts constitute an attempt to commit a particular offense, but the evidence herein shows that the acts of the appellant had passed the stage of preparation and that

an overt act was performed, namely, an effort to penetrate the complainant's body, which act constituted an attempt to commit the crime made punishable by section 286. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383.

Undoubtedly, where the persons participating in an offense of this character do so without compulsion, each is an accomplice of the other, and is liable to prosecution as such. Penal Code, § 31. In such case there is a common intent to unite in the attempt to commit the offense. People v. Stratton, 141 Cal. 604, 75 P. 166; People v. Langdon, 1 Cal.App.2d 287, 36 P.2d 424; People v. Stoll, 84 Cal.App. 99, 257 P. 583.

[3, 4] "When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact." People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 902, 39 L.R.A.,N.S., 704. The court instructed that "An accomplice is * * * one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given" and gave the usual instruction based on Penal Code, § 1111. The evidence accepted by the jury as true demonstrates that the complainant was not an accomplice. People v. Tenner, 67 Cal.App.2d 360, 154 P.2d 9. The trial court could not adjudge him such. People v. Thorn, 138 Cal.App. 714, 33 P.2d 5. If he was not an accomplice, corroboration of his testimony was not necessary. People v. Langdon, supra.

Appellant claims that the court erred in refusing to give certain instructions. Three of such instructions relative to suspicious circumstances and opportunity to commit the crime are covered by given instructions. The three refused are referred to by appellant in his brief merely by number.

[5, 6] One of the proposed instructions noted in the brief reads as follows: "The Court hereby instructs you that it is the law that in prosecution for sodomy where the person on whom the crime of sodomy was alleged to have been committed was over the age of 14 years at the time the crime was committed, that he is an accomplice (sections 26 and 1111 of the Penal Code) and unless such testimony of the accomplice has been corroborated by independent evidence you must acquit the defendant." This instruction would have entirely taken from the jury the right to determine whether the complainant was an accomplice.

In a case where it is not disputed that a witness was an accomplice it may be and in fact has been held that it is the duty of the court to state that fact positively to the jury (People v. Ferlin, 203 Cal. 587, 265 P. 230), but where, as here, the evidence shows that the witness was not an accomplice, it certainly may not successfully be claimed that the court should have instructed that he was. 8 Cal.Jur. § 390, pp. 349, 350; People v. Dillon, 1 Cal.App. 2d 224, 36 P.2d 416; People v. Wilson, 54 Cal.App.2d 434, 129 P.2d 149. Unless the status of the complainant as an accomplice was definitely fixed as a matter of law, the giving of the requested instruction would have been an infringement by the court upon the province of the jury to pass upon questions of fact. People v. Sansome, 98 Cal. 235, 33 P. 202; People v. Brown, 61 Cal.App. 748, 216 P. 58; People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437. The rule is concisely stated in 23 C.J.S., Criminal Law, § 1227, pp. 787, 788:

"Where a witness who testifies for the prosecution is, as a matter of law, an accomplice, the court should so charge. In such case, an instruction defining an accomplice is not necessary.

"Conversely, where, as a matter of law, the witness is not an accomplice, the court does not err in refusing to charge that he is or in refusing to submit such issue to the jury.

"Where it is for the jury to determine whether or not the witness is an accomplice, the court should so charge, and should instruct as to what constitutes an accomplice."

The instructions in the present case, in view of the facts, were favorable to appellant.

[7] During the oral argument appellant attacked the testimony of an expert witness who appeared on the sanity hearing. The credibility and the weight to be given the testimony of all witnesses are matters in the hands of the jury.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

STEVENSON v. SAN DIEGO COUNTY.

Civ. 3350.*

District Court of Appeal, Fourth District, California.

Feb. 8, 1945.

Rehearing Denied Feb. 27, 1945.

Hearing Granted April 9, 1945.

1. Counties ⇐54

Language of resolution by county board of supervisors requiring plaintiff and another to furnish necessary data for application for federal funds to finance remodeling old buildings and construction of new units for county hospital without charge to county, when considered in connection with two contracts entered into by county with plaintiff to render architectural services, was so ambiguous as to authorize construction by the court.

2. Counties ⇐127

Resolution by county board of supervisors requiring plaintiff and another to furnish necessary data for application for federal funds to finance remodeling old buildings and construction of new units for county hospital would not be construed as modifying two earlier contracts entered into by county with plaintiff for architectural services, where data mentioned in resolution was not the same as preliminary work described in the contracts.

3. Counties ⇐129

Where contracts entered into by plaintiff with county for architectural services provided that plaintiff was entitled to receive progress payments as work progressed, reserving right to county to abandon work or any portion of it at any time upon payment of compensation earned up to the time of abandonment, upon abandonment of the contracts, plaintiff's action against county was on the contracts and not for damages for their breach.

4. Counties ⇐127

Where plaintiff, contracting with county for architectural services in connection with remodeling old buildings and construction of new units for county hospital, assisted in preparing application filed by county with federal authorities for project to be taken over by federal agency, and thereafter plaintiff contracted with federal agency as architect on the project at a fixed fee, a novation releasing county from liability on its contract was not established by execution of the federal contract.

* Subsequent opinion 161 P.2d 553.

5. Abandonment ⇐2

An "abandonment" of a known right occurs when there is an intention to abandon it coupled with acts or omissions by which such intent is carried into effect.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

6. Abandonment ⇐2

The characteristic element of "abandonment" is the voluntary relinquishment, and it is in that respect distinguished from other modes by which ownership may be divested.

7. Contracts ⇐256

An abandonment of a contract by consent may be implied from acts of the parties.

8. Contracts ⇐352(6)

The question of whether an agreement has been abandoned is a mixed question of law and fact.

9. Appeal and error ⇐1010(1)

A finding of trial court on question of abandonment of an agreement may not be disturbed on appeal when there is any substantial evidence in the record supporting it.

10. Appeal and error ⇐1078(1)

Generally, appellate courts are not required to hunt out errors in the record that are not argued in the briefs.

11. Appeal and error ⇐1078(1)

The rule that appellate courts are not required to hunt out errors in the record that are not argued in the briefs is for convenience of the court, and where appeal is taken by means of alternative method appellate courts may consider any serious errors that affect the judgment and appear on the face of the record.

12. Counties ⇐129

Evidence supported finding that plaintiff who had contracted with county for architectural services in connection with remodeling of old buildings and construction of new units for county hospital abandoned his claim against county on the contract by thereafter entering into contract with federal agency which took over the project to serve as architect on the project at a fixed fee. Code Civ.Proc. § 1963, subd. 3.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

On rehearing.

Judgment affirmed as modified.

Prior opinion, 152 P.2d 644.

Thomas Whelan, Dist. Atty., Carroll H. Smith, Deputy Dist. Atty., and Frank T. Dunn, Asst. Dist. Atty., all of San Diego, for appellants.

George H. Stone and Monroe & McInnis, all of San Diego, for respondent.

MARKS, Justice.

A rehearing was granted in this case by the court on its own motion after a petition for rehearing had been received too late for filing. It was argued that in reducing the judgment by $15,500 in our former opinion (— Cal.App.2d —, 152 P.2d 644) we had gone beyond the issues made in the pleadings, raised during the trial, and presented in the briefs. We directed that additional briefs be filed on these questions. They have been filed and carefully considered and we have again reviewed the entire record.

This is an appeal from a judgment for $21,539.10 which plaintiff recovered for services as an architect rendered to the county of San Diego under two written contracts, one dated February 15, 1937, and the other January 20, 1939.

Under the earlier contract defendant employed plaintiff to prepare preliminary plans and estimates, and working plans and specifications for the erection of a group of buildings for the county tuberculosis sanatorium on the site of the Vauclain Home in the city of San Diego, and to supervise construction for a fee of 8 per cent of the cost of each building. The Vauclain Home was a part of the county hospital but occupied grounds separate and apart from the main group of buildings.

It was provided that when the preliminary studies for the construction of the buildings and preliminary estimates of costs were prepared they should be submitted to the board of supervisors; that when they were approved, either by signatures of a majority of the board or by a resolution passed by the board, plaintiff would be entitled to receive 1½ per cent of the estimated cost of the buildings. Progress payments were provided for which do not affect this case. It was also provided that should the work, or any part of it, be abandoned the architect would be paid the amount of the progress payments earned up to the time of such abandonment. We will refer to the work done under this contract as the "Vauclain Home" project.

Under the contract of January 20, 1939, defendant employed plaintiff to do similar work in connection with the erection of additions to and alterations of some of the buildings of the San Diego County Hospital also in the city of San Diego. The two contracts were practically identical except that in the second the architect's fee was set at 10 per cent of the cost of construction and alteration. The initial payment was fixed at 2½ per cent of the estimated cost, and progress payments in other percentages. We will refer to the work done under this contract as the "County Hospital" project.

At the times of entering into the contracts it was contemplated that the cost of the construction would be partly financed under federal grants, the federal government contributing 55 per cent of the cost and the county of San Diego 45 per cent. Before beginning the construction of the improvements in question here, the Lanham Act, 55 Stat. 361, Tit. 42, chap. 9, subchap. III, sec. 1531 et seq., U.S.C.A., was passed which authorized the federal government to pay the total cost of such improvements. The financing of the improvements now under consideration was planned under the terms of that act.

Prior to the passage of the Lanham Act plaintiff proceeded to perform his obligations under the first contract. He prepared plans and specifications for three buildings at the Vauclain Home. Two of them were built and he was paid his fees in instalments totaling $19,706.04, the final instalment being paid on December 20, 1939. Nothing further was done concerning additional construction on the Vauclain Home project until well into 1941.

Plaintiff prepared four sets of preliminary plans and studies for the county hospital project. Three of these were never presented to the supervisors but the fourth was presented and approved early in 1939. No contracts were let and on March 27, 1939, plaintiff was paid $600 in settlement of his claim for these services. Between that date and July 14, 1941, plaintiff prepared additional sets of plans for the project, none of which were presented to the supervisors prior to July 14, 1941.

On July 14, 1941, the board of supervisors passed its resolution No. 80 directing that an application be made to the Federal Works Agency, Public Works Administration, for assistance in remodeling old buildings and constructing new units for the county hospital and Vauclain Home, made necessary by activities of the National Defense Program in San Diego. This resolution contained the following: "Be it further resolved that the Clerk of this Board be and is hereby authorized and directed to prepare and file said application on behalf of this Board, and that the District Attorney, County Auditor and Controller, E. L. Freeland, Structural Engineer, and Architect F. W. Stevenson, be and they are hereby authorized and directed to furnish the necessary data and information required in said application, and to assist the Clerk in the preparation and filing of the same, the services of the said E. L. Freeland and the said F. W. Stevenson in this matter to be without charge to the County."

Plaintiff testified that the preliminary plans and estimates had been prepared by him prior to July 14, 1941; that "outside of minor changes and a few things that we added, you know, but they were substantially all prepared. The main buildings were all done before that time." He also testified that he and Mr. Freeland assembled the required data and information and made the necessary estimates therefor from the plans already prepared, subject to changes made necessary to comply with government requirements.

This data and information were placed on the form of application furnished by the government or attached thereto as exhibits. Copies of the modified preliminary drawings were also attached.

The application, with all of the exhibits, was presented to the board of supervisors and approved by formal resolutions passed on August 11 and 15, 1941. This included approval of the preliminary plans and estimates with a description of the character of the work and materials to be used.

If we understand the evidence correctly, the plans called for four new buildings, remodeling two of the existing buildings and the boiler plant in the county hospital project, and for three new buildings in the Vauclain Home project, all at a total estimated cost of $1,057,643.59, including equipment for both projects.

The federal authorities approved the construction of two new buildings and the remodeling of two buildings in the county hospital project, disapproved the other proposed construction there, and disapproved all the proposed construction in the Vauclain Home project. $620,000 was appropriated for the new construction, and $60,500 for the remodeling in the county hospital project, with added appropriations for equipment.

The new construction was all to be done under federal contract and the county of San Diego had no connection with that part of the improvement. The remodeling was done through contracts let by the county of San Diego which had charge of those improvements.

By a contract with plaintiff dated February 10, 1942, the federal authorities employed him to act as architect on the new construction at a fixed fee of $29,760. Plaintiff testified that the preliminary plans and estimates which he prepared under his second contract with the county of San Diego served, with slight modifications, as the preliminary plans and estimates under his contract with the government.

Sometime between August 15, 1941, and the fall of 1942, differences arose between plaintiff and defendant and defendant terminated its contracts with plaintiff and refused to permit him to act as architect for the work of remodeling the two buildings in the county hospital project. The money allotted for this work was expended under the supervision of another architect. Except for the two new buildings and the remodeling, the other proposed work in the county hospital project, as proposed in the application, and remodeling the boiler plant, was abandoned. The construction of the three proposed buildings in the Vauclain Home project was abandoned, although there is some evidence in the record indicating that one building may have been constructed there entirely different in type and design from any of those shown on the plans prepared by plaintiff.

It is the theory of plaintiff, which was adopted by the trial court in its important particulars, that the various portions of the work contemplated in the two contracts between plaintiff and defendant were divisible so that plaintiff became entitled to payment of the initial payments specified on the approval of preliminary plans and estimates by the board of supervisors; that upon formal approval of such plans and estimates on August 11 and 15, 1941, plaintiff became entitled to payment of the follow-

ing sums: $15,500, being 2½ per cent of $620,000, the estimated cost of construction of the two new buildings in the county hospital project; $1,512.50, being 2½ per cent of $60,500, the cost of remodeling the two old buildings in the county hospital project; $1,361.25, being the estimated profit he would have made in other proposed new buildings and remodeling the boiler plant in the county hospital project, had defendant not canceled plaintiff's contract of January 20, 1939; $3,165.35 for his approved preliminary plans and estimates of the proposed buildings in the Vauclain Home project. Judgment was rendered in favor of plaintiff in the sum of $21,539.10, being the total of the foregoing amounts.

As its principal defense defendant argues that the portion of the resolution of July 14, 1941, already quoted, which directed plaintiff and E. L. Freeland "to furnish the necessary data and information" for the application for funds to finance the proposed projects, and provided that their "services in this matter to be without charge to the County", was a modification of plaintiff's two contracts with the county so that he was entitled to no compensation for any of the services rendered by him to the county. It is urged that the language of the resolution was clear and unambiguous and therefore was not subject to construction by the trial court.

[1, 2] We may concede the clearness and lack of ambiguity of the resolution without being able to reverse the judgment on the ground urged. The contracts, which the resolution is claimed to have modified, must be considered with the resolution to determine if their combined terms were clear and unambiguous so as to prohibit interpretation by the trial court. Under the contracts plaintiff was employed to render professional services to "consist of the necessary conferences; the preparation of preliminary studies, working drawings; specifications, large scale and full size detail drawings; * * *" for the projects. The contracts also provided that upon the completion of the preliminary studies for the new buildings and the remodelings, and their approval by the supervisors, plaintiff would be entitled to 2½ per cent in one instance and 1½ per cent in the other of the estimated cost of these improvements. When the language of the resolution is considered in connection with the language of the contracts it becomes uncertain. The resolution only specified that the "necessary data and information" for the application for funds be furnished free of charge. This might easily refer to a small part of the work required of plaintiff in the contracts. The trial court concluded that the data and information mentioned in the resolution was not the same as the preliminary work described in the contracts. This is supported by the evidence of plaintiff who testified that the resolution required the assembling of the data for the application from the plans and estimates already prepared. As the language of the resolution, when considered in connection with that of the two contracts, is uncertain, the trial court was empowered to construe it. We cannot say that the construction placed upon such language by the trial court is unreasonable so we cannot hold the findings on that question unsupported by the evidence. See, Evans v. Citizens National Trust & Savings Bank, 29 Cal.App. 2d 133, 84 P.2d 218; Kautz v. Zurich, etc., Co., 212 Cal. 576, 300 P. 34; Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 270 P. 668.

[3] Defendant argues that the action is for damages for breach of contract; that if plaintiff was entitled to recover at all he could recover nothing more than his prospective profits, instead of the full amount of the earned percentages which he was awarded, except in the one instance already noted.

We cannot agree that the action is for damages for breach of contract. In both contracts plaintiff was employed to perform certain services for defendant. They provided that he was entitled to receive progress payments. Defendant was given the right to abandon the work or any portion of it at any time. On such abandonment it agreed to pay plaintiff the compensation earned up to the time of abandonment. Two and one-half per cent of the estimated cost of construction and remodeling in the county hospital project, and 1½ per cent of the estimated cost of construction in the Vauclain Home project became due and payable to plaintiff on the approval of the preliminary plans and estimates. They were approved by the resolutions of August 11 and 15, 1941. Under the contracts those resolutions fixed plaintiff's right of recovery at that time, although portions of the proposed work were thereafter abandoned and plaintiff was prevented from performing his contract for remodeling the two

buildings in the county hospital project. Thus the action is on the contracts and not for damages for their breach.

This is true, with the exception of two of the proposed four new buildings and remodeling the boiler plant in the county hospital project for which the federal government refused to allot money. By common consent of the parties, this phase of the case seems to have been treated as an action for breach of the second contract between plaintiff and defendant. Defendant does not question this portion of the judgment, if it be held that plaintiff is entitled to recover at all.

This disposes of all the issues in the case except the award of $15,500, being 2½ per cent of $620,000 which the government originally allotted as the cost of the two new buildings, construction of which was originally approved. It follows that the balance of the judgment in the sum of $6,039.10 must be affirmed.

Plaintiff testified that he had prepared preliminary plans and specifications for the new buildings prior to July 14, 1941, when the board of supervisors decided to apply for the allotment of federal funds under the Lanham Act; that he and Mr. Freeland prepared the necessary data for the application and placed it on proper forms; that this data, with the preliminary plans and specifications, were either included in or attached to the application for funds and were presented to the board of supervisors on August 11, 1941, and approved by a resolution then passed. Then they were presented to Louis J. Seckels, the district engineer for the Federal Works Agency.

The preliminary plans and specifications for the new buildings called for multiple story fireproof reinforced concrete structures. Mr. Seckels recommended changes, chiefly in the specifications, by the elimination of scarce materials. The only change he recalled when testifying was the elimination of steel in the windows.

Plaintiff testified he made the suggested changes. The amended preliminary plans and specifications were presented to the board of supervisors and were approved by them by resolution on August 15, 1941.

The application with the preliminary plans and specifications finally reached Washington. Plaintiff testified that other changes were suggested by various officials there and were made by him. The application for the erection of two new buildings in the county hospital project was approved and $620,000 was allotted for the work.

Under date of February 10, 1942, plaintiff signed a contract with the federal government, acting through the Federal Works Agency, Public Buildings Administration, employing him as architect on the proposed project. It was designated as "Docket California 4—914". The architect was to be employed and paid, all contracts were to be left, and all work was to be done under direction of the federal authorities. Even the title to the land on which the buildings were to be erected was acquired by the federal government from the county of San Diego so that the land and buildings would belong to the federal government with the county of San Diego entirely out of the picture in so far as the erection and ownership of the new buildings were concerned. Mr. Seckels testified that this portion of the hospital would be operated and perhaps later acquired by the county under some agreement the terms of which would be fair and equitable.

In the contract of February 10, 1942, employing plaintiff as architect on the project we find the following:

"Article 1. Employment of the Architect.—The Commissioner, acting pursuant to and in accordance with Title 11 of the Act of October 14, 1940 (Public No. 849, 76th Congress) as amended by the Act of June 28, 1941 (Public No. 137, 77th Congress [42 U.S.C.A. § 1541 et seq.]), hereby employs the Architect to perform the necessary professional services hereinafter set forth in connection with the Defense Public Works Project at San Diego, California, and described as follows:

"Construction of two (2) additions to Hospital operated by the County of San Diego, Docket California 4—914, consisting of one addition to provide 140 beds for communicable diseases and the other, to an administration building, to provide 104 beds for general medical, pediatric and obstetrical cases, excluding equipment.

"Article 2. Scope of Contract.—The Architect shall perform all of the professional services necessary for the development of the Project to the satisfaction of the Commissioner or his duly authorized representative, including the following:

"(a) Preliminary Documents.—The preliminary documents shall include a site plan showing the location of each struc-

ture and other physical improvements, roads, walks, playground areas, and general grades related to the topography of the site; floor plans and elevations of each structure and other drawings sufficient to illustrate the intent and scope of the improvement; outline specifications in sufficient detail to indicate type of construction, kinds of materials and finishes, and proposed electrical, plumbing, heating and ventilating systems; and a detailed estimate of the construction cost of the project including structures, equipment and furnishing of buildings, site development and improvement (exclusive of landscaping), and all utilities. * * *

"(b) Working Drawings and Specifications.—After the preliminary drawings have been approved in writing by the Commissioner and the Architect instructed in writing to proceed with working drawings and specifications for the project (unless this procedure is waived as set forth in the next preceding paragraph), the Architect shall prepare working drawings in pencil or ink (at his option) on tracing cloth or tracing paper suitable for producing clear, well-defined blueprints. These drawings shall include not less than the following: * * *

"No supervision of the work executed from the drawings and specifications is to be required under this contract. * * *

"Article 4. Revisions.—The Architect shall, without additional compensation, and until final approval thereof, make such revisions in the preliminary documents and in the working drawings and specifications as may be required by the Commissioner; * * *

"Article 7. Fee and Payments.—(a) In consideration of the Architect's undertaking under this contract, the Architect shall receive the following:

"A fixed fee of Twenty-nine Thousand Seven Hundred Sixty Dollars ($29,760) which shall constitute complete compensation for the Architect's services under this contract, except as provided in Articles 4 and 5 hereof."

Articles 4 and 5 are not involved in this controversy nor are other provisions for special additional compensation contained in the contract.

If we understand the testimony of plaintiff correctly, the drawings and specifications prepared by him and submitted with the original application of the County for federal funds, with slight modifications, served as the preliminary drawings, plans and specifications and as a basis for the working drawings, plans and specifications under the federal contract. We have found nothing indicating that he prepared any other preliminary plans and specifications after the execution of his contract with the federal government.

Plaintiff prepared working plans and specifications which were approved. However, the buildings as planned by plaintiff were never constructed owing to acute material shortages, but the federal government paid plaintiff $29,760 in full for the services which he had performed under his contract. Temporary buildings were constructed by the federal government to meet the pressing demand for added hospital facilities with Mr. Freeland acting as architect on the project.

The trial court found as follows: "That it is true that pursuant to the laws, rules and regulations governing the grant by the Federal Government it pays all costs involved in the construction of the buildings, as alleged in said paragraph, except that under said contracts the fees and costs for the preparation of preliminary plans and studies are not paid by the Federal Government; that the contract executed by plaintiff on February 10, 1942, and referred to in said paragraph IV (of the answer), did not include any compensation for the preparation of preliminary plans and studies, or for the services sued for in this action, and the payment of twenty-nine thousand seven hundred sixty dollars ($29,760.-00) received by plaintiff as alleged in said paragraph IV did not include any compensation for the services performed by plaintiff and sued for herein; * * *"

The following appears in the conclusions of law:

"That said contracts of January 20, 1939, and February 15, 1937, were neither modified nor abandoned at the time services were performed by plaintiff thereunder and at the times mentioned in plaintiff's complaint, but that said contracts, and each of them, were at said times in full force and effect. * * *

"That the contract made by plaintiff with the Federal Works Agency and the payments received by plaintiff thereunder covered work other and different than that sued for in this action, and said contract

and the performance thereof did not in any manner affect the liability of the defendant county for the items sued for herein."

Plaintiff seeks to support the foregoing on several grounds. He first argues that neither the questions of payment, novation nor abandonment were made an issue in the pleadings, presented at the trial, nor urged in the briefs on appeal; that the issue must be considered one of novation and not abandonment of a contractual right; that both novation and abandonment are affirmative defenses that must be pleaded and proved by the defendant; that the sufficiency of the evidence is not an issue on appeal; that the finding that there was no novation, abandonment nor payment is supported by the evidence.

[4] We rather agree with plaintiff that the question of novation is not now before us and that there was no novation established by the execution of the federal contract of February 10, 1942. However, we cannot take the same view of the defense of abandonment of the right of plaintiff to seek compensation from the county for preparing the preliminary plans and specifications under his county contracts and of his payment in full for all services by the federal government.

[5] An abandonment of a known right occurs when there is an intention to abandon it coupled with acts or omissions by which such intent is carried into effect. As said in City of Los Angeles v. Abbott, 129 Cal.App. 144, 18 P.2d 785, 787:

[6] "Abandonment includes the intention to abandon, and the external act by which such intention is carried into effect. Hough v. Brown, 104 Mich. 109, 62 N.W. 143; Barnett v. Dickinson, 93 Md. 258, 48 A. 838; Cassell v. Crothers, 193 Pa. 359, 44 A. 446. Intention is the essence of abandonment. Tennessee & C. R. Co. v. Taylor, 102 Ala. 224, 14 So. 379; Bartley v. Phillips, 165 Pa. 325, 30 A. 842. The characteristic element of abandonment is the voluntary relinquishment, and it is in that respect distinguished from other modes by which ownership may be divested. Commonwealth v. Koontz, 258 Pa. 64, 101 A. 863; Dikes v. Miller, 24 Tex. 417; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 P. 1054. 'Abandonment' is the intentional relinquishment of a known right. Sharkey v. Candiani, 48 Or. 112, 85 P. 219, 7 L.R.A.,N.S., 791; Moore v. United Elkhorn Mines, 64 Or. 342, 127 P. 964, 130 P. 640."

[7, 8] "It is settled that an abandonment of a contract by consent may be implied from the acts of the parties. Newell v. E. B. & A. L. Stone Co., 181 Cal. 385, 184 P. 659, 9 A.L.R. 993; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Tompkins v. Davidow, 27 Cal.App. 327, 149 P. 788; Tatterson v. Kehrlein, 88 Cal.App. 34, 47, 263 P. 285; Jones v. Noble, 3 Cal.App.2d 316, 322, 39 P.2d 486. * * * The question of whether or not an agreement has been abandoned is a mixed question of law and fact (Ross v. Tabor, 53 Cal.App. 605, 200 P. 971; * * *." Thompson v. Municipal Bond Company, 23 Cal.App.2d 402, 73 P.2d 274, 278. See, also, Barton v. Pierce, 131 Cal.App. 33, 20 P.2d 736; Pidgeon v. Lamb, 133 Cal.App. 342, 24 P.2d 206; Peal v. Gulf Red Cedar Co., 15 Cal.App.2d 196, 59 P.2d 183; Lohn v. Fletcher Oil Co., Inc., 38 Cal.App.2d 26, 100 P.2d 505; Dessert Seed Co. v. Garbus, 66 Cal.App.2d 838, 153 P.2d 184.

[9] It is true that the foregoing cases thoroughly establish the principle that abandonment involves a question of fact, and that a finding of the trial court on it may not be disturbed on appeal when there is any substantial evidence in the record supporting it. We will consider the sufficiency of the evidence to support the quoted findings later in this opinion.

We believe that the questions of abandonment and payment were made an issue in the pleadings. Paragraph 4 of the answer set forth in detail, and chronologically, the various facts involved in the transactions between plaintiff and defendant and between plaintiff and the federal government. It contained the following allegations:

"That said offer of grant of $896,000 for both projects was duly accepted by said Board of Supervisors on behalf of defendant County on January 28, 1942.

"That thereafter, on February 10, 1942, plaintiff executed a contract for architectural services on the Federal Project, Docket: Calif. 4—914, with the United States of America, Federal Works Administrator, By Commissioner of Public Building, which contract provides for the payment to plaintiff of a total fee of $29,760 for such services, being 4.8% of an estimated construction cost for the project of $620,-

000. A copy of said contract, marked Exhibit 4, is attached hereto, and is by this reference made a part hereof.

"That defendant is informed and believes, and therefore alleges, that the United States of America paid plaintiff his total fee of $29,760 in full for services performed under said contract, prior to the commencement of this action."

The "Exhibit 4" attached to the answer is a copy of the contract by which the federal government employed plaintiff as architect on the federal project, and contained the provisions already quoted, as well as others bearing on the questions of abandonment and payment. By reference this contract was made a part of the answer. Thus, by alleging the facts in detail and by the allegations we have quoted, the questions of abandonment and payment were sufficiently raised by the pleadings.

Plaintiff admitted the execution of the contract between himself and the federal government and the receipt by him of $29,760. This contract was before the trial court, and as it was an important part of the evidence we must conclude that it was considered in the decision of the case. There are findings and conclusions of law on the questions of abandonment and payment. Thus, it cannot be said that these questions were not issues before the trial court even though they may not have been specifically argued by counsel during the trial.

It is true that the questions of abandonment and payment were not argued in the original briefs in the form in which we are considering them. However, the rehearing was granted to permit counsel to brief these questions and to argue them orally should they desire. The questions have been fully presented in the briefs now filed.

[10, 11] As a general rule, appellate courts are not required to hunt out errors in the record that are not argued in the briefs. This rule is for the convenience of the courts, and where the appeal is taken by means of the alternative method appellate courts may consider any serious errors that affect the judgment and appear on the face of the record. 2 Cal.Jur. 729; Richardson v. Davis, 116 Cal.App. 388, 2 P.2d 860. The consideration of abandonment and payment seems so necessary to a proper decision of the case that we cannot overlook them, especially since counsel have been given ample opportunity to brief the questions.

[12] The remaining arguments of plaintiff may be considered together under the topic of the sufficiency of the evidence to support the findings. Counsel point to the testimony of plaintiff and Louis J. Seckels and urge that it supports the findings against abandonment and payment, thus creating a conflict in the evidence which was resolved in favor of plaintiff by the trial judge which is final and conclusive on appeal.

Plaintiff testified in effect that he had no intention of abandoning his claim against the County and no thought that such claim would be liquidated by the payment from the federal government.

Plaintiff's contract with the federal government required him to furnish preliminary drawings, plans and estimates for the proposed work. He testified that those prepared for the County, with slight modifications, served under this contract. The federal contract also specified that the payment of $29,760 would be in full for services rendered under the contract, including preliminary drawings, plans and estimates which in fact were those prepared for the county with modifications. The conclusion seems inescapable that the payment by the federal government covered payment for the work plaintiff had done for the county, and that the portion of the judgment for $15,500 gives him double compensation for the same services.

Further, the future performance of the full terms of plaintiff's contract with the county has been rendered impossible, at least for some time. Title to the ground upon which the buildings designed by plaintiff were to have been erected has passed out of the County of San Diego and is vested in the United States. Hospital buildings have been erected on that ground. While these facts in themselves are not sufficient to establish abandonment, when they are considered with the further fact of payment they furnish a strong argument supporting the conclusion that plaintiff abandoned his claim against the County when he signed his contract with the federal government and accepted his fee from it.

It is presumed "that a person intends the ordinary consequences of his voluntary act." Subd. 3, sec. 1963, Code Civ.Proc.

If plaintiff did not intend to abandon his claim against the County when he signed his contract with, and accepted his fee from the federal government, it shows a lack of attention to the precise terms of that instrument or a lack of understanding of its clear and unambiguous language.

Mr. Seckels testified that it was not the practice of the federal government to pay for preliminary drawings. While his evidence is not at all clear on this subject, a study of it indicates that in making this statement he probably was referring to the sketches that must accompany the application for funds, and not to the preliminary drawings, plans and specifications that the federal contract required plaintiff to furnish. The witness referred to sketches made on ordinary wrapping paper and others prepared by persons not architects so that the federal government could not offer a contract to any such person to act as architect. This conclusion is also supported by the following from the testimony of Mr. Seckels:

"Q. You have given some testimony as to the practice sometimes employed about fees for preliminary sketches. As I understand you, the government, of course, or your department, doesn't undertake to pay at all for that type of work? A. No, sir.

"Q. That is all supposed to be done *before you take over?* A. That is right.

"Q. So that as far as your department is concerned, it is of no materiality to you whether the party *who presents that application* does or does not pay their architect? A. That is right." (Emphasis ours.)

If we are wrong in this opinion, and Mr. Seckels intended to testify that it was not the practice of the federal government to pay for any preliminary plans and specifications, then it is clear from the terms of the contract before us that such practice was not followed in this case.

The record in this case seems too clear to leave room for any reasonable doubt as to the effect of the execution of the contract between plaintiff and the federal government together with the acceptance of the fee from the government by plaintiff. Under the testimony of plaintiff that the preliminary plans and specifications he prepared for the county served, with slight modifications, under the federal contract, and under the clear terms of that contract requiring him to furnish such preliminary documents as part consideration for his fee of $29,760, which was admittedly paid him in full for all services rendered by him under his federal contract, we must hold that this claim against the county was abandoned and that he has received payment in full for the services in question rendered defendant.

It follows that the findings of fact and conclusions of law already quoted lack evidentiary support.

If we cannot affirm the judgment in its entirety, plaintiff asks us not to reduce the judgment by $15,500, but to reverse that portion of it so that the issue may be retried. We can see no good purpose to be served by such reversal. Our conclusions are based principally on the evidence of plaintiff himself and on the clear terms of written instruments. Certainly plaintiff cannot complain if we accept his own testimony at its face value and follow the clear language of a contract which he voluntarily executed and under which he was paid. His testimony and this contract show that the payment of the fee by the government covered payment for this work done for the county, so nothing could be gained by another trial.

The judgment for $21,539.10 is reduced by $15,500 to $6,039.10, and as so reduced is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

67 Cal.App.2d 760

STONER v. SUPERIOR COURT IN AND FOR YOLO COUNTY.

Civ. 7144.

District Court of Appeal, Third District, California.

Jan. 31, 1945.

1. Marriage ⇐66

Where suit had been instituted for annulment of marriage on ground that it was void ab initio because one of parties had a living spouse by former marriage and court made order allowing defendant a monthly allowance for support pendente lite, counsel fees and costs, petition for certiorari to review the order failed to state a cause of action since the remedy by appeal from the order was available in annulment suit. Civ.Code, §§ 82, 137; Code Civ.Proc. § 1068.

2. Appeal and error ⇐41(1)
Divorce ⇐280

An appeal lies, either in divorce suit or action for separate maintenance, or for annulment, from an order granting or denying a party thereto alimony, counsel fees, or costs.

3. Certiorari ⇐5(1)

A writ of certiorari may be granted only when there is no appeal from a final order or judgment, and such rule is applicable even though court is without jurisdiction to make the order or judgment. Code Civ.Proc. § 1068.

4. Certiorari ⇐5(2)

Where remedy of appeal is available, the fact that appeal does not afford a plain, speedy, and adequate remedy does not authorize resort to writ of certiorari. Code Civ.Proc. § 1068.

Appeal from Superior Court, Yolo County; C. C. McDonald, Judge.

Certiorari proceeding by Clarence Stoner against the Superior Court of the State of California in and for the County of Yolo, to review an order allowing defendant in an action for annulment of marriage a monthly allowance for maintenance and support, counsel fees and costs. On demurrer to the petition.

Demurrer sustained and petition for writ of certiorari denied.

George I. Lewis, of Sacramento, for petitioner.

Bradford, Cross & Prior, of Sacramento, for respondent.

THOMPSON, Justice.

The respondent demurred to petitioner's application for a writ of certiorari, on the ground that it fails to state a cause authorizing the issuance of the writ.

[1] The petition alleges that Clarence Stoner brought suit in the Superior Court of Yolo County against his wife Gertrude Stoner, under Section 82 of the Civil Code, for annulment of his marriage, on the ground that at the time of said marriage he had a living wife by a former marriage, which was then in force; that Gertrude Stoner demurred to that complaint on the ground that it failed to state facts sufficient to constitute a cause of action; that, upon motion of the defendant in that action under Section 137 of the Civil Code, supported by affidavits, over the objection of plaintiff, the court made an order allowing the defendant $75 per month for maintenance and support pendente lite and $100 counsel fees, together with $10 costs; and that the court was without jurisdiction to make said order for the reason that the second marriage was void ab initio.

We are of the opinion the petition for a writ of certiorari fails to state a cause of action authorizing the issuance of the writ for the reason that the plaintiff in the annulment suit had a remedy by appeal from the order awarding maintenance pendente lite, counsel fees and costs. It is not alleged in the petition that the appeal from the order for maintenance, counsel fees and costs would not afford an adequate remedy, but it is immaterial, under Section 1068 of the Code of Civil Procedure, whether the appeal afford an adequate remedy. If the right of appeal exists the writ of certiorari should not issue.

[2] An appeal lies, in either a divorce suit or an action for separate maintenance or for annulment from an order granting or denying a party thereto alimony, counsel fees or costs. The order is a final judgment from which an appeal lies. Lincoln v. Superior Court, 22 Cal.2d 304, 309, 139 P.2d 13; Coan v. Superior Court, 14 Cal. 2d 591, 95 P.2d 931; Robbins v. Mulcrevy,

101 Cal.App. 300, 281 P. 668; Biltmore Drug Store v. Superior Court, 101 Cal. App. 363, 281 P. 710; Allen v. Superior Court, 133 Cal. 504, 65 P. 977; Hite v. Hite, 124 Cal. 389, 393, 57 P. 227, 45 L.R. A. 793, 71 Am.St.Rep. 82; White v. White, 86 Cal. 212, 24 P. 1030; Poole v. Wilber, 95 Cal. 339, 30 P. 548; 1 Cal.Jur. 966, sec. 20, 993, sec. 47. In the Allen case, supra, which was a suit for annulment, the petition for a writ of mandamus to compel the court to try the cause on its merits, after refusal to do so until the plaintiff had first paid defendant alimony and suit-money which had been allowed, was dismissed. In the Lincoln case, supra, and in the Hite case, supra, the Supreme Court specifically held that such an order for maintenance, counsel fees or costs, is a final judgment from which an appeal lies. In 1 Cal.Jur. 993, sec. 47, it is said:

"An order granting or refusing suit money, like an order in respect to an allowance for support and maintenance pendente lite, is in effect a final judgment, and error in it is subject to correction by an appellate court. In fact, it is only by direct appeal from the order regarding suit money that error therein may be reviewed and corrected."

[3] A writ of certiorari may be granted only when "there is no appeal" from a final order or judgment. Sec. 1068, Code of Civ.Proc. That is the invariable rule, even though the court is without jurisdiction to make the order or decree. Ivory v. Superior Court, 12 Cal.2d 455, 459, 85 P.2d 894; Stoddard v. Superior Court, 108 Cal. 303, 41 P. 278; Helbush v. Superior Court, 99 Cal.App. 501, 278 P. 1062; 4 Cal.Jur. 1052, sec. 24. In the Stoddard case, supra, the court said:

"It may be readily admitted that the court had no jurisdiction to make the order; but, as the order is appealable, certiorari will not lie, because it lies only where 'there is no appeal.' Code Civ.Proc., § 1068. In this respect it differs from mandamus and prohibition, which lie 'in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.'"

[4] In 4 California Jurisprudence, at page 1053, it is said, regarding the inapplicability of the writ of certiorari, when an appeal is afforded from an order or judgment:

"The fact that the appeal does not afford a plain, speedy and adequate remedy does not make any difference. The provision of the statute is explicit and governs."

For the foregoing reasons, the demurrer is sustained and the petition for the writ of certiorari is denied.

ADAMS, P. J., and PEEK, J., concur.



67 Cal.App.2d 738

THOMAS v. WHITE.

Civ. 3254.

District Court of Appeal, Fourth District, California.

Jan. 30, 1945.

Rehearing Denied Feb. 19, 1945.

Hearing Denied March 29, 1945.

1. Mines and minerals ⇐109

Defendant was not entitled to royalties under contract which defendant's deceased husband had executed with plaintiff on theory that death did not terminate such contract and that continuing duties did not call for his personal services and that in any event the right to terminate the contract was waived by plaintiff, where written contract referred to was canceled by defendant's husband and plaintiff before oil well was put on production and a different agreement was entered into.

2. Mines and minerals ⇐109

Where written contract between plaintiff and defendant's deceased husband contemplated a reconditioning of oil well by the husband by "gravel pact" process but the portion which set forth what the husband agreed to do merely provided that he was to take charge of the work necessary to recondition and place the well upon production, court, under evidence, erred in finding that contract provided absolutely for reconditioning of the well by "gravel pact" process or that such requirement was not waived by a subsequent agreement or that the royalty was not required to be paid until production of oil averaged 50 barrels per day.

3. Mines and minerals ⇐109

Evidence sustained findings that written agreement between plaintiff and defendant's deceased husband regarding operation of oil well was canceled and that a different contract was entered into which required personal attention of the husband as superintendent of the oil well so that plaintiff's duty to pay royalties under subsequent agreement was terminated on husband's death.

4. Appeal and error ⇐1010(1)

Trial court's findings supported by evidence could not be disturbed.

Appeal from Superior Court, Orange County; Howard C. Cameron, Judge Presiding.

Action by Adolph Thomas against Stella R. White to quiet title to real estate as against any rights of defendant arising out of contractual relations between plaintiff and defendant's deceased husband, wherein defendant filed a cross-complaint to recover royalties allegedly due under the contract. From a judgment for plaintiff, defendant appeals.

Affirmed.

Ray H. Overacker, of Huntington Beach, and George B. Bush, of Los Angeles, for appellant.

Harvey, Rimel & Harvey, of Santa Ana, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to real property as against any rights of the defendant arising out of certain contractual relations between her deceased husband, D. R. White, and the plaintiff.

D. R. White and the plaintiff executed a written agreement dated January 10, 1938. By way of preamble it recited that the plaintiff owned certain land upon which was an oil well which was not then in production; that he proposed to recondition and redrill said well so as to place it on production by a process known as "gravel pact"; that White claimed to be an experienced driller, familiar with the reconditioning and drilling of oil wells, and familiar with the process known as the "gravel pact"; and that he was willing to undertake to recondition and place said well on production on the terms thereafter mentioned. It was then mutually agreed that the owner would furnish the land, well, machinery and equipment and approximately $10,000 for the purpose of reconditioning and placing said well on production by what is known as the "gravel pact" process; that White would "take full charge of work in connection with the reconditioning and placing of said well upon production" and would serve without salary except for $5 a day for actual expenses during the reconditioning; that when the well was placed on production the owner would pay to White 10% of the net production as the oil was sold, the same to continue while the well remained pumping and producing oil in paying quantities, it being agreed that "paying quantities" would mean an output of oil of not less than 50 barrels a day over a production test of thirty consecutive days, and provided that the owner would not be required to operate the well when the production was less than 50 barrels a day. It was then agreed that White would give his personal supervision and attention during the drilling and reconditioning of the well; that after the well was placed on production he would visit the well as often as necessary to "check the production thereof for the benefit of the parties hereto"; that if White failed to put the well on production or the well failed to produce oil in paying quantities, as therein defined, the agreement should be null and void; that White should keep records of operations, costs and sales, which would be open to the inspection of the owner; and that the terms of the contract should extend to the heirs, executors, administrators and assigns of the parties.

It appears that on account of bad pipe White could not get to the bottom of the old well and was therefore unable to proceed by the "gravel pact" process. By some sort of understanding between the parties arrived at about March 1, 1938, it was decided to redrill the well, using the old hole and pipe for the first 700 feet and from there on drilling a new hole to the required depth. This was done and a well was brought in on May 17, 1938. Thereafter, two pumpers operated the well, White visited the well occasionally, and the well was continuously operated although no 30-day production test was ever made. Each month the plaintiff paid White 10% of the net proceeds, marking the checks to indicate that it was his royalty, and each check was accompanied by a statement

showing the sales, expenses and net proceeds. By some sort of an agreement between the parties a second well was drilled or reconditioned and placed on production about September, 1938. After that the plaintiff paid White 10% of the net production of both wells.

On August 12, 1939, White died suddenly, and his estate was duly set aside to the defendant as his widow. After White's death the plaintiff gave to the defendant statements and checks covering the production for July, August and September, 1939, the checks being marked as her 10% royalty. About October 1, 1939, he offered to give the defendant $50 a month for three months, but denied any further liability under the contract.

In this action which followed, the defendant, by answer and cross-complaint, claimed the right to a continuance of the 10% royalty payments so long as the well was operated. The plaintiff introduced his deed to the land and the written agreement into evidence, testified that the well had not been reconditioned by the "gravel pact" process and that it had never produced an average of 50 barrels per day, and rested. Before that the court had stated that he would hold that the contract called for the reconditioning of the well by the "gravel pact" process, and that it called for no payments to White unless the well produced an average of 50 barrels a day over a 30-day period. It appears from the evidence that the well actually produced from 1000 to 1300 barrels a month.

Apparently because of the court's rulings in the respects noted the defendant called the plaintiff as a witness under section 2055, Code Civ.Proc., and brought out the fact that certain conversations had taken place between the plaintiff and White about March 1, 1938, and later in connection with the second well. These conversations were then thoroughly gone into by counsel on both sides. In this connection the plaintiff testified to facts which, if true, show that at the first of these conversations it was agreed that the written contract should be cancelled; that they would proceed to redrill the old hole on a different arrangement; that White would do the work without salary except the same expense account of $5 a day; that in lieu of salary he would be paid 10% of the net proceeds of the well during such time as the well should be operated regardless of the amount of oil produced, but with the further agreement that White would act as "superintendent" while the well was on production and that the 10% should be paid him only so long as he continued to act as such superintendent. With respect to the second conversation he testified that a similar arrangement was made with respect to the drilling or redrilling of the second well.

The court found in all respects in favor of the plaintiff, finding, in particular, that under the terms of the written agreement the plaintiff was not obligated to pay 10% of the production to White because the well had not been placed in production through the "gravel pact" process and because the well had not produced an average of 50 barrels a day; that White had not performed his part of this contract for these reasons; that before any oil was produced that contract was canceled and rescinded by the mutual consent of the parties; that the amounts later paid to White by the plaintiff were not paid under said agreement, but were paid under two subsequent oral agreements, which later agreements terminated on the death of White since he was no longer able to continue to perform the obligations thereof; that the payments to the defendant after the death of White were not paid under the written agreement but were paid solely as an act of kindness and gratuity; that after the death of White the defendant had no interest in the existing agreements; and that performance on the part of White had never been waived by the plaintiff. Judgment was entered quieting title in the plaintiff and denying any relief to the defendant, and from that judgment the defendant has appealed.

[1] The appellant first contends that the death of D. R. White did not terminate this agreement; that any personal obligation imposed upon him thereby had been discharged; that the continuing duties were of a character which did not call for his personal services, and their performance by other persons was contemplated by the contract; and that, in any event, any right to terminate the agreement upon the death of White was waived by the acts and conduct of the respondent. It may be conceded that all of these things are true or would be true if we were concerned only with the rights of appellant as owner of the original written agreement and with the effect of that agreement in the light of the subsequent action of the parties thereto. A different situation is presented if, as found by the court, this written con-

tract was cancelled before the well was put on production and another and different agreement was entered into.

[2] It is next contended that any obligation on the part of White to bring the well in by the "gravel pact" process and any provision in the contract for the payment of a royalty only while the well was producing oil in the average amount of 50 barrels a day were waived by the acts and conduct of the respondent, and that the court's findings to the contrary are not supported as a matter of law. While the written contract seems to have contemplated a reconditioning of the oil well by a system known as the "gravel pact" process, the portion thereof which sets forth what White agreed to do in this connection merely provides that he was to take charge of the work necessary to recondition and place the well upon production. It can hardly be said that the contract provided absolutely for the reconditioning of the well by the "gravel pact" process and in no other manner or if this could be said it appears, without dispute, that this requirement was either waived or changed by some subsequent agreement of the parties. We also think the court erred in interpreting the written contract as providing that the 10% royalty need not be paid unless and until the production of oil averaged 50 barrels a day. The reasonable construction of the language used is that this royalty would be paid so long as oil was produced and sold, but that the owner was under no obligation to operate the well if the production did not average 50 barrels a day. In any event, no production test as agreed upon was ever made and production was continued although it amounted to less than 50 barrels a day on the average. The court could well have found that these two provisions of the contract were waived, and it would have been reversible error not to so find had it not been for the evidence of the subsequent conversations and agreements of the parties, which evidence was first and largely brought out by the appellant.

[3] The final contention is that the court's "apparent finding of a novation or oral modification cannot be supported." It cannot be questioned that the evidence of respondent, if accepted as true, fully supports the findings that the written agreement was canceled and that a new and slightly different contract was entered into and that one of the terms of the new agreement was to require the personal attention of White as superintendent of the two wells. Among his duties as superintendent were to keep the wells in operation, to make repairs, to clean out the wells when they sanded up and to attend to all things necessary to keep the wells operating. Most of these duties were not called for in the written agreement. The appellant argues that there could have been no novation, under the law, because the new oral contract was void since it was not to be performed within a year and since it created an interest in real property. While it might be void after the death of White for these reasons this is an argument against the right of the appellant to a continuing interest in the production of this well. There can be no question that the agreement was fully executed up to the time White died. It is also argued that the "oral modification theory" is unsupportable because the new or changed contract did not require anything in addition to the requirements of the written contract. It required a redrilling or reconditioning of the well in a manner different from that originally contemplated and, if the testimony of the respondent is to be believed, it required considerably different services on the part of White after the well was put on production. There is also evidence that the well as completed cost $32,000 instead of the $10,000 originally contemplated.

[4] While the facts testified to by the respondent seem improbable it cannot be said that they are impossible and nothing appears in the record from which it can be said, as a matter of law, that this testimony was unworthy of any belief. The question was one of fact for the trial court and the findings necessary to the decision are all supported by the evidence of the respondent. While all of that testimony is with regard to things which could not be contradicted because the only other party present at the conversations was dead, the matter was largely brought out and entirely opened up by the appellant. The findings could well have been to the contrary and we would like to reverse the judgment, but we have been unable to find any legal reason for doing so under the established rules of law.

For the reasons given, the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

67 Cal.App.2d 864

CALIFORNIA EMPLOYMENT COMMISSION v. ROSE et al.

Civ. 6983; Sac. 5614.

District Court of Appeal, Third District, California.

Feb. 7, 1945.

Master and servant ⇐78
Taxation ⇐219

Services in baling hay do not constitute "agricultural labor" within exemption provisions of the Unemployment Insurance Act where the workmen are not employees of the farm owner or tenant as required by the commission's rule, but are employees of one baling hay on contract with farmers. Gen.Laws 1937, art. 8780d, § 2; Gen.Laws Supp.1939, art. 8780d, §§ 7(a), 37, 90.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

Appeal from Superior Court, Yolo County; John H. O'Donnell, Judge.

Action by California Employment Commission, formerly Unemployment Reserves Commission, against John Rose and others to collect assessments under the Unemployment Insurance Act. From an adverse judgment, the Commission appeals.

Reversed with direction.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Forrest M. Hill, Ralph R. Planteen, and Doris H. Maier, Deputy Attys. Gen., for appellant.

Lawrence J. Skirving, of Sacramento, for respondents.

THOMPSON, Justice.

California Employment Commission has appealed from a judgment which was rendered against it in a suit instituted under Section 37 of the Unemployment Insurance Act of California, Stats.1935, p. 1226, as amended, Deering's Gen.Laws Supp. of 1939, p. 1697, Act 8780d, to collect from the respondent, who was engaged in baling hay on contract with farmers in Yolo County, alleged delinquent assessments levied under that Act. Section 7(a) of the Act specifically exempts from its provisions "agricultural labor." The appellant contends that baling hay by an independent contractor, for a farmer who produces the crop, does not constitute agricultural labor, and that pursuant to Section 90 of the Act the Commission adopted Rule 7.1, which defines "agricultural labor", excluding therefrom all services "unless they are *performed by an employee of the owner or tenant of the farm* on which the materials in their raw or natural state were produced."

The facts are not disputed. During the period of time which is involved in this suit, the respondent John Rose was engaged in the business of baling hay on contract for farmers who produced crops in Yolo County. He owned and operated his own hay baling equipment, and employed and paid eight men who performed the labor for him. He had the exclusive right to hire or fire these workmen. They were not necessarily farmers. The farmers who produced the hay paid to the contractor a stipulated amount per ton for the baling. The respondent's employees were paid by him an agreed sum per ton for their services. Sometimes the hay was baled on the farms where it was produced, but to save cost and inconvenience of moving the hay-baling equipment, the hay was usually hauled to a location near the ranch, where it was baled.

The rule upon which the appellant relies became effective February 14, 1937. It reads in part:

"Rule 7.1. Agricultural Labor Defined.—The term 'Agricultural Labor' includes all services performed:

"(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops; the raising, feeding, management of livestock, poultry and bees; which includes, among others, the spraying, pruning, fumigating, fertilizing, irrigating, and heating which may be necessary and incident thereto;

"(2) By an employee in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth *do not constitute agricultural labor unless they*

are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations.

"As used herein the term 'farm' includes, among others, stock, dairy, poultry, fruit and truck farms, plantations, ranches, ranges, orchards and vineyards." (Italics ours.)

The court adopted findings to the effect that the work performed by the employees of John Rose in baling hay constitutes "agricultural labor" which is exempted by the provisions of Section 7(a) of the Unemployment Insurance Act, whether the hay was baled upon or off of the farms where it was produced, and that said contractor is therefore not liable for payments of contributions for his workmen to the unemployment fund under Section 37 of said act, or at all. Judgment was accordingly rendered in favor of John Rose. From that judgment this appeal was perfected.

The Commission contends that John Rose is not exempted from paying contributions for his workmen to the unemployment fund provided for by the act for the reason that they were not engaged in "agricultural labor", as that term is defined by the foregoing quoted rule, since they were not employed by the owners or tenants of the farms on which the hay was produced, and because they were engaged in a separate business of baling hay by an independent contractor. On the contrary the respondent asserts that the rule contains an unwarranted and invalid restriction of the term "agricultural labor", and that his employees were clearly engaged in work of an agricultural nature and therefore exempt from the provisions of the Unemployment Insurance Act.

The identical rule which is involved in this case has been approved by our Supreme Court as a valid exercise of the power of the California Employment Commission.

In the recent case of California Employment Commission v. Butte County Rice Growers Association, 25 Cal.2d 624, 154 P.2d 892, the Supreme Court approved the previously quoted Rule 7.1 of the California Employment Commission as a proper definition of the term "Agricultural Labor". That rule was adopted pursuant to Section 90 of the act. By the approval of that rule the decision in that case determines that employees are not exempt from payment of contributions to the unemployment fund, as "agricultural laborers", even though they may be engaged in work of an agricultural nature, unless the services "are performed *by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced.*" In upholding the validity of Rule 7.1 the Supreme Court of California said in the case last cited that:

"Where the Legislature has by its enactments declared policies and fixed primary standards, as it did in the Unemployment Insurance Act, there can be no question but what it may validly confer on administrative officers power to 'fill up the details' by prescribing rules and regulations to promote the spirit and purpose of the legislation and its complete operation. In its general form of distinction, rule 7.1 appears to be a practical, workable definition in amplification of the unexpanded statutory exemption here presented. Practically all of the courts that have been required to pass upon regulations identical with or very similar to rule 7.1 have upheld the same as proper interpretations of the statutes involved." (Citing numerous authorities.)

The court further says, in the last case from which we have quoted, that the definition of agricultural labor contained in Rule 7.1 is significant of the legislative intent since the California Unemployment Insurance Act was enacted "as a part of a National plan of unemployment reserves and social security" (Sec. 2, Unemployment Reserves Act, Deering's Gen.Laws of 1937, p. 4122, Act 8780d), and is in accordance with the Federal construction of the term "agricultural labor".

The Supreme Court of Arizona has also construed the same language contained in a rule adopted by the Employment Security Commission of that State requiring the owners or tenants of the farms upon which the crops are produced to be the employers of workmen in order to exempt them from the provisions of an unemployment compensation act which excludes "agricultural labor" from its terms. In the case of Employment Security Commission v. Arizona Citrus Growers, Ariz., 144 P.2d 682, it was held that employees of a cooperative marketing association engaged in grading, cleaning, wrapping and boxing citrus fruits for market were not agri-

cultural laborers, because they were not employed by the owners or tenants of the farms upon which the fruits were produced. On page 687 of 144 P.2d, the court said regarding the construction of the language of that rule:

"Rule I, subdivision 2, provides that labor such as that performed by the claimants herein 'does not constitute agricultural labor unless it is performed *by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced.*' Applying this standard to the facts as heretofore set forth, it is evident that the services in the present case were not performed by an employee of the 'owner or tenant'."

It follows that the services performed, regardless of their nature, even though they consist of work on a hay baling press operated upon or off of the farm where the hay is produced, do not constitute "agricultural labor" under the California Unemployment Insurance Act unless the workmen are employees of the owner or tenant of the farm upon which the materials are produced.

The only remaining question to be determined on this appeal is whether the workmen engaged by John Rose on his hay baling equipment were "employees of the owner or tenant of the farm on which the materials * * * were produced." If they were not employees of the owners or tenants of the farms upon which the hay was produced, they may not be deemed to be exempt from payment of contributions to the unemployment fund. The undisputed facts of this case clearly show that the workmen were not employed or under the direction or control of the owners or tenants of the farms. They are therefore not exempt. While it is true that John Rose was engaged in the industry of baling hay, which business is agricultural in character (Goldberg v. Miller, 54 Wyo. 485, 93 P.2d 947, 96 P.2d 570), and that it is ordinarily desirable to bale the hay for marketing purpose, Rose's hay baling enterprise was entirely separate and distinct from the farmers' cultivation of the soil and their planting and harvesting of the crops. He conducted his business independently of the farmers for his own individual profit. He owned the hay baling outfit and operated it at his own expense. He hired the workmen and paid them for their services. He merely contracted with the farmers to bale their hay for a stipulated price per ton. He was carrying on an independent business for financial profit. The owners of the farms upon which the hay was produced neither hired the hay balers nor paid their wages. The farmers had no authority to direct their work. Therefore the workmen may not be deemed to come within the exclusion term of "agricultural labor" as it is used in the Unemployment Insurance Act, and they are not exempt from payment of contributions to the unemployment fund.

It is true that it has been held in industrial accident cases, based on the exclusion from such statutes of persons employed in agricultural labor (Sec. 3352, Labor Code, St.1937, p. 267), that employees who were injured while working on hay baling presses, *owned and operated by farmers* engaged in baling hay on contract, either upon or off of the farms on which the crops were produced, are not entitled to recover damages under the Workmen's Compensation Act, because they were deemed to be engaged in labor of an agricultural nature. Morris v. Spears, 1 Dec. of Ind.Acc.Comm., p. 317; Vincent v. Louis, 2 Dec. of Ind.Acc.Comm., p. 168; Neimeyer v. Volger, 2 Dec. of Ind.Acc. Comm., p. 335; In re Roby, 54 Wyo. 439, 93 P.2d 940. But no rule of the Commission defining "agricultural labor", such as is involved in this action, was involved or considered in those proceedings. Likewise, it was held in Cook v. Massey, 38 Idaho, 264, 220 P. 1088, 35 A.L.R. 200, under similar circumstances, that a workman who was injured while employed on a steam threshing machine was not entitled to damages under a Workmen's Compensation Act, on the theory that he was engaged in work of an agricultural nature. The authorities in various jurisdictions are conflicting with respect to the conditions which may bring occupations incident to farming, such as threshing, hay baling and other pursuits designed to aid in the preparation of agricultural products for market, within the term "agricultural labor". In re Roby, supra; Mundell v. Swedlund, 59 Idaho 29, 80 P.2d 13; Cook v. Massey, supra; 107 A.L.R. 977, note; 139 A.L.R. 1164, note; 146 A.L.R. 1318, note.

General definitions of agricultural labor contained in numerous authorities are however of slight assistance in determining whether the workmen hired by the appellant in this case were exempt from payment of contributions to the unemployment

fund in view of the language contained in Rule 7.1 which is approved by our Supreme Court. It not only held that the rule was a valid exercise of authority by the California Employment Commission, but also that warehouse workmen hired by the farmers cooperative association to process and prepare for market the produce of its members were not engaged in agricultural labor so as to exempt them from contributing to the unemployment fund. In the Butte County Rice Growers Association case, quoting with approval from Pinnacle Packing Co. v. State Unemployment Commission, an unreported decision of the Circuit Court of Jackson County, Oregon, our Supreme Court said:

"The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading, packing, and marketing, *then the exemption ceases. The plaintiffs engaged in processing, grading, and packing and marketing the fruits are engaged in industry and are, therefore, subject to the provisions of the act and are not exempt as being engaged in agricultural labor.*" (Italics added.)

In the Butte County Rice Growers Association case, the Supreme Court concludes that the workmen engaged in the cooperative association warehouse were not exempt from payment of unemployment contributions. The court said:

"Concededly, the services performed by the defendant's employees are *not* 'on a farm' and so do not meet the specification of subdivision (1) of said rule. Equally exclusive is the plain language of subdivision (2), for it requires that services rendered 'in connection with the drying, processing packing, packaging, transportation, and marketing of materials which are produced on the farm' be *'incident to ordinary farming operations as distinguished from manufacturing or commercial operations'* and be *'performed by an employee of the owner or tenant of the farm.'* (Italics ours.) Thus, to come within the 'agricultural labor' exemption, *off the farm* services must be an integral part of farming operations performed for the farmer as such—*not for a third person* separate and apart from such fundamental concept. Regardless of any argument as to the commercial nature of the defendant association's enterprise, it admittedly is not the owner, tenant or operator of any farm land.

* * * * *

"It therefore follows that the defendant association may not claim the exemption sought but is liable for 'contributions' computed on the wages paid to its employees as provided by the statute."

On the authority of the foregoing case, and for the reasons previously stated, we conclude that Rule 7.1 is a valid delegation of authority for the adoption of the definition of the term "agricultural labor" contained therein, and that the defendant John Rose is not exempt under the California Unemployment Insurance Act from payment of unemployment contributions as therein provided for the reasons that he performed the services of baling hay as an independent business separate and distinct from the production of the crops by the farmers, and that his workmen were not employees of the farmers.

The judgment is reversed and the trial court is directed to render judgment for the plaintiff for the sums ascertained to be due the Commission as contributions to the unemployment fund as provided by the statute.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.

67 Cal.App.2d 842

VER BRYCK v. LUBY.

Civ. 14772.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1945.

1. Deeds ⇐211(1)

Evidence supported finding that plaintiff was mentally competent at time she executed deed conveying her residence to defendant, with reservation of life estate.

2. Witnesses ⇐206

Where third party is present at conversation between attorney and client, the communications are not confidential and privileged.

3. Witnesses ⇐206

Attorney who was consulted by plaintiff in regard to executing a deed conveying her residence to defendant, subject to reservation of life estate, was properly permitted to testify as to conversation which took place between himself and plaintiff in presence of defendant, since conversation was not privileged.

4. Evidence ⇐552

A duly qualified expert witness may express through an answer to an hypothetical question an opinion upon a subject of expert testimony.

5. Evidence ⇐510

Mental capacity of a person is a proper subject of expert testimony.

6. Evidence ⇐510, 553(3)

A qualified psychiatrist was properly permitted to express his opinion as to plaintiff's mental capacity on date she executed deed conveying her residence to defendant, subject to reservation of life estate, in answer to hypothetical question predicated upon facts received in evidence.

7. Appeal and error ⇐1078(1)

Where appealing party failed to furnish District Court of Appeal with either argument or authorities upon point urged as ground for reversal of judgment, the point was abandoned.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Lula B. Ver Bryck, an incompetent person, by Will H. Winston, her guardian, against A. Michael Luby, to cancel a deed. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Will H. Winston, of Long Beach, for appellant.

Harry Albert and Walhfred Jacobson, both of Long Beach, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in an action to cancel a deed, plaintiff appeals.

The evidence being viewed in the light most favorable to the defendant (respondent), and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d 214, 216, 146 P.2d 424, the essential facts are:

On April 9, 1943, plaintiff deeded a parcel of real property in the city of Long Beach to defendant reserving in herself a life estate. The present action was instituted for the purpose of setting aside the deed on the ground that plaintiff was not mentally competent to make a deed on April 9, 1943.

There are four questions presented for our determination which will be stated and answered hereunder seriatim:

[1] First: *Was there substantial evidence to sustain the trial court's finding that plaintiff on April 9, 1943, was mentally competent to make, execute and deliver a deed of real property?*

This question must be answered in the affirmative. The testimony of defendant and attorney Jacobson discloses these facts:

That defendant had known plaintiff since 1932 or 1933 and that following her husband's death he had consulted with her frequently on matters pertaining to her business. In March, 1943, plaintiff asked defendant to serve as executor of her will. Thereafter an appointment was made with attorney Jacobson and in the middle of March, 1943, plaintiff and defendant went to Mr. Jacobson's office where a conversation ensued, plaintiff desiring that defendant remain while she discussed the contents of her will with her attorney. She also stated to Mr. Jacobson that she wanted defendant to have her home. This was the first time defendant had heard of

plaintiff's desire to give him her residence. Mr. Jacobson then told plaintiff because of her advanced years he wanted to talk to someone else before she deeded the home to defendant. Accordingly an appointment was made with Mr. Vaughan of the Title Insurance Company who interviewed plaintiff out of the presence of defendant and later stated that plaintiff had told him that she wanted to give her home to defendant.

On April 9, 1943, plaintiff and defendant returned to Mr. Jacobson's office and Mr. Jacobson told plaintiff that an officer of the Title Insurance Company had telephoned him and said that Title Insurance Company would issue a policy of title insurance if plaintiff deeded her home to defendant and that he had prepared a deed and will accordingly. Mr. Jacobson then asked plaintiff if she still wanted to go ahead, to which she replied, "Yes, I do." Plaintiff then read the deed and inquired what "to have and to hold" meant. Mr. Jacobson explained that plaintiff had a life estate, that it was her property, that when she died defendant would have the full ownership of the property. Plaintiff then said, "All right," and that she wanted to sign the deed. Plaintiff then executed the deed. Mr. Jacobson took her acknowledgment and plaintiff handed the deed to defendant saying, "Here, Mr. Luby. Here is the deed." Defendant handed the deed to Mr. Jacobson with the request that it be mailed to the Title Insurance Company for recordation.

Dr. Victor Parkin testified that in his opinion plaintiff's mind was fundamentally sound on April 9, 1943, and that she had understanding.

The foregoing evidence clearly warranted the trial court in inferring and finding that plaintiff had sufficient mental capacity to make, execute and deliver a deed to her property on April 9, 1943, and that in fact she did deed her property to defendant on such date.

[2, 3] Second: *Did the trial court crroneously permit attorney Jacobson to testify as to the conversation which took place between himself and plaintiff in the presence of defendant?*

This question must be answered in the negative and is governed by the established rule in California that where a third party is present at a conversation between an attorney and a client, the privilege is waived and the communications are not confidential and privileged. Sharon v. Sharon, 79 Cal. 633, 678, 22 P. 26, 131; Mitchell v. Towne, 31 Cal.App.2d 259, 265, 87 P.2d 908.

Applying the foregoing rule to the facts in the instant case, since defendant was present at plaintiff's request at the conversation between herself and her attorney, the conversation was not privileged and the trial court properly admitted evidence thereof.

[4-6] Third: *Did the trial court erroneously permit Dr. Victor Parkin to testify relative to his opinion as to plaintiff's mental capacity?*

This question must likewise be answered in the negative and is governed by the established rule in California that a duly qualified expert witness may express through an answer to a hypothetical question an opinion upon a subject of expert testimony.* 10 Cal.Jur. (1923) page 965, sec. 222.

In the present case counsel stipulated that Dr. Parkin was a qualified psychiatrist. Thereafter the trial judge properly permitted Dr. Parkin to express his opinion as to plaintiff's mental capacity on April 9, 1943, in answer to a hypothetical question predicated upon facts received in evidence.

[7] Fourth: *Did the trial judge commit prejudicial error in denying plaintiff's motion for a new trial?*

This question will not be considered by us for the reason that the rule is settled that, where, as in the instant case, the appealing party fails to furnish this court with either argument or authorities upon a point urged as ground for reversal of the judgment, the point will be deemed to have been abandoned. Woodcock v. Petrol Corp., 48 Cal.App.2d 652, 657, 120 P.2d 889.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

* It is settled that the mental capacity of a person is a proper subject of expert testimony. 10 Cal.Jur. (1923) page 999, sec. 258.

67 Cal.App.2d 878

SHEARER v. DAVIS et al.

Civ. 14615.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1945.

1. Joint adventures ⇐2

Dissolution of a joint venture takes place when either party thereto ceases to be associated in carrying on the common business, as distinguished from the winding up of the business. Civ.Code, § 2423.

2. Joint adventures ⇐5(2)

Evidence, in action for accounting and dissolution, sustained the trial court's finding that a joint venture formed in July, 1934, to develop a tandem arrangement of an airplane foil or wing was dissolved in April, 1936, when plaintiff reiterated his refusal to invest any more money. Civ. Code, § 2423.

3. Joint adventures ⇐5(1)

The right to an accounting accrues to a member of a joint venture at the time of dissolution thereof in the absence of a contrary agreement. Civ.Code, § 2437.

4. Limitation of actions ⇐60(2)

An action for an accounting, brought more than four years after the parties were shown by the evidence to have dissolved a joint venture to develop an airplane wing, was barred by limitations. Civ.Code, § 2437; Code Civ.Proc. § 343.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Douglas G. Shearer against David Davis and others for an accounting and dissolution of an alleged joint venture. Judgment for defendants, and plaintiff appeals.

Affirmed.

Gang, Kopp & Tyre, of Los Angeles, for appellant.

Haight, Trippet & Syvertson, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury, in an action for an accounting and dissolution of an alleged joint venture, plaintiff appeals.

The evidence being viewed in the light most favorable to the defendants (respondents), and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the essential facts are:

In July, 1934, plaintiff and defendant David Davis, hereinafter referred to as defendant, formed a joint venture to test and develop a tandem arrangement of an airplane foil or wing which could be evolved from the formula expressed in United States Patent No. 1942688. Defendant had been interested in aviation from his youth and obtained in January, 1934, the patent above mentioned. Between August, 1934, and July, 1935, plaintiff advanced to defendant approximately $2900 which defendant used in supporting himself, paying wages to an assistant, and fabricating wing sections and other equipment to be used in making tests and running tests of air wings. In July, 1935, plaintiff told defendant that he would not advance any more money and that "things had finished." Plaintiff allowed defendant to keep the test car which belonged to plaintiff for a few more tests. This car was returned to plaintiff in August, 1935. In January, 1936, defendant borrowed the car from plaintiff who consented that defendant might use it for several test runs. At plaintiff's request the car was returned to him shortly after April 4, 1936. Thereafter no discussion relative to their business dealings took place between plaintiff and defendant until the summer of 1941. The present action was filed August 6, 1941.

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Was there substantial evidence to sustain the trial court's finding that the joint venture between plaintiff and defendant was dissolved in April, 1936?*

This question must be answered in the affirmative and is governed by this rule:

[1] Dissolution of a joint venture takes place when either party to the joint venture ceases to be associated in carrying on the common business as distinguished from the winding up of the business. Section 2423, Civil Code. See also Zeibak v. Nasser, 12 Cal.2d 1, 12, 82 P.2d 375; Bayer v. Bayer, 215 App.Div. 454, 214 N.Y.S. 322, 340.

[2] The defendant testified relative to a conversation he had with plaintiff in July, 1935, thus:

"Yes, I asked Mr. Shearer for some money to continue the work. Mr. Shearer stated to me that he had had considerable conversation with his wife about having played around a great deal on projects and not having saved any money and not having any automobile except the one that he was using, which was a pretty old car, and he felt that he had played around quite a bit and he was going to have to stop putting up money, and *that there would be no more money, and that things had finished* * * * I said that I hoped that his interest would continue until he had worked out the answer to the tandem foil, and I still felt that there was an answer there. He said that you would have to stop sometime, and when you did, that was the end * * * I said that * * * there was some odds and ends and outstanding bills, and I wondered if he would write a check to cover those, and he said, *'Dave, there is only one way to stop these things, and that is to stop.'* * * * He asked me to return the car and I asked if I might keep it for some other tests for a reasonable length of time, tests which I wanted to run, and he said I could keep it for a reasonable length of time, but he wanted to get the car back." (Italics added.)

Defendant further testified that in January, 1936, he had a conversation with plaintiff the substance of which was as follows:

"I told Mr. Shearer that I had done further work in the wind tunnel on tandem airplane types with the maximum camber [1] up instead of down. I asked Mr. Shearer if he thought he might be able to interest himself in further work on the tandem wing. He said, no, he didn't have the money and wasn't playing around, and also that he had at that time interested himself in a ranch or was about to * * * I said, 'You have a lot of contracts on the lot; you know directors, you know a lot of monied men here; could you interest some of them?' He said he might be able to. I asked him if I could borrow his car again to do a little more work and he said, 'Yes, you can have it a little while * * *.' The first test in that group was January 26, 1936. The last test was the final testing date, April 4, 1936 * * * I returned [the car] after April 4, 1936 within the next three or four days at least."

Shortly before defendant returned plaintiff's car, plaintiff instructed his secretary to call defendant and tell him to return the car to him. After defendant returned plaintiff's automobile in April, 1936, he made no further tests on the equipment constructed during his association with plaintiff.

From the foregoing testimony the trial court was justified in inferring in accordance with the rule above stated that the joint venture was dissolved in April, 1936.

Caulkins v. Lavigne, 156 Mich. 89, 120 N.W. 607 is factually distinguishable from the instant case, particularly since there was not any issue in such case as to dissolution of the venture or the statute of limitations.

Second: *Was plaintiff's action barred by the statute of limitations, section 343 of the Code of Civil Procedure?*

This question must also be answered in the affirmative and is governed by this established rule in California:

[3] The right to an accounting of his interest shall accrue to a member of a joint venture at the time of dissolution of the joint venture in the absence of any agreement to the contrary. (Civil Code, sec. 2437.)[2]

[4] Since the trial court found, supported by substantial evidence, that the joint venture was dissolved in April, 1936, and the present action was not instituted until August 6, 1941, more than four years had elapsed from the time plaintiff's cause of action accrued until he filed the complaint in the present action. Therefore under the provisions of section 343 of the Code of Civil Procedure, his action was barred by the statute of limitations. Brooks v. Campbell, 97 Kan. 208, 155 P. 41, 42, Ann.Cas.1918D, 1105.

In view of our conclusions it is unnecessary for us to discuss other points argued by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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[1] The convexity or rise of the curve of an airfoil from its chord.

[2] Zeibak v. Nasser, 12 Cal.2d 1, 12, 82 P.2d 375, holds that the rights and liabilities of joint venturers as between themselves are governed by the same as those which apply to partnerships.

67 Cal.App.2d 891

CORUM v. HARTFORD ACCIDENT & INDEMNITY CO.

Civ. 12705.

District Court of Appeal, First District, Division 1, California.

Feb. 9, 1945.

1. Evidence ⇐43(1, 4)

The Court of Appeal may take cognizance of its records and those of Supreme Court. Code Civ.Proc. § 1875.

2. Pleading ⇐192(2)

Ordinarily a demurrer for uncertainty does not lie where facts alleged in complaint show a superior knowledge of a particular fact on part of demurring party and it appears that defendant is not injured as result of failure to allege particularly that which is alleged generally.

3. Pleading ⇐18

Less particularity in pleading is required where from nature of allegations adverse party must possess full information of subject.

4. Pleading ⇐207

The failure to allege a material date, such as date of accident, known to plaintiff and as to which it may be assumed plaintiff's knowledge is superior to defendant's, is subject to special demurrer.

5. Pleading ⇐18

The statutory rule that statement of facts constituting cause of action involving an essential and material allegation shall be pleaded in ordinary and concise language does not dispense with necessity of alleging specifically a material date, if it may be assumed that plaintiff has superior knowledge thereof. Code Civ.Proc. §§ 426, 463.

6. Pleading ⇐207

Mere recitals, references to, or allegations of material facts, which may be left to surmise, are subject to special demurrer.

7. Insurance ⇐635

In suit on policy by person injured by insured's automobile, plaintiff should have alleged date of accident and it was insufficient to allege merely that date was well known to insurer. Code Civ.Proc. §§ 426, 463.

8. Action ⇐8

Courts possess inherent powers to prevent administration of justice from being brought into disrepute by maintenance of false and fictitious actions.

9. Attorney and client ⇐36(1)

Courts in exercise of inherent power necessary to orderly and efficient exercise of jurisdiction may supervise and discipline the conduct of attorneys who are officers of court.

10. Appeal and error ⇐1111

In suit on alleged accident policy by person injured by insured's automobile, where it appeared from court records and insurer's affidavit on appeal that plaintiff's alleged cause of action might have been purely fictitious because based on an ordinary automobile liability policy and because plaintiff had failed to secure judgment against insured, reviewing court would take no action with regard to possible abuse of judicial process, but left that matter for trial court on reversal of case. Code Civ. Proc. § 597; St.1935, p. 716, §§ 11580, 11581.

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Suit by Augusta Corum against the Hartford Accident & Indemnity Company to recover under an accident policy issued to E. G. Nielson. From a judgment after order sustaining general and special demurrers to a second amended complaint without leave to amend, the plaintiff appeals.

Judgment reversed with direction.

Alfred J. Hennessy, of San Francisco, for appellant.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondent.

WARD, Justice.

Plaintiff appeals from a judgment after order sustaining general and special demurrers to a second amended complaint without leave to amend. The complaint purports to set forth a cause of action upon a contract claimed to be within the code provisions that "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Civil Code, sec. 1559.

The unverified complaint, signed by the attorney for the plaintiff, avers that "on a date unknown to plaintiff but prior to the enactment of section 11580 of the Insurance Code of said State [St.1935, p. 716], the said defendant Hartford Accident and Indemnity Company did in the course of its said business of accident insurance, make, execute, deliver and issue in said State of California, to one E. G. Nielson, therein designated the insured, a certain written contract, constituting a policy of accident insurance, and in it made said contract expressly for the benefit of plaintiff as herein alleged, to wit: That in and by the terms of said contract and policy of accident insurance, the said defendant did expressly promise, and agree to and with said insured E. G. Nielson, that in the event the plaintiff Augusta Corum was thereafter injured and damaged in and about her person, in said State of California, by the said E. G. Nielson carelessly and negligently driving his automobile upon a public street or highway in the City of Oakland in said State of California, into collision with her, the said defendant would pay the said plaintiff all damages sustained by her as the result of any and all personal injuries inflicted upon her by said collision and by said negligence on the part of the said insured E. G. Nielson. That in said insurance policy it is expressly stated that the same is made for the benefit of plaintiff. * * * That plaintiff had no knowledge or information of the existence of said accident insurance contract and policy, nor of its being expressly made for her said benefit as hereinbefore alleged, until within one year next prior to the commencement of the above entitled action." It is further alleged that subsequent to the execution of the contract of insurance Nielson, who is not made a party to this proceeding, "on a date well known to defendant" negligently drove his automobile into collision with plaintiff etc., as a result of which she suffered injuries and incurred expenses, etc. It is further alleged "That on the day said accident occurred, there was written notice of the same and of the time and place thereof, given said defendant as said insurer, by said E. G. Nielson, the insured."

As grounds for the special demurrer it was averred "That the Second Amended Complaint is uncertain, in this, because of the failure of plaintiff to allege the date on which said automobile collision occurred, which is referred to in Paragraph III of plaintiff's Second Amended Complaint, it cannot be ascertained therefrom whether or not said accident occurred on such a date as to entitle plaintiff to make any claim under the terms and provisions of defendant's insurance policy which said Second Amended Complaint alleges was executed and issued by said defendant, nor can it be ascertained therefrom whether or not any claim against said defendant would be barred by the provisions of Section 337 of the Code of Civil Procedure of the State of California." After order sustaining the demurrer without leave to amend, upon the application of the attorney for plaintiff, judgment was entered in favor of defendant.

Appellant does not argue that she should be permitted to file a fourth complaint, but that the judgment should be reversed and the trial court directed to overrule the demurrer. Respondent, in addition to its argument in support of the demurrer, admits "that under normal circumstances a plaintiff must be afforded an opportunity to amend the complaint with respect to a point such as that made by the demurrer at bar," but calls attention to an affidavit which will be later referred to, set forth in the appendix to its brief. We are unable to agree with appellant that the superior court should be directed to overrule the special demurrer, and we cannot approve the position of the respondent that the judgment as entered should be affirmed.

[1] This court may take cognizance of its records and those of the Supreme Court. Code of Civil Procedure, sec. 1875. Such records disclose that the appellant herein appealed from a judgment in the case of Augusta Corum v. E. G. Neilson in which the appeal was dismissed and a petition for hearing by the Supreme Court denied, all in the year 1936. (Note the difference in the spelling of defendant's name.) The present complaint was filed in 1943. These facts, if known, may have prompted the action of the trial court in entering the order sustaining the demurrer without leave to amend. We refer to these records only in so far as they may indicate the necessity or otherwise of alleging the date of the accident, so that not only the defendant but the trial court may be apprised accurately of the facts in the event that an answer or a further demurrer should, as the present special demurrer does, make the point that the action is barred by the statute of limitations.

[2, 3] It may be admitted that the date of the insurance policy referred to in the complaint, if issued, is a matter peculiarly within the knowledge of the defendant. Ordinarily a demurrer for uncertainty does not lie where the facts alleged in the complaint show a superior knowledge of a particular fact on the part of the demurring party (Brea v. McGlashan, 3 Cal. App.2d 454, 39 P.2d 877; Swasey v. de L'Etanche, 17 Cal.App.2d 713, 62 P.2d 753; Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Schaake v. Eagle, etc., Can Co., 135 Cal. 472, 63 P. 1025, 67 P. 759) and it appears that the defendant is not injured as a result of a failure to allege particularly that which is alleged generally. Less particularity is required where, from the nature of the allegations, the adverse party must possess full information of the subject. Gerritt v. Fullerton U. H. School Dist., 24 Cal.App.2d 482, 75 P.2d 627.

[4-6] However, the failure to allege a date, which appears to be material, such as the date of an accident, known to plaintiff, and as to which it may be assumed plaintiff's knowledge is superior to that of defendant, is subject to special demurrer. Baird v. Olsheski, 102 Cal.App. 452, 283 P. 321; Johnson v. Nolan, 105 Cal.App. 293, 288 P. 78. Under such circumstances a pleader may not rely upon the rule that statements of facts constituting the cause of action involving an essential and material allegation (Code of Civil Procedure, sec. 463) shall be pleaded in ordinary and concise language (Code of Civil Procedure, sec. 426) as dispensing with the necessity of alleging specifically the date of the occurrence of an event if material. Williamson v. Joyce, 137 Cal. 151, 69 P. 980; Baird v. Olsheski, supra. Mere recitals, references to or allegations of material facts, which may be left to surmise, are subject to special demurrer. Vilardo v. Sacramento County, 54 Cal.App.2d 413, 129 P.2d 165; Philbrook v. Randall, 195 Cal. 95, 231 P. 739.

[7] The complaint alleges that the date of the accident was well known to defendant. Assuming this to be true, the court is entitled to know such date by allegation in the complaint in the event that resort should be had to a proceeding to abate the prosecution of this action (Code of Civil Procedure, sec. 597) or for any other purpose, during the trial or prior thereto. Appellant seeks aid from certain language used in recent Supreme Court decisions some of which are listed in Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 154 P.2d 399, at page 406, wherein it was said: "It is established that the running of the statute of limitations may be suspended by causes not mentioned in the statute itself." In the Bollinger case it was held that defendant may lose the privilege to urge a defense unless it is pleaded plainly and promptly. It is important to defendant, should it wish to plead the statute of limitations, to assert promptly by demurrer or otherwise this legal defense, which can only be pleaded if plaintiff alleges plainly the date of the accident and other facts with reasonable particularity sufficient to acquaint the opponent of the nature, source and extent of the cause of action so that it in turn with precision may admit, deny, explain or plead special, legal or factual defenses.

There is another matter that requires attention. If this action is based on an ordinary automobile liability policy, the complaint would fail to state a cause of action because under the terms of such policies, which are based upon the statute of 1919, now embodied in sections 11580 and 11581 of the Insurance Code, St.1935, p. 716, the cause of action of the injured third person against the insurance carrier of the tort feasor does not arise until the third person secures a final judgment against the tort feasor. It appears that the unverified second amended complaint here involved is carefully drawn to avoid such limitation by alleging the existence of a most unusual type of policy whereby the insurance company is alleged to have contracted with Nielson that if Nielson injured Corum the company would pay Corum damages. Such a policy might have been written and we cannot determine on this appeal whether that has occurred. If this were all that were before us, we simply would reverse the judgment for the reasons heretofore set forth. But that is not all that is before us. The records of the District Court of Appeal for this district show the following: On September 7, 1934, there was filed in the superior court of Alameda County a complaint entitled Augusta Corum v. E. G. Neilson and another. (Note the defendant's name is spelled differently in the Alameda action than the person referred to in the complaint here involved.) That complaint alleges that on September 18, 1933, while Augusta Corum was walking in a pedestrian crosswalk at the intersection of 13th Street and Broadway, Oakland, she was injured by Neilson's automobile.

The description of Corum's injuries in that complaint is almost identical with that of the injuries described in the present complaint. The records further show that the Alameda action proceeded to trial, Augusta Corum being represented by the same counsel as here appears for the person by the same name, and in due course judgment was entered for defendant Neilson. Corum appealed to the appellate court for this district, where the appeal was given the number 1 Civ. 10293. In due course, and on July 16, 1936, on motion of Neilson, the appeal as heretofore related was dismissed. The judgment in favor of Neilson thereupon became final.

In addition to the above facts we find attached to the brief of respondent in the present action an affidavit of one of its counsel heretofore referred to. It is therein averred that on September 6, 1933, the insurance company did issue to E. G. Neilson a standard form of automobile insurance policy, covering a designated automobile for the ensuing year. It is averred that this is the only policy of insurance ever issued by the company to Neilson. It is further averred that the only claim ever made by Augusta Corum against either Neilson or the insurance company is a claim based on the accident of September 18, 1933. The complaint in the present case, signed only by the attorney, and unverified, was filed December 16, 1943.

[8, 9] If the averments contained in the affidavit are true, it may be that the present complaint was drawn so as to get past a demurrer, and so as to get to trial on a purely fictitious and non-existent cause of action. If so, it constitutes an abuse of judicial process. To take up the time of the courts with an action known by the attorney to be false and fictitious is clearly an abuse of judicial process. The courts involved are not impotent to protect themselves from such imposition. They possess inherent powers to prevent the administration of justice from being brought into disrepute by such tactics, and specifically may use the implied power "to properly and effectively function as a separate department in the scheme of our state government" (Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018, 1020, 66 A.L.R. 1507) to supervise and discipline "the conduct of attorneys who are officers of the court." Barton v. State Bar, 209 Cal. 677, 681, 289 P. 818, 819. These powers do not depend upon constitutional grant but arise from the inherent power "necessary to the orderly and efficient exercise of jurisdiction." 14 Am.Jur., pp. 370, 372, sec. 171.

[10] However, although courts possess inherent powers to protect themselves from such abuses, we have determined not to exercise such powers in the present case as the trial court is well equipped to handle the matter. Inherent powers are usually exercised and called into operation only where there is no statutory provision by which the same result can be reached. In the present case the respondent did not attempt to bring these matters to the attention of the trial court in any formal way. Respondent had a statutory method by which it could have raised this issue. Had it filed an answer setting up this defense it could have moved, under section 597 of the Code of Civil Procedure, for a trial of such defense separately from the trial of the other issues. It may still do so. If upon such a hearing it develops that there has been a deliberate intentional abuse of the judicial processes by counsel for appellant, the trial court possesses full and complete powers to punish such abuse by contempt proceedings or otherwise. In that event there would be a complete and proper record upon which to act.

The judgment is reversed and the trial court directed to permit plaintiff to amend the complaint.

PETERS, P. J., and KNIGHT, J., concur.

25 Cal.2d 822

PACIFIC STATES SAVINGS & LOAN CO. v. HISE, Building and Loan Commissioner (STATE GUARANTY CORPORATION, Intervener).

S. F. 16847.

Supreme Court of California.

Jan. 31, 1945.

1. Building and loan associations ⇐42(3)

A building and loan association's burning of appraisers' reports requested by examiner constituted "refusal" to submit to inspection within statute authorizing commissioner to seize association's property, even if reports included obsolete cases or data otherwise obtainable. St.1931, p. 539, § 13.11.

See Words and Phrases, Permanent Edition, for all other definitions of "Refusal".

2. Building and loan associations ⇐42(3)

If a building and loan association's documents, though later found to be unimportant, are part of the corporate records and are demanded by the commissioner, refusal to produce them justifies seizure of the association's property. St.1931, p. 539, § 13.11.

3. Building and loan associations ⇐42(16)

The superior court's jurisdiction in a proceeding challenging the commissioner's seizure of property of a building and loan association is limited to determining the validity of the seizure, and, if found invalid, the court may order return of the property. St.1931, p. 540, § 13.12.

4. Building and loan associations ⇐42(6)

If superior court finds on competent evidence that the commissioner has validly seized building and loan association for any of statutory reasons, the commissioner alone has discretion to determine whether to continue the business, reorganize, or liquidate. St.1931, pp. 539, 540, §§ 13.11, 13.12.

5. Building and loan associations ⇐42(16)

The superior court in a statutory proceeding challenging the commissioner's seizure of a building and loan association cannot review his subsequent determination to liquidate. St.1931, pp. 539, 540, §§ 13.11, 13.12.

6. Building and loan associations ⇐42(1)

Evidence supported the trial court's findings that a building and loan association's assets were impaired within statute authorizing seizure by commissioner. St. 1931, p. 539, § 13.11.

7. Building and loan associations ⇐42(1)

Under the statute, if a building and loan association's assets, if sold at other than a forced sale, would not equal liabilities, so that creditors would not be paid in full, the commissioner has discretion to take over the association, without considering its going concern value. St.1931, p. 539, § 13.11.

8. Building and loan associations ⇐42(1)

In determining whether building and loan association's assets were impaired within statute justifying seizure by commissioner, concept of "going concern" as meaning amount by which value of assets as a whole, assembled for conduct of business, exceeds aggregate of separate items, did not apply, in absence of possibility of selling all assets to a single purchaser. St.1931, p. 539, § 13.11.

See Words and Phrases, Permanent Edition, for all other definitions of "Going Concern".

9. Building and loan associations ⇐42(1)

In determining whether building and loan association's assets were impaired within statute authorizing seizure by commissioner, trial court's directions to appraisers as to market value, contemplating allowance of reasonable time to find a purchaser and excluding forced sale, sufficiently indicated need to have a willing seller as well as willing buyer. St.1931, p. 539, § 13.11.

10. Building and loan associations ⇐42(1)

In determining whether building and loan association's assets are impaired within statute authorizing seizure by commissioner, question is whether assets can be sold for enough to pay liabilities in full, whether market is depressed or not, allowing reasonable time for sale, but not awaiting return of fair or more normal market. St.1931, p. 539, § 13.11.

11. Building and loan associations ⇐42(1)

Since the test of value at an assumed liquidation applies in determining whether building and loan association's assets are impaired within statute authorizing seizure by commissioner, cash prices necessarily control rather than sales on terms or exchanges of property. St.1931, p. 539, § 13.11.

12. Building and loan associations ⇐42(1)

On question whether building and loan association's assets were impaired within statute authorizing seizure by commissioner, trial court's definition of "fair market value" as amount the property would sell for on open market within reasonable time, etc., was proper, where it eliminated forced sale and included value based on highest and best use of property. St.1931, p. 539, § 13.11.

See Words and Phrases, Permanent Edition, for all other definitions of "Fair Market Value".

13. Corporations ⇐439

A parent company holding controlling stock in another company, such as a building and loan association taken over by the commissioner, may expend its own funds to defend the association.

14. Building and loan associations ⇐42(17)

A holding corporation owning all of guaranty capital stock of a building and loan association taken over by the commissioner, and intervening in an action challenging the seizure, was not entitled to attorneys' fees from the association's funds in the commissioner's hands. St.1931, p. 540, § 13.12.

15. Building and loan associations ⇐42(16)

An application by a building and loan association, taken over by the commissioner, for attorneys' fees and costs in resisting the seizure, is addressed to trial court's discretion and should be granted only on a showing that resistance is based on reasonable grounds. St.1931, p. 540, § 13.12.

16. Building and loan associations ⇐42(17)

Where a building and loan association, challenging commissioner's seizure of its property, did not apply for attorneys' fees until commissioner rested his case after lengthy trial and then sought only future fees to be incurred in presenting evidence, but admitted inability to overcome showing of impairment of assets under court's correct definition of value, denial of fees was not abuse of discretion. St.1931, p. 540, § 13.12.

In Bank.

Appeals from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by the Pacific States Savings & Loan Company against Harley Hise, as Building and Loan Commissioner, etc., challenging defendant's seizure of plaintiff's business and assets, wherein the State Guaranty Corporation intervened. From a judgment for defendant and orders denying attorneys' fees, plaintiff and intervener appeal.

Judgment and orders affirmed.

Prior opinion, 146 P.2d 427.

Hanna & Morton, of Los Angeles, John L. McNab, of San Francisco, and John L. Mace and Leon B. Brown, both of Los Angeles, for appellants.

Sullivan, Roche, Johnson & Farraher and Linforth, Cannon & Miller, all of San Francisco, as amici curiae on behalf of appellants.

Robert W. Kenny, Atty. Gen., and John J. Dailey, Roy D. Reese, and Lenore D. Underwood, Deputy Attys. Gen., for respondent.

Maynard Garrison, of Los Angeles, in pro. per., James M. O'Brien, of Beverly Hills, and S. M. Saroyan and Shirley, Robb & Saroyan, all of San Francisco, as amici curiae on behalf of respondent.

SHENK, Justice.

These appeals are taken from orders and a judgment made and entered in an action brought to challenge the propriety of the seizure by the Building and Loan Commissioner of the State of California of the business and assets of Pacific States Savings & Loan Company, a corporation.

Pacific States was incorporated as a building and loan association in 1889, and continued to do business until its seizure on March 4, 1939. State Guaranty Corporation was organized in 1927 and shortly thereafter acquired all of the guaranty capital stock of Pacific States and all of the outstanding stock of another allied company, Pacific States Auxiliary Corporation. A majority of the stock of State Guaranty is owned by the general public, but at the time of the seizure, State Guaranty Auxiliary owned a large block of its stock. Pacific States and Pacific States Auxiliary are operating companies while State Guaranty and Guaranty Auxiliary are holding companies. The commissioner has contended throughout that Robert S. Odell, who became president of Pacific States in 1928, and the "Odell group" either directly or through proxies controlled

all of the corporations. Many of the officers and directors were common to several of the companies. The trial court adopted the alter ego theory as to at least three of the corporations. For reasons hereafter appearing it is unnecessary to pass upon the correctness of the findings with respect to the alter ego theory.

In 1929 Pacific States was in a good financial condition. Its assets exceeded $53,000,000 of which approximately $7,000,000 were in cash and government bonds and $46,000,000 in mortgage loans on real estate. It had also a capital surplus and undivided profits, substantial holdings in real estate, and there were no unpaid withdrawal notices on file. As a result of the depression that followed, real estate holdings in large numbers were forced upon the company through surrender and foreclosure. By December, 1933, Pacific States had taken over some 3,870 widely scattered small parcels of property. Sales or rentals of such properties became stagnated and the aggregate expense of maintenance became burdensome. Prevailing conditions caused borrowers to default in the payment of their loans, made potential investors unable or unwilling to invest in building and loan associations, and prompted many of the old investors to demand withdrawal. In the interim, the Fidelity Savings & Loan Association of Los Angeles became involved in financial difficulties and Pacific States took over its assets and obligations. In this transaction, Pacific States took over assets (no cash or liquid assets) of an approximate value of $40,000,000, issued definite term certificates in excess of $24,000,000 and assumed liabilities in excess of $13,000,000. At one time the outstanding investment certificate liability of Pacific States approximated $91,000,000.

Over a period of years and up to the time of the seizure here challenged, the certificate liability of Pacific States was reduced to $46,000,000. The commissioner challenges most of the transactions by which the certificate liability was so reduced, urging, among other things, that Pacific States, with the assistance of Pacific Auxiliary, intended to freeze out its certificate holders for the purpose of enhancing the value of State Guaranty stock to the ultimate benefit of Odell and his associates, and that by these transactions Pacific States ceased to be a building and loan association but became in fact a real estate holding company. These contentions were upheld by the trial court, but for reasons later appearing it is unnecessary to determine the correctness of the findings with respect thereto.

On March 4, 1939, the commissioner, acting under section 13.11 of the Building and Loan Act, Stats.1931, pp. 483–539; Deering's Gen.Laws, Act 986, took possession of the business and assets of Pacific States and placed a custodian in charge. Two days later, Pacific States, as an aggrieved party, challenged the seizure under section 13.12 of the act and prayed the superior court to enjoin the commissioner from further proceeding and to direct return of its business and assets. The commissioner filed an answer alleging the facts that in his opinion justified his action. The trial commenced immediately and continued more than two years. The transcript of the evidence exceeds 26,000 pages and the parties have filed briefs running into hundreds of pages. Briefs have been filed by several amici curiae The commissioner has assigned, and the trial court has found, many reasons assertedly justifying the seizure. We shall herein discuss only two of these reasons. Our conclusion with respect thereto makes it unnecessary to express an opinion as to the others. It is immaterial that other grounds also may exist in support of the seizure.

Preliminarily, it is essential that we have before us the provisions of section 13.11 which, under the circumstances and conditions therein prescribed, authorize the commissioner summarily to seize and take over the business and assets of a building and loan association. The section reads: "If the commissioner as the result of any examination or from any report made to him or to any association doing business in this state or its investors or any thereof, shall find that such association is violating the provisions of its articles of incorporation or charter or by-laws or any law of this state, or is conducting its business in an unsafe or injurious manner, he may by an order addressed to such association direct a discontinuance of such violations or unsafe or injurious practices and a conformity with all the requirements of law; and if such association shall not comply with such order within the time specified therein, or if it shall appear to the commissioner that any association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous

to the public or to any or all of its investors, or if he shall find that its assets are impaired to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock, or if any association shall refuse to submit its books, papers and accounts to the inspection of the commissioner or any of his examiners, deputies or assistants, or if any officer thereof shall refuse to be examined upon oath concerning the affairs of such association, then the commissioner may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him."

[1, 2] Among the grounds relied upon by the commissioner in support of his seizure, and found to be true by the trial court, is the destruction of certain papers or records after demand had been made for their inspection by an examiner representing the commissioner. As appears above, it is made a ground of summary seizure under the section "if any association shall refuse to submit its books, papers and accounts to the inspection of the commissioner or any of his examiners, deputies or assistants. * * *" The facts surrounding the destruction of certain of the papers or records of Pacific States are set forth in the following finding of the trial court: "Shortly prior to February 20, 1939, the Commissioner determined to make an extra examination of and to devote extraordinary attention to the affairs of Pacific States, and he authorized his Chief Examiner, Milton O. Shaw, to make such examination, with such assistants as he might choose. On February 17, 1939, pursuant to such authority, Shaw appeared at the office of Pacific States and demanded that he be permitted to make such examination without any restrictions on his activities by Pacific States in so doing. Pacific States refused to permit him to make such examination but on February 20, 1939, Pacific States stated that it would permit such an examination and thereupon the examination commenced. Shortly thereafter Shaw found on the books and records of Pacific States certain figures which were designated 'S.T.P.' and 'S.C.P.' He was informed by its employees that these symbols respectively designated 'sacrifice term price' and 'sacrifice cash price', that they were related to the assets of Pacific States and that they were supported by appraisals in its files. The figures designated as 'sacrifice term price' were in truth and in fact figures representing the fair market value of the assets of Pacific States as determined from time to time by appraisers employed by it. Shaw thereupon, on or about February 21, 1939, asked Pacific States to show him such appraisals. He was informed by employees of Pacific States that they could not be located. Immediately after Shaw's demand, and after Odell had been informed thereof, Odell directed the officers and employees of Pacific States to remove all of such appraisals from its files and destroy the same, and on February 23d and February 24th, 1939, such officers and employees did secretly remove substantially all of such appraisals from the files of Pacific States, caused them to be taken to the Central Tower Building in San Francisco and to the Hermoyne Apartments in Los Angeles, and there burned them. Odell, prior to the destruction of such records, and prior to ordering their destruction, was advised by one of the attorneys for Pacific States that the Building and Loan Act required it to permit Shaw to inspect such documents. Those documents were destroyed by Pacific States for the purpose of preventing the Commissioner and his examiners and assistants from inspecting them and their destruction constituted a refusal by it to submit them to the inspection of the Commissioner and his examiners and assistants. Those appraisals showed that the fair market value of the assets of Pacific States on March 4, 1939, was many millions of dollars less than the valuations at which such assets were carried on the books of Pacific States. The destruction of these appraisals was a violation, among other things, of the Uniform Classification of accounts established and prescribed by the Building and Loan Commissioner of California."

The evidence supports this finding of destruction of records, and the facts so found justify the seizure. The company may not successfully urge as a defense that the papers contained in great part data relating to obsolete cases, or that the same or similar data could be obtained from other records. It cannot make itself

the judge of the importance or relevancy of the documents. If demanded documents are part of the corporate records, the refusal to produce them justifies a seizure regardless of whether it is subsequently discovered that they were not important. Moreover, the destroyed papers contained information not appearing in any other records of the company. The papers were actually used in the conduct of its business and the commissioner therefore had a right under the act to inspect them. The company president was so informed by one of its attorneys before he gave the order directing their destruction. As found by the trial court, the documents were destroyed by Pacific States for the purpose of preventing the commissioner and his examiners and assistants from inspecting and acquiring the information therein contained. This destruction constituted a refusal by Pacific States to submit the documents to inspection, and such refusal justified the seizure.

[3, 4] Section 13.11, as shown, empowers the commissioner to take summary possession under prescribed circumstances. Once he has done so, he operates the company. The jurisdiction of the superior court in a proceeding such as this, challenging the seizure under section 13.12, is limited to determining the validity of the take-over. If it be determined that the seizure was invalid, the court may direct the commissioner to return the company. But if it is found on competent evidence that the commissioner has validly taken possession for any of the reasons designated in section 13.11, then he alone is charged with the duty of determining in his discretion whether to continue the business after correcting abuses, whether to reorganize, or whether the best interests of the investors and the public will be served by liquidation. In North American Building, etc. Ass'n v. Richardson, 6 Cal.2d 90, 100, 56 P.2d 1221, 1225, it was urged that at most a technical impairment existed and that the superior court had power in a proceeding under section 13.12 to determine, even though the seizure was proper, that the retention of possession was unjustified. After stating that the cited section protected an association from any arbitrary or unjust seizure, this court held: "We find no merit in appellant association's further contention that the *retention* of the business, property, and assets of the association by the commissioner was not justified. The statute * * * provides that the commissioner shall retain possession 'until such association shall with the consent of the commissioner, resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him.' It appears from this language that the commissioner having once rightfully taken possession of the assets of an association, it lies in his sound discretion whether he will retain possession of them or return them upon an approval of some plan of reorganization." This conclusion finds support in that portion of the act empowering him to operate the business and to reorganize. He is not required to return the company to the management that committed or permitted the acts that necessitated the takeover.

[5] It thus appears that the seizure of Pacific States finds ample justification in the unlawful destruction of some of its records after demand therefor. Independently of that ground of seizure the commissioner urged as a further justification for the seizure, and the trial court found, that on March 4, 1939, the assets of the company were materially impaired within the meaning of section 13.11 of the act above quoted. If these findings are supported by substantial evidence they demonstrate not only that the seizure was justified but also that after the seizure there was no abuse of discretion on the part of the commissioner in retaining the assets and in refusing to return the company to its old management. Moreover, the determination of whether the trial court correctly found that the assets were impaired is indispensable in passing on the propriety of its rulings on the motions for attorneys' fees. The propriety of the commissioner's retention of the assets after the seizure should not be confused, however, with the question whether or not he abused his discretion in determining some months after the seizure to liquidate the company. Section 13.12 under which this proceeding was commenced does not provide for a review of the determination to liquidate, and the trial court in this action challenging the validity of the take-over could not, and did not, pass on the propriety of any contemplated liquidation. As a matter of fact, the court found that "a judgment for the commissioner in this action will not necessarily result in the liquidation of Pacific States. The determination which the Commissioner has

made to liquidate Pacific States is subject to his right to make such other disposition of all or any part of its business, affairs and assets as is or may be authorized by law." In other words, liquidation is not the inevitable result of a valid seizure.

[6] Turning to the question as to whether the assets of the company were impaired on March 4, 1939, we find that the standard by which the commissioner is governed in determining this question is prescribed by the Legislature in section 13.11. The presently material portion of that section authorizes summary seizure of an association by the commissioner "if he shall find that its assets are impaired to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock." Applying this test to the evidence before it, the trial court found that the assets of Pacific States were impaired in an amount exceeding $10,000,000. Specifically the court found that "On March 4, 1939 [the date of the seizure], its assets, after deducting all liabilities other than to its investors, did not equal or exceed, but on the contrary were at least $10,234,422.22 less than, the sum of the value (as defined in the Building and Loan Association Act) of its outstanding shares and investment certificates and the par value of its outstanding stock." It was further found that "The books and records of Pacific States were false and misleading and were not kept in accordance with good accounting practice, and did not on March 4, 1939, truly reflect the financial condition of Pacific States. If the books and records of Pacific States had been kept in accordance with good accounting practice and in accordance with the requirements of the Building and Loan Association Act and of the uniform classification of accounts mentioned above, those books and records would have disclosed upon their face on March 4, 1939, that the assets of Pacific States were impaired on that date to such an extent that after deducting all liabilities, other than to its investors, they did not equal or exceed, but on the contrary were at least $10,000,000.00 less than, the sum of the value (as defined in the Building and Loan Association Act) of the outstanding shares and investment certificates and the par value of the outstanding stock of Pacific States."

These findings are supported by expert testimony indicating that application to the company's books of the uniform classification of accounting system established and prescribed by the commissioner for all associations and application of other proper accounting practices revealed an impairment of assets in excess of $10,000,000. This impairment was also demonstrated by physical appraisals of the assets of the company. In this latter connection the court appointed certain experts and gave them definitions of "value" to be employed in their appraisals. Using these definitions, the experts reported that the assets were impaired in the amount stated above. One of the experts appointed to prepare and render a report on the financial condition of Pacific States, including its accounting methods and the value of its assets, testified that he had made an examination of all the assets and liabilities of the company, that in so doing it was necessary to reappraise its assets, and that he utilized, as authorized, the services of certain other experts (all of whom likewise testified upon the trial). In response to a question as to what in his opinion was the financial condition of Pacific States on March 4, 1939, the witness replied: "In my opinion as of that date, there existed a deficit in the affairs of the company of $12,756,022.22. As representing a part of that deficit there was a capital stock of $628,600 and a capital surplus of $1,893,000. By applying those against the $12,000,000 deficit there remains an impairment of capital of $10,234,422.22." The testimony of the other experts also substantiates the finding of impairment of assets at the time of the take-over. Thus, in addition to the showing of impairment consequent upon application to the company's books of the established accounting system and practices, the record also contains substantial evidence of impairment based on the physical appraisals by experts. Thus, the challenged findings on this issue are amply supported. This being so, there remains for consideration the question whether the standard of "value" as defined by the trial court for the experts was a correct one.

The standard set down by the court was contained in the following three instructions or definitions: (1) "Market value is the amount this property would sell

for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community in which it is situated, with a reasonable time being given to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used and make the sale." (2) "In considering the value of property 'Blank' as of March 4, 1939, and without giving any consideration to what this property was worth to the plaintiff for speculation, or merely possible uses, nor what the plaintiff claims or may claim it was worth to it, nor what it may be worth to the plaintiff for purposes other than the highest and best use to which this property was adapted, nor what this property would bring at a forced sale, nor what this property would sell for under special or extraordinary circumstances, but considering only the highest and best use for which this property was adapted and its fair market value, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale, and considering market value to be the amount this property would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community in which it is situated, with a reasonable time being given to find a purchaser, buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used, what, in your opinion, was the fair market value of this property on March 4, 1939?" (3) "The highest price, estimated in terms of money, which the property would bring if exposed for sale in the open market with reasonable time allowed in which to find a purchaser buying with full knowledge of all the uses and purposes to which the property was adapted and for which it was capable."

It was urged upon the trial and is repeated here that the rule of fair market value as defined and adopted by the court was erroneous and that the basis of valuation adopted by it was too narrow and restricted and excluded proper and necessary elements of value. Specifically, it is urged that "(1) the rule of fair market value, as interpreted by the Court, was adopted as the controlling rule of value, (2) no allowance was made for 'going concern value'; (3) the element relating to value of the amount a prudent owner willing, but not forced to sell, would accept, was excluded; (4) the element of an existing fair market was excluded; [and] (5) the element of a cash price was required, to the exclusion of sales on terms."

[7] The history of this case definitely indicates that challenge 2, having to do with "going concern value," has assumed the position of greatest importance in appellants' attack upon the trial court's definitions of value, and we therefore consider it first.

In light of the purpose of section 13.11, authorizing summary seizure of associations under the circumstances there designated, it is obvious that the reason for ascertaining whether assets are impaired within its meaning is not to determine whether the company shall ultimately be liquidated but only whether a takeover is justified. This is so because, as said above, liquidation is not the inevitable result of seizure. On the contrary, the commissioner may operate, rehabilitate or liquidate. In determining which of these ultimate courses is most appropriate as regards a particular seized association, conceivably the commissioner will consider all relevant facts and circumstances including whether the association has a reasonable chance of paying off all of its debts, thus giving recognition to "going concern" value as these terms are here used. But, as stated, we are not here concerned with the propriety of his determination with respect to the ultimate fate of Pacific States, or with the factors that influenced that determination. We are presently concerned with the propriety of the seizure in the light of the legislative determination that it is in the best interests of the certificate investors and the public that the commissioner take over an association whose assets are impaired. The legislative intent is clear that if at any time the assets of an association, if sold at other than a forced sale, would not equal its liabilities so that its creditors would not be paid in full, the commissioner, in his discretion, should take over and operate the association. It is not necessary that he delay such seizure until he can determine whether or not as a "going concern" the company may have a reasonable possibility of paying off its debts some time in the indefinite future. To so stay his hand would mean that an association could not be taken over unless it was in such an advanced state of insolvency as to require liquidation without hope of operation by the commissioner and conceivable ultimate

rehabilitation although this latter objective is clearly expressed in the act. In view of this objective, it must be concluded that the Legislature intended that when a company is in such financial condition that it cannot, if liquidated, pay off its debts, the commissioner should take it over and he, not its management, should carry on its further operation until it can be determined, in his sound discretion, whether the company can safely be returned to the same or a new management, or must be liquidated. We are satisfied, therefore, that the commissioner has the power to take over and operate a company whenever it is insolvent as measured by such a liquidation test. Application of such test places the commissioner in the position of being able to decide whether certificate holders will benefit most by immediate liquidation, thus minimizing losses, or whether rehabilitation is the more reasonable and practicable course. The standard of "market" value, such as was here employed by the trial court, while adhering to the liquidation theory of valuation, did not assume a liquidation by a trustee in bankruptcy, a type of sale which depresses price, but, rather, a liquidation by the owner with a reasonable time allowed to dispose of the property. To deny the commissioner the power to seize a company until it is not only insolvent as measured by a liquidation test but until all reasonable hope of rehabilitation has vanished, would increase the losses of the investors and of the public.

When the Legislature intended that consideration should be given to "going concern" value of the association, it expressly so provided. In 1935 it adopted an article of the act, as emergency legislation, which did not continue in effect beyond February, 1937, providing for the rehabilitation and reorganization of building and loan associations under certain circumstances, art. XVI, Stats.1935, p. 814. The plan there provided required the consent of certain creditors, including certificate holders, but eliminated the necessity for the consent of shareholders "if the value of the assets of such association shall be less than the liabilities of such association, including the value of its investment certificates but not including the value of its shares, or if the business, properties and assets of such association be then in the possession of the commissioner. *For the purpose of this article,* real property, * * * loans, and all other assets (whether like or unlike the foregoing) *shall be valued at what may reasonably be expected to be realized therefrom in the orderly and proper conduct of a going business.*" § 16.04. (Italics added.) When it intended to include a "going concern" value, the Legislature expressly provided therefor, and it definitely limited the definition to "the purpose of this article." Such limitation would be unnecessary had it intended the same definition to be applicable for the purpose of determining whether an impairment of assets existed under section 13.11. Thus, the silence of section 13.11 on the subject and the positive legislative expression thereon in another part of the act can only suggest that the Legislature intended that "going concern" value need not be considered in determining whether an impairment of assets exists within the meaning of section 13.11 to warrant the take-over of an association.

The cases relied on by appellants and decided under section 77B of the Bankruptcy Act [11 U.S.C.A. § 501 et seq.] are of no assistance in the solution of the problem here presented. They deal generally with reorganizations under the Bankruptcy Act and, as under the emergency reorganization section (16.04) of our state act last referred to above, one of the factors to be considered in determining whether a company shall be reorganized is "going concern" value, namely, the prospect of its being able to pay off its debts. The test applicable under such circumstances differs materially from that to be applied in determining whether a company shall be taken over and operated. As stated above, if the commissioner prior to seizure must not only determine whether the company is insolvent in the sense that if liquidated it could not pay its debts, but must also first ascertain its future prospects of working out its financial difficulties, the legislative objective unquestionably would effectively be destroyed by reason of necessitous delay in the seizure, a delay that could serve only to increase the insolvency to the point where reorganization or rehabilitation would be impossible. It should also be added that the experts in valuing the various properties that were in fact operating businesses, such as hotels, office buildings, ranches, etc., valued them as going businesses under the court's definitions. In this sense "going concern" values were in fact included within the appraisals.

[8] Before leaving the subject of "going concern," as an element of value, reference should also be made to appellants' use of the phrase as meaning the amount by which the value of the assets as a whole, assembled together for the conduct of a business, exceeds the aggregate of the value of the separate items of property. This concept, frequently discussed in rate fixing cases involving the valuation of franchises and public utility properties, can have no reasonable application here where no claim is made of the existence of a possibility of selling all the assets of Pacific States to a single purchaser.

[9] Appellants also urge that while the trial court's definition of value assumed a willing buyer, it failed to assume a willing seller. That market value is the amount for which a property can be sold by a willing seller to a willing buyer, is quite generally recognized. In its first and third directions to the experts the court provided for "a reasonable time being given to find a purchaser." This language is not indicative of an unwilling seller required to sell at the earliest moment. In the second of its instructions or definitions, the trial court expressly informed the experts that they were not to consider what the assets would bring at a forced sale. These directions, in our opinion, sufficiently eliminated the unwilling seller from consideration by the experts. It might be added that there has been criticism of the willing-seller, willing-buyer test. It is stated in Helvering v. Walbridge, 2 Cir., 70 F.2d 683, 684, that "'Willing' adds nothing, for, if the trade goes through at all, both must be willing, and the degree of their reluctance is not a serviceable measure." See, also, McGill v. Commercial Credit Co., D.C., 243 F. 637, 647; 1 Bonbright, Valuation of Property, p. 61.

[10] Nor do we find merit in appellants' criticism that the court's definition excluded the element of an "existing" fair market. They urge, in brief, that if the market is in a depressed state when the seizure is made, as of which date the assets must be valued to determine whether there is an impairment within the meaning of section 13.11, consideration should not be given to the amounts for which they actually could be sold on the market, but, rather, to amounts for which they could be sold on a more normal market that might exist some indefinite time in the future. Acceptance of this contention would require a disregard of realities. If the purpose of the valuation is to determine whether the commissioner was justified in seizing the company on the ground of impairment of its assets as of the time of the take-over, and if, as held, an assumed liquidation is to furnish the value test, the question is whether the assets can in fact then be sold for enough to pay the liabilities in full, allowing a reasonable time to complete the sale, but not awaiting the return of a market which is fair or normal to the debtor. Cf. Johnson v. Land Title Bank & Trust Co., 329 Pa. 241, 198 A. 23, 25; Mitchell v. Investment Securities Corporation, 67 F.2d 669, 671; In re Studebaker Corporation, D.C., 9 F.Supp. 426, 427.

[11] We turn to appellants' further contention that the trial court's definition of value required a cash price to the exclusion of sales on terms. If, as we have held, the test is value at an assumed liquidation, cash prices necessarily control rather than sales on terms or exchanges for other property. Johnson v. Land Title Bank & Trust Co., 329 Pa. 241, 198 A. 23, supra; Mitchell v. Investment Securities Corporation, 67 F.2d 669; People ex rel. Nelson v. First State Bank, 274 Ill.App. 46.

[12] The three definitions or directions set down by the trial court for the guidance of the experts informed them that they were to ascertain the "fair market value" of the assets of Pacific States. They were told that "Market value is the amount this property would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community in which it is situated, with a reasonable time being given to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used. * * *" They were next told not to consider speculative or mere possible uses of the property or "what it would bring at a forced sale," but were to consider "only the highest or best use for which this property was adapted and its fair market value, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale. * * *" Later, the court eliminated the "cash" feature and defined market value as "The highest price, estimated in terms of money, which the property would bring if exposed for sale in the open market with reasonable time allowed in which

to find a purchaser buying with full knowledge of all the uses and purposes to which the property was adapted and for which it was capable."

In thus defining "fair market value" the court eliminated a forced sale and included a value based upon the highest and best use of the property. It gave the accepted definition of market value. Sacramento Southern R. R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979; Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 399, 153 P. 705; In re Estate of Felton, 176 Cal. 663, 668, 169 P. 392; City of Napa v. Navoni, 56 Cal.App.2d 289, 299, 132 P.2d 566; City of Redding v. Diestelhorst, 15 Cal.App. 2d 184, 192, 59 P.2d 177; City of Stockton v. Vote, 76 Cal.App. 369, 401, 244 P. 609; People v. Olsen, 109 Cal.App. 523, 532, 293 P. 645; City of Los Angeles v. Deacon, 119 Cal.App. 491, 493, 7 P.2d 378; Joint Highway Dist. v. Ocean Shore R. R. Co., 128 Cal.App. 743, 752, 18 P.2d 413; Temescal Water Co. v. Marvin, 121 Cal.App. 512, 518, 9 P.2d 335; Wild Goose Country Club v. Butte County, 60 Cal.App. 339, 341, 212 P. 711. The fact that the definition so used has most frequently appeared in condemnation cases and in some tax cases does not detract from its applicability here when, as we have held, the liquidation test is to be applied in determining whether the assets of Pacific States, if sold, would or would not pay off its indebtedness. We are satisfied, therefore, that the definition of value as given by the trial court was proper and that its findings, based on the evidence adduced thereunder, that the assets of Pacific States were impaired on March 4, 1939, within the meaning of section 13.11, are fully supported.

[13, 14] We turn to a consideration of the appeals from the orders denying applications for attorneys' fees. As regards the appeal of State Guaranty, the so-called parent corporation, it should first be noted that when it sought and procured leave to intervene in the trial court it did so on the representation that it did not "expect to come here asking for leave of the court to pay its expenses in defending its rights as a stockholder." In addition, it has advanced nothing persuasively suggesting that it should be allowed attorneys' fees. While a parent company may expend its own funds to defend a company in which it holds the controlling stock (Pratt v. Robert S. Odell & Co., 49 Cal.App.2d 550, 122 P.2d 684), it should not be awarded fees from funds in the commissioner's hands seized from a subordinate company.

[15] As pointed out earlier, the trial consumed approximately two years. Neither at its inception nor at any time during this period did Pacific States ask for an allowance of attorneys' fees, although it was at all times represented by competent counsel, nor does it now ask for attorneys' fees for these past services. Its application for an allowance of attorneys' fees was made after the commissioner had rested his case and was for future legal services to compensate counsel during the production of evidence by Pacific States. During the course of the hearing on the application, Odell, the president of Pacific States, was called as a witness and was examined and cross-examined over a period of weeks. During his examination there was considerable discussion as to whether Pacific States intended to or could produce evidence of the fair market value of its assets. His testimony reveals that the evidence expected to be produced was predicated upon a "normal" market (the time of the arrival of which he admitted he could not foresee or foretell) and not upon the market that existed at the time of the seizure. This subject is discussed above in another connection. In addition, counsel for Pacific States frankly admitted that if the trial court's definition of value was correct (and we have approved it herein), it would be impossible for them to prove that there was not an impairment of assets. Under the circumstances, it would have resulted in a useless waste of the company's assets to permit the expenditure of its funds for the future services of counsel in the continuation of a case in which admittedly they could offer no evidence to overcome the showing of impairment which showing alone justifies the seizure and retention of assets. A seized association, as in the case of receiverships, is not entitled as of right to attorneys' fees and costs in resisting the seizure. An application therefor is addressed to the discretion of the trial court and should be granted only upon a showing that the resistance to the seizure is based upon reasonable grounds. Cf. Anderson v. Great Republic Life Ins. Co., 41 Cal.App.2d 181, 191, 106 P.2d 75; Barker v. Southern Building & Loan Ass'n, 5 Cir., 181 F. 636; Witherspoon v. Hornbein, 70 Colo. 1, 196 P. 865; Watson v. Johnson, 174 Wash. 12, 24 P.2d 592, 89 A.L.R. 1527; Barnes v. Newcomb, 89 N.Y. 108; Commonwealth

Finance Corp. v. Missouri Motor Bus Co., Mo.App., 251 S.W. 756; O'Malley v. Continental Life Ins. Co., 343 Mo. 382, 121 S.W.2d 834; 89 A.L.R. 1531.

[16] As stated above, Pacific States made no application for attorneys' fees until the commissioner rested his case. The request was not for fees already incurred but for attorneys' fees to be incurred in the future in presenting the defense. In denying the application, the trial court had before it the evidence that justified the seizure, and the company, through its officers, was aware of the facts making it subject to lawful seizure. Under all the circumstances, including the admission of Pacific States that it could not offer any evidence to overcome the commissioner's showing of impairment of assets under the trial court's definition of value, here approved, we find no abuse of discretion in the trial court's conclusion that the evidence produced on the application for attorneys' fees was insufficient to justify an allowance for that purpose.

The judgment and orders appealed from are affirmed.

EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

GIBSON, C. J., did not participate therein.



25 Cal.2d 848

PEOPLE v. KELSO.

Cr. 4585.

Supreme Court of California.

Feb. 2, 1945.

1. Homicide ⇐289

Where jury was instructed that person who causes death of another while perpetrating, or attempting to perpetrate, burglary is guilty of murder in first degree, no other instruction on subject was required, where all the evidence tended to prove that accused fired fatal shot while he was committing burglary. Pen.Code, § 189.

2. Criminal law ⇐798(1)

Trial court's refusal of instruction, in criminal action, that verdict both as to guilt or innocence of defendant and degree of offense may be returned only on unanimous agreement of jury, is error.

3. Criminal law ⇐1186(4)

On appeal from conviction after trial in which court refused to give instruction that verdict both as to guilt or innocence and degree of offense may be returned only on unanimous agreement of jury, question for decision is whether, considering all the circumstances, the error was prejudicial. Const. art. 6, § 4½.

4. Criminal law ⇐1186(4)

Where evidence of guilt is clear and convincing and it appears that a different verdict would not otherwise have been probable, ordinarily a judgment of conviction will not be reversed solely for errors in or failure to give an instruction. Const. art. 6, § 4½.

5. Criminal law ⇐1186(4)

Where evidence convincingly, if not conclusively, showed that accused when surprised in commission of burglary of theater by manager thereof without justification fired four times at manager at close range, refusal to instruct that law requires the unanimous agreement of the jury before verdict of conviction, and also as to degree of offense and penalty to be inflicted if accused was found guilty of first-degree murder, did not prejudice accused's rights nor result in miscarriage of justice. Pen.Code, § 189; Const. art. 6, § 4½.

6. Criminal law ⇐823(1)

An instruction, in murder and burglary prosecution, that jury must return a verdict expressing the individual opinion of each juror on the fact issues involved, and that it was each juror's duty to consider and weigh all the evidence in determining accused's guilt uninfluenced by fact that other jurors might reach a different conclusion, did not cure error in failing to direct jury that unanimous agreement was required in reaching verdict as requested by accused. Pen.Code, § 189; Const. art. 6, § 4½.

7. Criminal law ⇐1186(4)

In considering alleged errors in refusing to give instructions, appellate court may consider the entire charge with other circumstances in determining whether prejudice resulted. Const. art. 6, § 4½.

8. Criminal law ⇐1144(16)

Where accused did not assert on appeal from murder and burglary conviction that less than 12 of the jurors found against him, nor complain of any failure to follow statutory procedure, appellate court must assume that when jurors returned from their deliberations trial judge followed statutory procedure with respect to receipt and recording of verdict, as respects any prejudicial effect from trial court's refusal to instruct as to unanimity required of jury. Pen.Code, §§ 1149, 1164; Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Silas J. Kelso was convicted of burglary in the first degree and murder in the first degree, and he appeals on an appeal automatically taken under Pen.Code, § 1239.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

EDMONDS, Justice.

James Lorette, the manager of a theater, was shot while investigating the source of noises which indicated that a burglary was taking place. He died almost immediately after the attack upon him.

Silas J. Kelso, Richard R. Graham and Edward Krudy were charged jointly with the burglary of the theater and, in a second count of the indictment, with the murder of Lorette. Graham and Krudy pleaded guilty and testified for the People in the trial of Kelso, who admitted that upon each of three previous occasions he had been convicted of a felony for which he served a term of imprisonment. A jury found him guilty of both offenses and decided that each crime was of the first degree. By special verdicts the jury determined that he was armed at the time of the commission of each offense, and as it made no recommendation concerning the punishment to be suffered by him, the death penalty was imposed. Upon appeal, as grounds for reversal of the judgment, Kelso relies upon asserted errors in instructions to the jury which, he insists, prevented him from having a fair trial.

The record shows that on the evening before the murder was committed, Kelso, Graham and Krudy were in a cocktail lounge from about eight o'clock until midnight. They left in Kelso's Ford coupé. He told his companions that he knew the location of the safe in the Kinema Theatre, about two blocks distant. They drove there and parked the automobile in the alley at the rear of the building. By breaking a catch on one of the front doors in the Kinema entranceway, access was gained to the inside of the theater. According to Krudy and Graham, they more or less reluctantly followed Kelso to the stage. Then they climbed a ladder to the attic and eventually reached a room adjoining the projection room, where, at one time, the theater safe had been kept. Not finding the safe where they had expected it to be, the three went to the front of the theater and in attempting to enter the office, broke the glass pane in a door.

The noise of the breaking glass awoke Lorette and his wife, who occupied an apartment directly above the theater entranceway. Lorette arose, slipped a pair of trousers over his pajamas, obtained a .25 caliber Colt automatic pistol from a nearby desk and proceeded downstairs. Mrs. Lorette looked out of the window and saw her husband on the sidewalk, facing the theater entranceway. She could not see anyone else. Lorette stepped closer to the building and out of his wife's view. She heard him say, "Come out with your hands up." She heard voices and then two shots in rapid succession; her husband staggered back to the curb and, as he fell, she heard two more shots.

Mrs. Lorette aroused Mr. and Mrs. Holmes, who also occupied an apartment in the theater building and the three hurried down the stairs to the street. Lorette was lying on his back near the curb, his feet extended toward the theater entrance. The left sleeve of his pajama top was on fire. A hammer, a pair of pliers and a flashlight were lying on the sidewalk.

Graham and Krudy told the jury that when Lorette appeared and told them to come out, they did so. Then, from behind them, a shot was fired and they proceeded to run down the street. Soon thereafter, Kelso appeared with his car and took Graham and Krudy to the latter's home in Cul-

ver City. On the way, Kelso remarked that the man they had encountered would not talk any more.

Within an hour after Lorette was shot, police officers arrested Kelso. He was then sitting in his automobile which was parked near Culver City. They found in his pocket the pistol which had been carried by Lorette. It was loaded with six shells. Although Kelso told an officer that two months before he had purchased the weapon at San Francisco from a person whose name he did not know, Mrs. Lorette identified it as the one in the possession of her husband on the night he was killed. She testified that it was purchased by her in a pawnshop, and a sales record corroborated her testimony.

At the time of Kelso's arrest he had in his possession four empty and five fully loaded .38 caliber cartridges. In a paper bag under the seat of his automobile, they found a .38 caliber Smith and Wesson revolver, fully loaded with six cartridges. The gun had a pungent odor about it, as though it had been recently fired. In the back of his car was a hack saw which was identified as having been taken from the projection room of the theater.

The autopsy surgeon testified that he found two bullets in the body of Lorette; another bullet was taken from Lorette's clothing. Death came almost immediately from wounds in the heart and left lung. Experts in ballistics testified that the four lethal bullets had been fired from the Smith and Wesson gun found under the seat of Kelso's car, and that they fitted the cartridges which were in his pocket at the time of his arrest. The body of Lorette showed burns on the left wrist and one of the experts stated that a shell loaded with black powder will cause fabric to burn if fired at a distance of less than three feet from the material.

Kelso did not testify nor was any evidence presented upon his behalf. He does not now claim that the evidence is insufficient to support the verdicts of conviction but he challenges the judgment upon the ground that neither the crime of murder nor the degrees of that offense were defined for the jury. He also assigns as prejudicial error the failure of the trial court to instruct the jury that they must be of unanimous agreement as to their verdict, as to the degrees of the respective offenses charged in the indictment, and as to the punishment to be imposed.

[1] The jury was instructed that a person who causes the death of another while engaged in the perpetration of, or attempt to perpetrate, the crime of burglary is guilty of murder in the first degree. This is the mandate of section 189 of the Penal Code, and as all of the evidence tends to prove that Kelso fired the fatal shots while he was committing a burglary, no other instruction upon this subject was required. People v. Murphy, 1 Cal.2d 37, 32 P.2d 635; People v. Boss, 210 Cal. 245, 290 P. 881; People v. Perry, 195 Cal. 623, 234 P. 890; People v. Denman, 179 Cal. 497, 177 P. 461; People v. Milton, 145 Cal. 169, 78 P. 549.

The following instruction was offered on behalf of Kelso and refused: "The law requires a unanimous agreement of the jury before you can render a verdict in this case. This applies not only to the question of the guilt or innocence of the defendant, to the degree of the crime if the defendant is found guilty, but also as to the penalty to be inflicted if the defendant is found guilty of murder in the first degree." The failure to give this instruction constitutes prejudicial error, says the appellant. He argues that it is not improbable to assume that some of the jurors might have had experience in the trial of civil cases in which a verdict may be returned upon the vote of nine members of the jury, and he points to the lack of any showing in the record of a unanimous agreement concerning his guilt and the punishment to be imposed.

The People contend that any error caused by the refusal to give the charge proposed by the appellant was cured by the instruction in which the jury was told that it must return a verdict "which will express the individual opinion of each juror." And in further support of that position the Attorney General calls attention to another instruction, which reads: "You are instructed that the people and the defendant are entitled to the individual opinion of each juror on the issue of fact in this case. It is the duty of each of you to consider and weigh all the evidence in the case and from such evidence to determine, if you can, the question of the guilt or innocence of the defendant. When you have so determined that question, you should not be influenced in giving your verdict by the mere fact that any number or all of your fellow jurors may have reached a different conclusion. * * * If, after such a

full and fair discussion with them, any juror is still satisfied that his or her decision is right, he or she should say so by his verdict. If, on the other hand, after such full and fair discussion, any juror is satisfied that his original decision was wrong, then he or she should unhesitatingly abandon such decision and render his or her verdict according to such final decision."

[2, 3] In a criminal action, it is error for the trial court to refuse an instruction stating to the jurors that a verdict, both as to the guilt or innocence of the defendant and the degree of the offense with which he is charged, may be returned only upon their unanimous agreement (People v. Howard, 143 Cal. 316, 324, 76 P. 1116; People v. Dole, 122 Cal. 486, 495, 55 P. 581, 68 Am.St.Rep. 50), and when one who has been convicted appeals from the judgment which has been entered against him following a trial in which such an instruction was rejected, the question for decision is whether, considering all of the circumstances of the case, the error was prejudicial. People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. Loomer, 13 Cal.App. 654, 110 P. 466. For the California Constitution declares: "No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, * * * or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Cal.Const., art. VI, § 4½.

[4] Where the evidence of guilt is clear and convincing, and it appears that a different verdict would not otherwise have been probable, ordinarily a judgment of conviction will not be reversed solely for errors in or the failure to give an instruction. People v. Cook, 15 Cal.2d 507, 102 P.2d 752; People v. Madison, 3 Cal.2d 668, 46 P.2d 159; People v. McEvers, 53 Cal.App.2d 448, 128 P.2d 93; People v. Marvich, 44 Cal.App.2d 858, 113 P.2d 223; People v. Ratterman, 38 Cal.App.2d 598, 101 P.2d 750; People v. Ollinger, 27 Cal.App.2d 381, 80 P.2d 1015; People v. Shellenberger, 25 Cal.App.2d 402, 77 P.2d 506; People v. Montoya, 17 Cal.App.2d 547, 62 P.2d 383; People v. Weaver, 96 Cal.App. 1, 274 P. 361; People v. Stuckrath, 64 Cal.App. 84, 220 P. 433. In applying that rule to the facts of the Cook case, supra, evidence convincingly showing that the appellant went to the place of assault with the intention of committing the crime of robbery was mentioned, as was also the fact that "he produced no evidence on his own behalf, nor any which tended to show mitigation, excuse or justification for the commission of the crime with which he was charged." [15 Cal.2d 507, 102 P.2d 756.] Accordingly, it was determined, the refusal of the trial court to give an instruction proposed by Cook did not warrant a reversal.

[5] The record in the present case likewise compels the conclusion that the refusal to give the instruction offered by Kelso did not prejudice his rights nor result in any miscarriage of justice. He offered no defense to the charges made against him nor any evidence whatever in mitigation of punishment for his cold-blooded acts. The evidence is without conflict and convincingly, if not conclusively, shows that when surprised in the commission of the burglary in which he encouraged his reluctant companions to participate, without any justification or excuse whatever, at close range he fired four times at Lorette. Under such circumstances it is difficult to believe that any one of the jurors could have entertained any doubt whatever as to his guilt.

[6-8] And although the instruction given by the trial judge did not cure the failure to direct the jury concerning the requirement of a unanimous agreement, the entire charge may be considered with the other circumstances of the case in determining whether prejudice resulted. People v. Ferdinand, supra. In two instructions the trial judge stated that the verdicts must express "the individual opinion of each juror" and unquestionably the determination against Kelso was reached by a unanimous vote. Indeed, the appellant does not assert that less than twelve of the jurors found against him, nor does he complain of any failure to follow the statutory procedure. It must therefore be assumed that when the jurors returned from their deliberations they were asked by the judge or the clerk whether they had agreed upon their verdict as required by section 1149 of the Penal Code; that they answered in the affirmative; and that after each one of the verdicts was received the clerk recorded it in the minutes, read it to the jurors and was told by them that the verdict as recorded was their decision up-

on the issues submitted to them. Pen. Code, § 1164. Moreover, counsel for the appellants expressly waived his right to poll the jury, as he might have done if he questioned the votes by which the verdicts had been found.

The judgment and the order denying a new trial are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



67 Cal.App.2d 554

PEOPLE v. HASHAWAY.

Cr. 3808.

Supreme Court of California.

Feb. 15, 1945.

Homicide ⇐22(2)

Supreme Court expressly withheld approval of ruling by District Court of Appeal that premeditation sufficient to constitute element of premeditation in murder of the first degree need not exist for any given length of time or for appreciable time, but that such premeditation might be instantaneous.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Zilla Hashaway was convicted of murder in the first degree, and she appeals. On defendant's petition for hearing after affirmance of her conviction by the District Court of Appeal, 155 P.2d 101.

Petition for hearing denied.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PER CURIAM.

We expressly withhold approval of the following statement in the foregoing opinion [155 P.2d 101, 110]: "It is not a legal requirement that premeditation, sufficient to constitute the element of premeditation in murder of the first degree, should exist for any given length of time, or for an appreciable time. [Citation] Such premeditation may be instantaneous. [Citations]."

The petition for hearing is denied.

25 Cal.2d 842

FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 19147.

Supreme Court of California.

Feb. 2, 1945.

1. Descent and distribution ⇐1

The right to succession is subject to such conditions as Legislature may prescribe, and courts cannot make exceptions not provided by Legislature.

2. Constitutional law ⇐309(2)

Courts should be particularly alert to require compliance with statutory provisions relating to constructive notice, since a departure therefrom constitutes a denial of due process of law.

3. War ⇐12

The jurisdictional defect because communication with testator's Russian heirs who were in enemy-occupied territory was prohibited by Trading with the Enemy Act was cured by general appearance, subsequent to order of probate of testator's will, on behalf of Russian heirs by the Alien Property Custodian. Probate Code, §§ 327, 328; Code Civ.Proc. § 1014; Trading with the Enemy Act § 3(c), 50 U.S.C.A.Appendix § 3(c).

4. Appearance ⇐19(1)

Under statute providing that, among other methods, a party appears when attorney gives notice of appearance for him, such appearance invokes general jurisdiction of court over the party when it is in form of a written notice filed in the action for that purpose. Code Civ.Proc. § 1014.

5. Wills ⇐271

The rule that a party's appearance through an attorney invokes general jurisdiction of court over the party when it is in form of a written notice filed in the action for that purpose applies in probate proceedings. Code Civ.Proc. § 1014; Probate Code, §§ 327, 328.

6. Appearance ⇐26

A general appearance made after entry of judgment has effect of curing any defect arising from lack of jurisdiction due to failure to serve or notify a person of the proceedings, and a judgment based upon such an appearance is valid. Code Civ.Proc. § 1014.

In Bank.

Original proceeding in mandamus by the Farmers & Merchants National Bank of Los Angeles, executor of the estate of Jacob Kahan, deceased, against the Superior Court of the State of California in and for the County of Los Angeles, and the Honorable William R. McKay, Judge thereof, to compel respondents to proceed with the administration of decedent's estate.

Writ granted.

Prior opinions, App., 148 P.2d 445, 150 P. 2d 241.

Bodkin, Breslin & Luddy and George M. Breslin, all of Los Angeles, for petitioner.

Herbert Wechsler, Asst. U. S. Atty. Gen., Charles H. Carr, U. S. Atty., of Los Angeles, A. Matt. Werner, Harry LeRoy Jones, and Albert Parker, all of Washington, D. C., J. A. Fridinger, of Arlington, Va. and Irving Jaffe and George A. McNulty, both of Washington, D. C., and John Ernest Roe, of Washington, D. C., amici curiae on behalf of petitioner.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, for respondents.

EDMONDS, Justice.

The question presented by the application of The Farmers and Merchants Bank of Los Angeles, as executor of the estate of Jacob Kahan, for a writ of mandate concerns the jurisdiction of the probate court to proceed with the administration of his estate in the absence of proof that notice of the hearing of the petition for probate of his will was given to certain devisees residing in Ukraine, Russia. At the time the will was filed Ukraine was occupied by the armed forces of Germany, and postal and other communications with persons in that state were prohibited by the Trading with the Enemy Act, 50 U.S. C.A.Appendix § 3, subsec. c.

As grounds for the issuance of the writ, the bank has alleged these facts: The petition for the probate of will included the names of the devisees thereunder and stated that two of them reside in Ukraine, Russia. A notice of the hearing of the petition was sent to these heirs by mail addressed to them in care of the Alien Property Custodian, Washington, D. C. When the petition came on for hearing, there had been filed in the proceeding a letter from the Alien Property Custodian acknowledging receipt of the notices and stating: "As provided in General Order No. 6, the Custodian will, within sixty days, determine whether or not he will accept service of the notice."

The custodian did not, within sixty days or at all, accept service, but almost one year after the will was admitted to probate, he entered a general appearance for the Russian devisees, and thereupon filed in their behalf a waiver of the failure to comply with the provisions of section 328 of the Probate Code and the Custodian's General Order No. 6. Following an order admitting the will to probate, the court held that it had no jurisdiction to do so and refused to further proceed with the hearing of a petition for confirmation of a sale of property of the estate. By demurrer and answer to the petition for the writ of mandate, the respondent court asserts that the order admitting the will to probate and the purported letters testamentary issued to the bank as executor are, and each of them is, void for want of jurisdiction, but the facts alleged in regard to the administration of the estate are expressly admitted.

Section 327 of the Probate Code provides for notice by publication of the hearing of a petition for probate of a will. By the terms of the following section, "At least ten days before the hearing, copies of the notice must be personally served upon the heirs of the testator and the devisees and legatees named in the will * * * or mailed, postage prepaid, from a postoffice within this state, addressed to them at their respective places of residence, if known to the petitioner, if not, at the county seat of the county where the proceedings are pending." § 328. The bank asserts that jurisdiction to admit a will to probate is obtained by the filing of the petition and the publication or posting of notice; the mailing of copies of the notice is not mandatory and, accordingly, may be excused where useless or impossible. In any event, says the bank, the Alien Property Custodian is empowered to represent the Russian devisees and, as notice was mailed to and received by him, the failure to accept service is immaterial for jurisdiction is acquired by the mailing of notice. In his brief as amicus curiae, the Alien Property Custodian states that he is properly authorized to represent aliens in enemy-occupied territory and, although he asserts that the notices mailed to him did not amount to a compliance with the terms

of section 328, he argues that jurisdiction vested in the superior court upon his general appearance therein.

In support of its action, the respondent court takes the position that compliance with the terms of section 328 of the Probate Code is mandatory and, as it appears from the judgment roll that copies of the published notice were not mailed to the Russian devisees at the addresses shown in the petition for probate, it was without jurisdiction to proceed in the matter. Moreover, says the respondent, since occupation of the Ukraine by the German army made communication with or notice to the Russian devisees impossible, constructive service by publication or posting under section 327 of the Probate Code was a nullity and ineffectual as a basis for jurisdiction over the parties. It is conceded, however, that either service upon the custodian as representative of the Russians or a general appearance by him in their behalf, prior to entry of the order admitting the will to probate, would vest jurisdiction in the superior court. But jurisdiction was not acquired upon either of these grounds for the reason that, first, the custodian did not accept service within sixty days as required by his rules and regulations, and, second, his appearance in the proceedings was made subsequent to the entry of the order admitting the will to probate. Accordingly, the respondent concludes, the order admitting the will to probate and all subsequent proceedings are void.

[1, 2] As there is no vested right to succession, it is subject to such conditions and limitations as the Legislature may prescribe. In re Estate of Perkins, 21 Cal.2d 561, 569, 134 P.2d 231. The statutory requirements must be followed and the courts are powerless to make exceptions not provided by the Legislature. In re Estate of Davis, 136 Cal. 590, 595, 69 P. 412. Courts should be particularly alert to require compliance with statutory provisions relating to constructive notice, for a departure therefrom constitutes a denial of due process. 5 Cal.Jur. 874. In addition to the publication or posting of notice required by section 327, the Legislature has prescribed that copies of the notice "must" be personally served or mailed in the stated manner. The terms employed are mandatory, and no exceptions are provided.

As justifying the orders made in the probate proceeding, the bank relies upon Murray v. Superior Court, 207 Cal. 381, 278 P. 1033, and Nicholson v. Leatham, 28 Cal.App. 597, 153 P. 965, 155 P. 98, which, it declares, construe section 328 as a directory statute. But each of them was decided upon a record showing that the names of the heirs to whom notice was not mailed were omitted from the petition for probate and, accordingly, the failure to comply with the statutory requirement was not apparent upon the face of the judgment roll. These decisions are therefore authority only for the proposition that the omission of the name of a known heir in a petition for the probate of a will does not affect the jurisdiction of the court, and such error may only be remedied by an independent suit in equity as distinguished from a collateral attack upon the order admitting the will to probate; they do not deal with the failure to mail notices to an heir named in the petition.

The distinction to be made in cases such as those relied upon by the petitioner and one where the failure to give notice appears upon the face of the judgment roll, is stated clearly in Re Estate of Ivory, 37 Cal.App.2d 22, 28–30, 98 P.2d 761. There the judgment roll showed that notice had not been given to a named heir and, distinguishing the Murray and Nicholson cases, it was held that an order admitting a will to probate which includes the names of known heirs who have not been notified of the hearing is void upon its face, and the probate court, at least up to the time of closing the estate, has power to set it aside.

[3-6] The jurisdictional defect was cured, however, by the general appearance on behalf of the Russian heirs. Section 1014 of the Code of Civil Procedure provides that, among other methods, a party appears "when an attorney gives notice of appearance for him." Such an appearance invokes the general jurisdiction of the court over the party, when it is in the form of a written notice filed in the action for that purpose (Davenport v. Superior Court, 183 Cal. 506, 191 P. 911), and the rule is equally applicable in probate proceedings (In re Estate of Kratz, 192 Cal. 494, 221 P. 340). In addition to the appearance made by the Alien Property Custodian, he also filed an express notice of waiver of any failure or omission to serve or mail any notice required by the Probate Code. Although the respondent court concedes that the general appearance of the Russian

heirs prior to the order admitting the will to probate would justify its jurisdiction, the argument is advanced that because such appearance was made subsequent to the order, it is ineffective to remedy the defect arising from noncompliance with section 328 of the Probate Code. No such distinction is made in the law of this state. In accord with the great weight of authority (Ann.Cas.1914C, 694; 3 Am.Jur. 795, Appearances § 22; 6 C.J.S., Appearances, § 20, p. 61), this court has held that a general appearance made after entry of judgment has the effect of curing any defect arising from the lack of jurisdiction due to the failure to serve or notify a person of the proceedings (Thompson v. Alford, 135 Cal. 52, 66 P. 983; Security, etc., Co. v. Boston, etc., Co., 126 Cal. 418, 58 P. 941, 59 P. 296; Douglass v. Pacific Mail S. S. Co., 4 Cal. 304), and a judgment based upon such an appearance is valid.

The general appearance of the Russians through the Alien Property Custodian is of no effect, however, unless the custodian was properly authorized to represent them in the probate proceedings. The respondent court does not deny but agrees with the contention of the petitioner and the custodian that the latter was authorized to represent the Russians pursuant to Executive Order No. 9095 (7 Fed.Reg. 1971), as amended by Executive Order No. 9193, 50 U.S.C.A.Appendix § 6 note (7 Fed.Reg. 5205), which orders were made according to the authority granted the President under the Trading with the Enemy Act of 1917, 50 U.S.C.A.Appendix § 1 et seq., as amended by the First War Powers Act of 1941, 50 U.S.C.A.Appendix § 601 et seq. Notwithstanding, therefore, that no issue exists in the present controversy as to the authority of the custodian to represent alien devisees residing in enemy occupied territory, it may be observed that when the same question arose in the First World War under the Trading with the Enemy Act, supra, the custodian was held to have broad powers in regard to the property interests of aliens (United States v. Chemical Foundation, 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131; Stoehr v. Wallace, 255 U.S. 239, 41 S.Ct. 293, 65 L.Ed. 604; Garvan v. $20,000 Bonds, 2 Cir., 265 F. 477, affirmed in 254 U.S. 554, 41 S.Ct. 214, 65 L.Ed. 403; Farmers' Loan & Trust Co. v. Hicks, 2 Cir., 9 F.2d 848; American Exch. Nat. Bank v. Garvan, 2 Cir., 273 F. 43; Kahn v. Garvan, D.C., 263 F. 909; In re Shafer's Estate, 50 S.D. 232, 209 N.W. 355; Keppelmann v. Keppelmann (Palmer), 91 N.J.Eq. 67, 108 A. 432; see: In re Estate of Bosse, 185 Cal. 666, 200 P. 412; 137 A.L.R. 1328; 137 A.L.R. 1335, 1338), and there is no reason to believe that a different conclusion will be reached in the construction of the statute as amended by the First War Powers Act, supra. In re Chapal's Estate, 182 Misc. 402, 45 N.Y.S.2d 237; In re Miller's Estate, 181 Misc. 88, 45 N.Y.S.2d 485; Matter of Renard's Estate, 179 Misc. 885, 39 N.Y.S. 2d 968; 150 A.L.R. 1418; see: Draeger Shipping Co. v. Crowley, D.C., 49 F.Supp. 215; cf. The Pietro Campanella, D.C., 47 F.Supp. 374.

A writ of mandate will therefore issue commanding the Superior Court of the County of Los Angeles to proceed with the administration of the Estate of Jacob Kahan, Deceased.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



25 Cal.2d 814

ANTHONY et al. v. HOBBIE.

Sac. 5676.

Supreme Court of California.

Jan. 31, 1945.

1. Appeal and error ⇐927(7)

On plaintiffs' appeal from a judgment on a directed verdict for defendant, only evidence most favorable to plaintiffs need be examined, testimony of defendant's witnesses may be disregarded, and, if there is any substantial evidence from which jury could have found for plaintiffs, judgment must be reversed.

2. Automobiles ⇐245(46, 55)

Evidence that defendant was driving 50 miles an hour at night where there were occasional fog banks and did not see decedent until he was immediately in front of defendant's car, and that immediately before accident defendant had looked away from road toward a parked automobile, was sufficient to raise jury questions on issue of defendant's negligence and proximate cause.

3. Negligence ⇐122(1)

Defendants generally have burden of proving contributory negligence.

4. Negligence ⇐136(9)

Contributory negligence is not established as matter of law unless the only reasonable hypothesis is that such negligence exists and reasonable men could have drawn that conclusion and none other, and where there are different inferences that may be drawn, one for and one against, the one against will be followed, and before it can be held as a matter of law that contributory negligence exists the evidence must point unerringly to that conclusion.

5. Appeal and error ⇐989

A plaintiff is not bound by testimony elicited from defendant when defendant has been called as witness under code section permitting examination of adversary as on cross-examination, and on appeal plaintiff, in support of a favorable judgment in attack on a directed verdict for defendant, may rely upon portion of such evidence that is favorable to him and disregard unfavorable portion. Code Civ.Proc. § 2055.

6. Automobiles ⇐245(72)

In death action, where most that appeared from plaintiffs' evidence, when unfavorable testimony given by defendant when called as plaintiffs' witness as on cross-examination was disregarded, was that, at time of accident, decedent was probably near middle of highway and defendant was driving on his right-hand side of highway, evidence was insufficient to establish that decedent was guilty of contributory negligence as a matter of law. Code Civ.Proc. § 2055.

7. Automobiles ⇐244(49)

The mere fact that pedestrian is afoot on a highway at night is not sufficient in itself to establish pedestrian's contributory negligence so as to preclude recovery for his death as result of being struck by an automobile.

8. Automobiles ⇐242(8)

In action to recover for death of a pedestrian who was struck down on a highway at night by defendant's automobile, where there was no evidence as to reason for pedestrian's presence on highway, plaintiffs were entitled to aid of presumption that pedestrian used due care. Code Civ. Proc. § 1963(4).

9. Automobiles ⇐242(8)

In action for death of pedestrian who was struck on highway by defendant's automobile, in absence of evidence establishing pedestrian's guilt of contributory negligence as a matter of law, evidence was not sufficient to refute presumption that he used due care. Code Civ.Proc. § 1963(4).

In Bank.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Death action by Sadie Anthony and another against Don G. Hobbie. From a judgment entered on a directed verdict for defendant, plaintiffs appeal.

Reversed.

Prior opinion, App., 148 P.2d 433.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellants.

Rich & Weis and Richard H. Fuidge, all of Marysville, for respondent.

CARTER, Justice.

Plaintiffs are the wife and daughter respectively of H. L. Anthony, deceased, who was killed when an automobile driven by defendant struck him at a point on the Sacramento-Marysville highway known as 99E about five miles south of Marysville in Yuba County on January 31, 1941, at about 1:45 a. m. Defendant was driving his car north en route from Sacramento to Oroville. The highway at the scene of the accident is paved and 20 feet in width exclusive of shoulders. Riding with defendant at the time of the accident were his employee, R. D. Caton, and an unidentified woman.

According to the testimony of defendant who was called by plaintiffs under section 2055 of the Code of Civil Procedure, he ran out of gas several miles south of the scene of the accident. He flagged a south bound motorist with whom he rode to a service station in Marysville to obtain gas. He was accompanied on the trip by two women, one of whom remained in Marysville. He contacted a Mr. Muller in regard to his difficulty and returned with him to where his car was stalled. He proceeded north at about 1:30 a. m. The pavement was dry, sky overcast and he had passed through "a few fog banks lying low on the ground." His speed was about 50 miles per hour. His brakes and headlights were functioning properly. Just before the accident he was

talking to the woman sitting beside him in the front seat; he looked at a car with headlights burning parked on the east side of and off the highway and when he got his eyes back to the road the "next thing (I saw) this man was right in the middle of the road in front of me. Q. You didn't slow down when you saw the car parked on the highway near the Southern Pacific tracks? You kept on at about the same speed? A. Yes." He had just come out of a fog bank and his lights may have been on low beam, under which circumstances it is more difficult to observe an object in the center of the road. He also testified with reference to his observation of decedent before the impact, that he was 75 to 100 feet away; that he was standing on the west side of the white center line, facing east with both arms in the air; that he looked like he was falling forward or trying to get out of the way; that he was three feet east of the white line when defendant's left front fender struck him; that decedent was crossing the highway from west to east when he saw him; that he first applied his brakes at the point of impact. He was travelling on the east side of the center line.

Plaintiffs called three witnesses to the accident. F. W. Muller, the man who brought the gasoline to defendant from Marysville testified that he followed defendant north after delivering the gasoline, and travelled about 235 feet to his rear for about three or four miles to the place of the accident. There was no other traffic on the highway at the time of the accident. Defendant did not slow down before the collision. This witness did not see decedent before the impact but saw his body fly through the air. The car parked on the east side of the highway belonged to Mrs. Inez Hansen, and was stuck in the mud. It was headed northeast. Defendant told him the accident happened so quickly he did not know what occurred. Defendant's car was on the east side of the center line at the time of the impact. He stated that Mrs. Hansen kept saying "stop the car." "You can't do that to him"; that she had been drinking.

H. L. Williams, a traffic officer who arrived at the scene of the accident sometime thereafter testified that he found a shoe and the lens of spectacles and broken headlight glass about four or five feet in from the east side of the highway. There were tire marks from about 10 feet south of where the above mentioned articles were found extending 206 feet north. The marks commenced about 40 feet diagonally from where decedent's body landed, which was at a point about five feet from the west edge of the pavement and 15½ feet west of the center line. He said defendant told him that "all at once" he saw decedent standing in front of his car and did not apply his brakes until he struck him; that when he saw the man it was too late to keep from hitting him.

Plaintiffs called Mrs. Hansen, who, together with decedent had been the occupants of the car parked beside the road near the scene of the accident. She stated that she had no recollection of what occurred. An attempt by plaintiffs to impeach her by reference to her testimony given at the coroner's inquest was refused by the trial court.

The trial court, after denying defendant's motion for a nonsuit, granted his motion for a directed verdict, and the jury returned a verdict accordingly on which a judgment was entered in favor of defendant.

[1] Inasmuch as this is an appeal from a judgment entered on a directed verdict, only the evidence most favorable to plaintiffs need be examined, the testimony of defendant's witnesses may be disregarded, and if there is any substantial evidence from which the jury could have found for plaintiffs, the judgment must be reversed. The rule with reference to sufficiency of the evidence on appeal from a judgment after a directed verdict is the same as on an appeal from a nonsuit. 24 Cal.Jur. 913-916.

[2] Clearly, the evidence is sufficient for the jury to have found that defendant was negligent and that his negligence was the proximate cause of the death The speed at which defendant was driving at night where there were occasional fog banks and an overcast sky, the evidence that he did not see decedent until he was immediately in front of his car, and that he had looked away from the road toward the car parked beside the road, established circumstances from which it could be said that defendant was negligent. The issues of negligence and proximate cause are essentially questions of fact. The various factors above mentioned are such as may justify the trier of fact in imposing liability on the driver of a vehicle striking a pedestrian. See 2 Cal.Jur. 10-Yr.Supp., Automobiles, pp. 368, 370-372.

[3-5] Turning to the question of contributory negligence on the part of the decedent, certain rules must be remembered.

The burden of proving contributory negligence is upon the defendant. 19 Cal.Jur. 697-699. True, contributory negligence may be found by the trier of fact from the plaintiffs' own evidence. But cases in which it can be said that the negligence of plaintiff contributes proximately to the accident as a matter of law are rare. The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. See Johnson v. Southern Pacific R. R. Co., 154 Cal. 285, 97 P. 520; Wise v. Stott, 114 Cal.App. 702, 300 P. 883; Heitman v. Pacific Electric Ry. Co., 10 Cal.App. 397, 102 P. 15; Daly v. Hinz, 113 Cal. 366, 45 P. 693; Robinet v. Hawks, 200 Cal. 265, 252 P. 1045; McVea v. Nickols, 105 Cal.App. 28, 286 P. 761; Schneider v. Market Street Ry. Co., 134 Cal. 482, 66 P. 734; Walker v. Southern Pacific Co., 38 Cal.App. 377, 176 P. 175; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Moss v. H. R. Boynton Co., 44 Cal.App. 474, 186 P. 631; Green v. Southern Pac. Co., 53 Cal.App. 194, 199 P. 1059; Kienlen v. Holt, 106 Cal.App. 135, 288 P. 866; Grimes v. Richfield Oil Co., 106 Cal.App. 416, 289 P. 245; Schellin v. North Alaska Salmon Co., 167 Cal. 103, 138 P. 723; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125; Smith v. Southern Pacific Co., 201 Cal. 57, 255 P. 500; Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369; Toschi v. Christian, 24 Cal.2d 354, 149 P.2d 848. Finally, the plaintiff is not bound by the testimony elicited from defendant under section 2055 of the Code of Civil Procedure. On appeal he may rely upon the portion of such evidence that is favorable to him and disregard the unfavorable portion in support of a judgment in his favor or in his attack on a directed verdict. See Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; Marchetti v. Southern Pac. Co., 204 Cal. 679, 269 P. 529; Bushnell v. Yoshika Tashiro, 115 Cal.App. 563, 2 P.2d 550; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825; Engstrom v. Auburn Automobile Sales Corporation, 11 Cal.2d 64, 77 P.2d 1059; People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029.

[6, 7] In the instant case, disregarding the testimony of defendant under section 2055, which is unfavorable to plaintiffs, the most that appears from plaintiffs' evidence is that at the time of the accident decedent was on the highway probably near the middle thereof, and defendant was driving on his right hand side of the road. It does not appear whether decedent was standing there for no purpose, was in the process of walking across the highway, or was endeavoring to flag down a passing motorist for assistance. It may be true that he was in a place of danger, but that is true of any pedestrian on the highway at night or in the daytime. Merely being on the highway is not necessarily negligence on his part. It may have been that he was there for a legitimate purpose, such as crossing the highway, and that he was observant of oncoming traffic, but was blinded by defendant's headlights, or misjudged defendant's speed. Those conditions would indicate a lack of contributory negligence rather than its existence. At most it cannot be said that merely being afoot on a highway at night alone leads to only one possible conclusion, that is, contributory negligence; or that if it was negligence, it proximately contributed to the accident. Hence, it cannot be said the plaintiffs' evidence established contributory negligence as a matter of law. But in addition to the foregoing, even the evidence elicited from defendant does not necessarily establish that conclusion. He testified that when he saw decedent he was three feet west of the center line and facing east. If so, he may well have been in a proper position waiting for defendant to pass, or may have been endeavoring to flag defendant down to obtain assistance for the parked car which was stuck in the mud.

[8, 9] The plaintiffs are entitled to the aid of the presumption that decedent used due care for his own concerns. Code Civ. Proc., § 1963(4). The case was a proper one for the application of that presumption. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. That such presumption was not dispelled from the case is obvious from the foregoing discussion showing that plain-

tiffs' own evidence did not show decedent was guilty of contributory negligence as a matter of law. Certainly if he was not guilty of contributory negligence as a matter of law, there is no evidence completely refuting the presumption that he was not. The rule is stated in Westberg v. Willde, supra, 14 Cal.2d at page 365, 94 P.2d at page 593, quoting from Mar Shee v. Maryland Assur. Corporation, 190 Cal. 1, 210 P. 269:

" 'a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case.'

"In the instant case the defendants do not contend that *as a matter of law decedent must be held to have been guilty of contributory negligence.* That is, they do not urge that the evidence is *'wholly irreconcilable' with the presumption.* It was therefore no error to give the questioned instructions under those circumstances." (Italics added.) We have seen that in the instant case the evidence is not wholly irreconcilable with the exercise of ordinary care by decedent, but is in fact compatible with it.

For the foregoing reasons the judgment is reversed.

GIBSON, C. J., and SHENK, and SCHAUER, JJ., concurred.

TRAYNOR, J., concurred in the judgment.

EDMONDS, Justice (concurring).

I concur in the conclusion of Justice Carter that as there was substantial evidence from which negligence of Hobbie and the lack of contributory negligence of H. L. Anthony might be inferred, the trial court improperly directed the jury to return a verdict in favor of the defendant. But I cannot agree with the holding that, under these circumstances, the "plaintiffs are entitled to the aid of the presumption that decedent used due care for his own concerns."

The disputable presumption stated in section 1963, subdivision 4, of the Code of Civil Procedure, is: "That a person takes ordinary care of his own concerns." A plaintiff may not call this statute to his aid and have the benefit of an instruction embodying its provisions upon the ground that the evidence presented by him, as in this case, is not wholly irreconcilable with the presumed fact. When the evidence of the plaintiff discloses the circumstances concerning the happening of the accident, the presumption that the person killed or injured used ordinary care is dispelled and it is error to instruct the jury in regard to the code section. Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16; Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884.

The plaintiffs who are prosecuting the present appeal are not bound by the testimony of Hobbie given under section 2055 of the Code of Civil Procedure, but there was other evidence produced by them from which the jury reasonably could have inferred that H. L. Anthony was guilty of negligence at the time of the fatal accident. F. W. Muller, a witness for the plaintiff, testified that just before the accident, the Chevrolet driven by Hobbie was then traveling in the proper lane of traffic. Muller heard a thud, and saw Anthony thrown into the air. According to a state traffic officer also called to testify for the plaintiffs, immediately after the accident Hobbie declared that when he saw Anthony the man was directly in front of his automobile. Other testimony of the officer relating to the physical facts at the scene of the collision tends to prove that the Chevrolet was on the right hand side of the road, and collided with Anthony while he was standing directly in its lane of travel.

These facts, to some extent, show the situation and acts of Anthony immediately before he was struck by the Hobbie car and bring the case within the rule of Speck v. Sarver, supra [20 Cal.2d 585, 128 P.2d 17], where a majority of my associates, after observing that "the jury was justified in making its implied finding that the plaintiffs were free from contributory negligence," held that the giving of an instruction stating the presumption of due care was error. It was said that although Speck's evidence was not wholly irreconcilable with the fact presumed, "such an instruction * * * should not be given where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time in question." 20 Cal.2d at pages 587, 588, 128 P.2d at page 18.

For these reasons, as I read the record, the opinion of my associates should not include the declaration that the case presented by the plaintiffs was a proper one for the application of the presumption of due care.



25 Cal.2d 854

In re KAUFMAN'S ESTATE.

SECOND CHURCH OF CHRIST, SCIENTIST, OF NEW YORK CITY v. KAUFMAN et al.
L. A. 18917.

Supreme Court of California.

Feb. 7, 1945.

Rehearing Denied March 8, 1945.

1. Wills ⇐189

Under the doctrine of "dependent relative revocation", an earlier will, revoked only to give effect to a later one on supposition that later one will become effective, remains in effect to extent that later proves ineffective, the doctrine being designed to carry out probable intention of testator where there is no reason to suppose that he intended to revoke his earlier will if later will became inoperative.

See Words and Phrases, Permanent Edition, for all other definitions of "Dependent Relative Revocation".

2. Wills ⇐189

Where testator, in execution of new will, did not change testamentary purpose but only minor details in its execution so that second will was virtually identical with first in disposition of testator's estate, and it was clear that first will was revoked only because second duplicated its purpose and that testator would have preferred first will to intestacy as to a substantial part of his estate, doctrine of dependent relative revocation applied to sustain bequest to religious society, although testator did not live 30 days after execution of second will.

3. Wills ⇐189

When a testator repeats same dispositive plans in a new will, revocation of old will by the new is deemed inseparably related to and dependent upon legal effectiveness of the new.

4. Wills ⇐189

Where new will repeating same dispositive plans as appeared in former will fails to give effect to twice-declared purpose of testator, its revocatory clause fails.

5. Wills ⇐189

Where all testimony disclosed that testator wanted no change in his New York will except for the naming of a California executor, trial court's finding that testator intended to revoke New York will unconditionally by his execution of subsequent California will was not supported by the evidence.

6. Wills ⇐189

Any conclusion as to testator's intention with reference to revocation of former will must be considered in light of his knowledge at time he executed second will.

7. Wills ⇐189

Where testator, who had executed New York will devising residue of his estate to a church, was not advised that he might provide in subsequent California will that revocation of charitable bequest by revocation clause in California will was dependent upon legal effectiveness of California will to carry out its bequest, and was not advised that same result would follow under doctrine of dependent relative revocation, and California will contained identical charitable bequest, upon testator's death so shortly after execution of California will that charitable bequest was void, New York will was entitled to probate as to charitable bequest under doctrine of dependent relative revocation.

In Bank.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Samuel B. Kaufman, deceased, wherein an instrument executed by decedent in California was admitted to probate as the will of decedent, and subsequently the Second Church of Christ Scientist of New York filed a petition seeking to have a prior will executed by decedent in New York admitted to probate, which petition was contested by Henry Kaufman and Fred Kaufman and by the California Trust Company, executor. From a judgment denying the

New York will admission to probate, the Second Church of Christ Scientist of New York appeals.

Reversed with directions.

Prior opinion, 151 P.2d 37.

Lindstrom & Bartlett and Ralph G. Lindstrom, all of Los Angeles, for appellant.

Gaines Hon, of Los Angeles, for respondents.

TRAYNOR, Justice.

On March 18, 1940, Samuel B. Kaufman executed a will in New York. He subsequently moved to California where he executed a new will on April 30, 1941, containing the clause "I, Samuel B. Kaufman, do hereby make and declare this to be my Last Will and Testament, revoking all former wills." Both wills named identical persons for identical cash bequests and the Second Church of Christ, Scientist, of New York City, as residuary legatee. The 1941 will named a new executor. It also directed that the testator's body be cremated; the 1940 will only stated a wish to that effect. It expressly provided, as the 1940 will did not, that the specific legacies were given free of deduction for inheritance or estate taxes. It made no express provision, as the 1940 will did, that "In the event there is not sufficient amount in my estate to pay the above bequests, I direct my executor to divide the proceeds in the proportion as stated above." The testator died on May 2, 1941. On petition of one of the executors, the 1941 will was admitted to probate. Appellant thereafter filed a petition to have the 1940 will admitted to probate, to which respondent filed a contest. The present appeal is taken from the judgment denying the 1940 will admission to probate.

The respondent contends that there is substantial evidence to support the finding of the trial court that it was the intention of the testator in executing the 1941 will to revoke the 1940 will unconditionally. The appellant contends that the 1940 will should be admitted to probate under the doctrine of dependent relative revocation, on the ground that the testator did not intend to destroy the testamentary effect of the 1940 will unless the 1941 will would become wholly effective.

Before executing the 1941 will, the testator consulted Mr. J. C. Seaman, assistant trust officer of the California Trust Company, with regard to the company's becoming the executor of this will. Mr. Seaman testified that after reading the testator's 1940 will "I asked him who he wanted to leave his property to or if he had any special wish that he wanted carried out and he said no, that he was perfectly satisfied with the testamentary disposition made by it, made by that Will; that he did not want to make any change. The only question that was bothering him was whether his friend and attorney, a Mr. Franklin would want to come out here to qualify in the event of his death. He rather thought that Mr. Franklin was a busy man and would not want to come and he had received a favorable report about our company through his relations with the Bank, our parent company, and that if Mr. Franklin did not want to act, that he would like to have our company. So, at that point I told him there was nothing I could do for him, that he better to go and see a lawyer and have a new will drawn or have a codicil drawn and to tell the lawyer his story, to seek proper advice. That he declined to do. He said he did not want to go and see a lawyer; he could not see why I could not fix it up for him. I told him that I could not do that, that he would have to seek legal advice on his problem. After that, why he said—he went to another desk that was not in the office and picked up a pen and he said, 'I will just write the name of California Trust Company in here and initial it', and I said, 'I don't think you should do that. You better go and see a lawyer and get proper advice on that.' In addition to that we talked about the fees in California and about his coming to California, and so forth, and at that point he left and went downstairs and later he came back either once or twice—I don't recall—and he said on the last occasion that he thought he would go and see a lawyer, but he did not know any; that he was a stranger out here and at that point he asked me if I would recommend someone, which I did, as I previously related." The testator thereafter consulted Mr. Moe M. Fogel, an attorney recommended by Mr. Seaman, who testified; "This Will (indicating) partly printed and partly written, is the one he showed me, the 1940 Will. I asked him what his purpose was, what he wanted, and he said he wanted a new Will to be just like the old one excepting that he wanted to have a California Executor. I examined this Will and then asked him to wait a moment while I examined the Code. I examined the Code and found from the

Code that if he executed this Will in exactly the same terms and revoked the other Will, then he would have to live a certain length of time, 30 days, in order to make it effective, and I said to him, 'if I were you, I would draw a Codicil to this Will because should you die within 30 days it would not be effective.' He said, 'No, I want a new Will. I don't want a Codicil,' and I drew the Will of 1941. There was one other thing which I inquired into in the meantime. I called Mr. Bruce Taft's office in his presence and asked him if the Church was properly designated in the old Will and found that it was, and I carried it into that Will. I then read the Will to him. I read from a copy and he had the original in front of him in the presence of Mrs. Nadine Simkins, my secretary. I asked him if this was his Last Will and Testament and he said yes, and I asked him, 'Do you wish Mrs. Simkins and I to act as witnesses?' And he said yes, and he executed this Will in our presence and we executed it in his presence * * * and in the presence of each other * * * I gave him the original of the 1941 Will and a carbon copy of the 1941 Will, I gave him back the original Will of 1940 and he left the office. * * * In about an hour or less he came back to my office and said that he was distressed at having taken" Charles Franklin's name "off as executor—he felt that Mr. Franklin might have his feelings hurt by that having been done and that Mr. Franklin who had been a man who had performed so many services for Mr. Kaufman and that he would not want him to feel that way about it and I said he could be put back on as an Executor if he wanted to come out here, he could come and he said that he was sure he would not want to come but he did want to have him on there so he would feel that he had been mentioned. So we then drew the Codicil of 1941, the Codicil to the 1941 Will and he declared it to be his Last Will and Testament in due form and we executed it, and I believe it has been admitted to probate already." Mr. Fogel recalled writing on the 1940 will "revoked by reason of change of residence and difficulty to come to California and qualify." These words had been partially erased. The word "Cancelled" was written on the 1940 will, but Mr. Fogel did not know who wrote it or when it was written. Mr. Fogel further testified that he told decedent he should keep the 1940 will after making the 1941 will. On redirect examination he reiterated that he had told decedent that he would have to live thirty days to make the residual bequest good, and, on recross-examination, stated that he did not point out to decedent any other methods by which he could safeguard the original will. Mrs. Nadine A. Simkins, Mr. Fogel's secretary, corroborated Mr. Fogel's testimony that his first suggestion to decedent was that he make a codicil to the will because that was the simplest way to do it, and that decedent replied that "He was not making any particular changes in the will except that he should take out his executor." Mrs. Simkins saw Mr. Fogel examine the code and heard the conversation between him and the testator substantially as Mr. Fogel related it.

[1] Under the doctrine of dependent relative revocation, an earlier will, revoked only to give effect to a later one on the supposition that the later one will become effective, remains in effect to the extent that the latter proves ineffective. Estate of Marx, 174 Cal. 762, 766, 767, 164 P. 640, L.R.A. 1917F, 234; Blackford v. Anderson, 226 Iowa 1138, 1150, 1151, 1175, 1176, 286 N.W. 735; Charleston Library Society v. Citizens & Southern Nat. Bank, 200 S.C. 96, 125, 126, 20 S.E.2d 623; Strong's Appeal, 79 Conn. 123, 125, 126, 63 A. 1089, 6 L.R.A.,N.S., 1107, 118 Am.St.Rep. 138; Wilbourn v. Shell, 59 Miss. 205, 209, 42 Am.Rep. 363; In re Roeder's Estate, 44 N.M. 578, 589, 106 P.2d 847; Stewart v. Johnson, 142 Fla. 425, 429, 430, 194 So. 869; In re Smalley's Estate, 131 N.J.Eq. 175, 178, 24 A.2d 515; Flanders v. White, 142 Or. 375, 382–384, 18 P.2d 823; In re Bonkowski's Estate, 266 Mich. 112, 115, 116, 253 N.W. 235; Carpenter v. Wynn, 252 Ky. 543, 549, 67 S.W. 2d 688. The doctrine is designed to carry out the probable intention of the testator when there is no reason to suppose that he intended to revoke his earlier will if the later will became inoperative. Estate v. Marx, 174 Cal. 762, 766, 164 P. 640, L.R.A. 1917F, 234; Estate of Thompson, 185 Cal. 763, 773, 775, 198 P. 795; Blackford v. Anderson, 226 Iowa 1138, 1163, 286 N.W. 735; Flanders v. White, 142 Or. 375, 385, 386, 18 P.2d 823; Rudy v. Ulrich, 69 Pa. 177, 183, 8 Am.Rep. 238; In re Roeder's Estate, 44 N.M. 578, 587, 106 P.2d 47; Stewart v. Johnson, 142 Fla. 425, 430, 431, 194 So. 869; In re Smalley's Estate, 131 N.J.Eq. 175, 177, 178, 24 A.2d 515; Stickney v. Hammond, 138 Mass. 116, 120; Gardner v. Gardiner, 65 N.H. 230, 231, 232, 19 A. 651,

8 L.R.A. 383; In re Appleton's Estate, 163 Wash. 632, 640–642, 2 P.2d 71. The doctrine has been invoked in California (Estate of Marx, 174 Cal. 762, 765–767, 164 P. 610, L.R.A.1917F, 234; Estate of Thompson, 185 Cal. 763, 772–776, 786, 198 P. 795), and is sustained by the weight of authority. See cases collected in 62 A.L.R. 1401–1410; 115 A.L.R. 721–725; 68 C.J., Wills, § 483, pp. 799, 800; 28 R.C.L. 182, 183; 38 L.R.A.N.S. 802; 1 Ann.Cas. 609, 610; 1 Jarman on Wills, (6th Ed.), Bigelow, 154; Page on Wills, § 478; Underhill on Wills, § 252; Warren, Dependent Relative Revocation, 33 Harv.L.Rev. 337; Francis T. Cornish, Dependent Relative Revocation, 5 So.Cal.L.Rev. 273, 393. In Estate of Smith, 140 Cal.App. 508, 35 P. 2d 335, on which respondent relies, the proponent failed to prove the existence of the earlier will to which might be related any dependent revocation. In Estate of Olmstead, 122 Cal. 224, 54 P. 745, the revocation of the will was not connected with the making of another will, so it could not be held that the testator intended the revocation of the will to depend upon the legal effectiveness of a new will. In Estate of Martens, 10 Cal.2d 395, 74 P.2d 238, the doctrine was inapplicable, for the testator made it clear by his revocation of the paragraph of his will appointing executors and his attempt to substitute his son and daughter in their place that he did not wish the persons originally named to serve as executors.

[2-4] The doctrine is clearly applicable to the facts of the present case. The record makes clear the intention of the testator. He did not change his testamentary purpose but only minor details in its execution. The five cash legacies with residue to appellant church constituted the whole of his unaltered testamentary purpose. Since the second will was virtually identical with the first in the disposition of the testator's estate, it is clear that the first will was revoked only because the second duplicated its purpose and that the testator would have preferred the first will to intestacy as to a substantial part of his estate. When a testator repeats the same dispositive plan in a new will, revocation of the old one by the new is deemed inseparably related to and dependent upon the legal effectiveness of the new. Estate of Thompson, 185 Cal. 763, 775, 776, 198 P. 795; Blackford v. Anderson, 226 Iowa 1138, 1162, 1164, 286 N.W. 735; Charleston Library Society v. Citizens & Southern Nat. Bank, 200 S.C. 96, 125, 126, 20 S.E.2d 623; Flanders v. White, 142 Ore. 375, 378, 386, 18 P.2d 823; Stewart v. Johnson, 142 Fla. 425, 430–432, 194 So. 869; Stickney v. Hammond, 138 Mass. 116, 121; Wilbourn v. Shell, 59 Miss. 205, 208, 209, 42 Am.Rep. 363. If the new will fails to give effect to the twice declared purpose of the testator, its revocatory clause falls, for a testator who repeats his purpose intends to confirm and not revoke it, and does not intend to have the new will operate as a revocation independently of its operation as a will. Blackford v. Anderson, 226 Iowa 1138, 1158, 1159, 286 N.W. 735; Rudy v. Ulrich, 69 Pa. 177, 182, 183, 8 Am.Rep. 238; Stewart v. Johnson, 142 Fla. 425, 430, 431, 194 So. 869; Wilbourn v. Shell, 59 Miss. 205, 208, 209, 42 Am. Rep. 363; Flanders v. White, 142 Ore. 375, 383, 386, 18 P.2d 823.

[5-7] The trial court's finding that the testator intended to revoke the 1940 will unconditionally is not supported by the evidence. All the testimony including the testimony of Trust Officer Seaman and of Attorney Fogel and his secretary, shows that the testator wanted no change in his will except for the naming of a California executor. Any conclusion as to the testator's intention must be considered in the light of his knowledge at the time he executed the will. Estate of Pearsons, 99 Cal. 30, 33 P. 751; Estate of Ladd, 94 Cal. 670, 30 P. 99; Estate of Bourn, 25 Cal. App.2d 590, 78 P.2d 193. The testator was not advised that he might provide in his 1941 will that the revocation of the charitable bequest by the revocation clause in the 1941 will was dependent upon the legal effectiveness of the 1941 will to carry out his bequest, nor was he advised that the same result would follow under the doctrine of dependent relative revocation. In the light of his twice-declared intention to leave his residuary estate to appellant church, it cannot be held that he chose not to make the revocation conditional or not to have the doctrine of dependent relative revocation apply. It does not appear why the testator chose a new will rather than a codicil. Certainly it cannot reasonably be held that he made that choice in order to invalidate the charitable bequest if he did not live for thirty days. Nothing that he said or did indicated that he wanted the

gift to fail if he did not live for thirty days. It does not follow from the fact that he was advised that the new will would not be effective unless he lived for thirty days that he intended that the charitable bequest should fail if he died within that period. To so hold would be to read into the charitable bequest an intentional condition precedent that the testator should live for more than thirty days. There is no evidence that the testator had any such intention.

The judgment is reversed with directions to admit the 1940 will to probate with the 1941 will and codicil.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concurred.



67 Cal.App.2d 898

BRYAN v. NICOLAS.

Civ. 14607.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1945.

1. Limitation of actions ⇐48(1)

Suit on notes, the latest of which was due in 1930, was barred by limitations in 1943. Code Civ.Proc. § 337.

2. Limitation of actions ⇐45

Where, in 1932, maker of notes borrowed third-party note and trust deed given as security for maker's notes, the statute of limitations in 1943 barred recovery of the third-party note and trust deed from maker's executor as personal property. Code Civ.Proc. § 338.

3. Frauds, statute of ⇐54½

An oral promise to take care of an obligation in promisor's will was barred by statute of frauds.

4. Limitation of actions ⇐37(2)

Where plaintiff has knowledge of fraud, period of limitations is three years. Code Civ.Proc. § 338.

5. Limitation of actions ⇐100(13)

The means of knowledge is equivalent to knowledge, as respects statute of limitations where plaintiff has knowledge of fraud. Code Civ.Proc. § 338.

6. Trusts ⇐365(5)

Where maker of notes, who gave payee a third-party note and trust deed as security, allegedly in 1932 fraudulently borrowed security without returning it, payee's administrator in 1943, in absence of allegations excusing delay in discovering fraud until after death of maker and payee, was not entitled to have third-party note and trust deed impressed with a constructive trust to pay balance due on maker's notes. Code Civ.Proc. § 338.

Appeal from Superior Court, Los Angeles County; A. E. Paonessa, Judge.

Action by Ormond W. Bryan, as administrator of the estate of Mary M. Bryan, deceased, against Eugene B. Nicolas, as executor of the estate of Marie E. Nicolas, also known as Marie Charles Nicolas, deceased, to establish a trust. From a judgment for defendant after a demurrer to plaintiff's amended complaint was sustained, plaintiff appeals.

Judgment affirmed.

Allen G. Mitchell, of Lakeside, for appellant.

George H. Pratt, of Los Angeles, and Roland J. Brownsberger, of Pomona, for respondent.

DRAPEAU, Justice pro tem.

Demurrer to plaintiff's amended complaint was sustained with leave to amend. Upon failure to amend, after notice, judgment for defendant was made and entered, from which plaintiff appeals.

Inasmuch as the decision necessarily turns upon whether a cause of action is stated by the amended complaint, the following is substantially its contents:

Plaintiff and defendant appear as administrator and executor, respectively, for the estates of the two decedents. While these parties are both dead, they will nonetheless for the sake of brevity be referred to as plaintiff and defendant.

It is alleged that in 1925 defendant executed and delivered to plaintiff a prom-

issory note for $2,000 due two years after date, and, as collateral security for the payment thereof, assigned and deposited with plaintiff a certain note and trust deed of a third party; that thereafter in 1928 defendant executed and delivered to plaintiff a second promissory note for $1,500 due two years after date, and agreed that said third party note and trust deed would be collateral security for payment of this second note too; that there is still due on the notes $400 and interest on the first, and $1,000 and interest on the second; that in 1932, with fraudulent intent, defendant requested plaintiff to return to her the third party note and trust deed, so that she might impress still another party with her financial stability. Plaintiff, relying on defendant's promise to return the said note and trust deed, then loaned them to defendant, for the purpose stated. Defendant never returned the note and trust deed, although often requested so to do, but defendant orally agreed to take care of her obligation to plaintiff in defendant's last will. This promise defendant made with no intention to perform, and when she died, there was no mention of plaintiff in her will; that the first discovery of the fraud alleged was by plaintiff administrator, after the death of both parties, who made demand for delivery of the trust deed and note March 13, 1943, upon defendant executor. Wherefore, plaintiff administrator prays the court to impress said trust deed and note with a trust and deliver the same to him.

[1] The complaint in this action having been filed July 15, 1943, obviously, plaintiff's cause of action is barred by the statute of limitations, if it is for recovery on the promissory notes, the latest of which was due in 1930. Sec. 337, Code Civ.Proc.

[2] The amended complaint alleges that the defendant borrowed the trust deed and note in 1932. Therefore, the statute of limitations bars the recovery thereof as personal property. Sec. 338, Code Civ. Proc.

[3] And, obviously, if the complaint were based upon the alleged oral promise to take care of the obligation in defendant's will, it is barred by the statute of frauds, not being in writing.

Plaintiff's brief states that the action is to enforce a constructive trust upon the trust deed and note, which is perhaps the most tenable theory of recovery under the complaint. This theory becomes untenable, however, when the court takes into consideration the fact that the trust deed and note were loaned to the defendant in 1932, and the complaint was not filed until 1943.

[4, 5] It is true that a cause of action for relief on the ground of fraud is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Rest.Restitution, § 148; 16 Cal.Jur. pp. 499-506. But, whenever the plaintiff has knowledge of the facts constituting the fraud, the period of limitations is three years. Sec. 338, Code Civ.Proc. And the means of knowledge is equivalent to knowledge. Shain v. Sresovich, 104 Cal. 402, 38 P. 51. The situation in this case is similar to that in Steiner v. Virden Packing Co., 30 Cal. App.2d 673, 675, 87 P.2d 35, wherein it is said:

[6] "When the nature of the alleged representations is considered, it is at once apparent that their falsity could have been discovered without delay by the exercise of the slightest diligence on the part of plaintiffs. We know of no facts which would have excused a delay of thirteen years in the discovery of the falsity of said representations but at any rate we are satisfied that plaintiffs pleaded no facts sufficient for that purpose."

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

67 Cal.App.2d 835

Ex parte PAYTON.

Cr. 3889.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1945.

1. Pardon ⇐10

An order suspending a parole is invalid unless the cause of the suspension is stated in the order. Pen.Code, § 3063.

2. Habeas corpus ⇐23

A parolee, taken into custody upon issuance of order suspending parole, was entitled to his release on habeas corpus where the suspension order failed to state cause of suspension. Pen.Code, § 3063.

W. J. WOOD, J., dissenting.

Proceeding in the matter of the application of Frank C. Payton for a writ of habeas corpus.

Writ granted and petitioner discharged.

A. L. Oster, of Los Angeles, for petitioner.

Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

McCOMB, Justice.

This is an original application for a writ of habeas corpus on the ground that petitioner is being illegally held in custody.

The undisputed facts are these:

Petitioner is a parolee from San Quentin prison. On November 24, 1944, he was placed in the custody of the sheriff of Los Angeles County at the instance of his parole officer. Thereafter at a meeting of the adult authority, held at San Francisco on December 8, 1944, an order* was made suspending petitioner's parole. Such order did not state the cause upon which the order of suspension was predicated.

[1, 2] Petitioner relies for his release upon this proposition:

That an order suspending a parole is invalid unless the cause upon which the order suspending the parole is predicated is stated in the order of suspension.

This proposition is tenable. It is the law in California that no parole shall be

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* So far as material here the order read as follows:

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS
ADULT AUTHORITY
Meeting of
December 8, 1944

Excerpt from Minutes of Meeting Held on the Above Date

To Whom It May Concern:

At a meeting of the Adult Authority held at the San Francisco Office, Ferry Building, on the above date, the following proceedings were had as will appear of record in the Official Book of Records on file in the office of the Executive Secretary, at San Francisco, upon approval of same by a majority of the members:

Parole Suspended and Return Ordered:

The Chief State Parole Officer presented reports in writing in each of the below listed cases (these reports are now on file in the office of the Executive Secretary at the San Francisco office), charging that the below named prisoners had wilfully violated the terms and conditions of their paroles and tickets of leave, and recommended that the parole in each case be cancelled, suspended, and/or revoked:

Payton, Frank—San Quentin 64552

Due cause being shown by the Chief State Parole Officer, it is hereby ordered that the parole heretofore granted the above named and numbered prisoners be suspended pending investigation of the complaints filed.

It is further ordered that the Chief State Parole Officer shall return said prisoners to the custody of the Warden of the State Prison at San Quentin to abide further action the Adult Authority.

* * * * * *

In the event any of said prisoners shall be found in any state other than California, an application for a requisition for the return of said prisoners is hereby authorized and Allen Moore, Chief State Parole Officer, is hereby authorized to execute such application for and on behalf of the Adult Authority.

* * * * * *

Adopted: By the Affirmative votes of Lewis Drucker, Chairman, and Walter A. Gordon, Member

Attest:
January 17, 1945
(Signed) E. A. Burkhart
E. A. Burkhart, Exec. Secretary
Adult Authority

Attest:
December 11, 1944

suspended without cause, which cause must be stated in the order suspending the parole. (Section 3063, Penal Code; In re Knaesche, 22 Cal.App.2d 667, 669, 72 P.2d 216).

In the present case, since it is clear that the order suspending petitioner's parole did not state the cause upon which the order of suspension was based, petitioner is being illegally held and should be discharged.

For the reason stated it is ordered that petitioner be released from the custody of the sheriff of Los Angeles County, subject, however, to the parole heretofore granted petitioner, and to all the conditions and restrictions contained therein.

MOORE, P. J., concurs.

W. J. WOOD, J., dissents.



67 Cal.App.2d 885

PEOPLE v. WOMBLE.

Cr. 3856.

District Court of Appeal, Second District, Division 3, California.

Feb. 8, 1945.

1. Assault and battery ⇐92

Evidence sustained conviction of restaurant operator of assault with deadly weapon upon sailors who were customers.

2. Assault and battery ⇐96(8)

Where information charging assault with pistol was read to jury, "deadly weapon" was correctly defined in instruction, and verdict of guilty as charged was supported by evidence, failure to instruct that defendant was not charged with using padlock thrown by him as a deadly weapon was not error.

3. Criminal law ⇐808½

In prosecution for assault with deadly weapon, wherein only issues were whether defendant used gun and the manner in which he used it, and such issues were clearly defined, instruction in statutory language that there must be joint operation of act and intent "or criminal negligence" was not misleading because of quoted phrase. Pen. Code, § 20.

4. Criminal law ⇐774

Where elements of assault with deadly weapon were clearly stated in instructions and necessity of actual assault was made clear, instruction on intoxication which stated that no specific intent was necessary to constitute the crime was not misleading, in view of evidence showing assault.

5. Criminal law ⇐824(1)

Failure to instruct on court's own motion that jury should not be influenced by passion or prejudice against defendant was not error.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Glenn E. Womble was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Seymour J. Chotiner and Leonard F. Herzog, both of Hollywood, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendant appeals from a judgment following a verdict of guilt in a prosecution for assault with a deadly weapon, a .32 automatic pistol, upon the person of one Robert J. Breese. Upon his appeal he challenges the sufficiency of the evidence to establish guilt and complains of error in instructions that were given and in the refusal of an instruction. It is claimed by defendant that there was not sufficient evidence to prove that the gun was loaded at the time of the alleged assault or that it was used in the assault.

Defendant was the proprietor of a cafe located on the highway several miles out of Oxnard. Robert J. Breese, a seaman first-class, and Harold H. Brooks, a coxswain, who were stationed at Port Hueneme, being on liberty, entered the bar of defendant's cafe about 6 o'clock in the evening. Defendant's wife and two others were seated there, a bartender was behind the bar, and a waitress entered the room and served Breese and Brooks a drink of whiskey. Defendant entered the bar shortly afterward and the evidence was that he was under the influence of liquor. Learning that it was Mrs. Womble's birthday, Breese and Brooks

asked her if she wished a drink, which she, already having one, declined. The evidence of the prosecution disclosed that defendant objected to the presence of Brooks' car outside the cafe, saying that it added nothing to the looks of the place, which Brooks admitted. Defendant said that he didn't like sailors patronizing his place, that "They come in and spend a buck and a half and expect to have a good time," and Brooks said that he "was probably used to a lot more money" than defendant was and had "poured more money down rat holes than defendant had ever had." Defendant ordered Breese and Brooks out of the cafe and as they started to leave the place defendant said, "Don't rush off, I will take care of both of you boys," and started toward a room in the rear. As Breese left the place he was struck in the back with a padlock which had been thrown at him. He turned around when he was six or seven feet outside the building and defendant was then rushing toward him pulling a gun from his pocket. Breese grabbed defendant's right hand, in which the gun was held, shoved it down and called to Brooks to grab the gun; it was taken from defendant's hand by a Mr. Helms, a patron of the place. As to the manner in which the gun was handled by defendant, Breese testified that the gun was in defendant's right hand, "he was pulling it up this way (illustrating) and I jumped him and I pinned his hand down—he was bringing the gun up—when I first saw it the gun was coming up—it was not pointed directly at me but he was bringing it up about right in there (illustrating) when I first saw it. That is when I jumped him." There was testimony that Breese and Brooks were not under the influence of liquor, although Breese testified that he had taken one drink and Brooks that he had taken two before they came to defendant's cafe. When questioned by the officers shortly after the occurrence, defendant denied that he had had or used the gun in the affair, but when Mr. Helms told of taking the gun from defendant he admitted having had it and stated it had fallen from his pocket. The gun was turned over to the officers by Helms three hours after the occurrence, the safety was off at that time and the gun was loaded with a full clip and a shell in the chamber. To the officers defendant stated that Breese and Brooks had insulted his wife, a woman friend and a waitress and had attempted to date them. Defendant testified that Breese and Brooks were intoxicated when they had finished half their drinks and that he had refused to sell them any more; that they became angry and were cursing and that he ordered them out. He testified that he went to get his coat, came back and looked to see if they had gone, that they came back and grabbed him at the screen door and dragged him outside, that he was wrestling with both of them, that he did not draw a gun, although he had one, that he had gone that morning to pay a government tax of about $450 and to buy his beer and had a little over $1,000 with him and that he carried the gun with him on that trip but that he did not draw the gun on anybody at any time; that the padlock fell from the screen door as he was pulled through it but that he did not throw it at anyone. He further testified that when the officers interviewed him about 9 o'clock he had forgotten all about the difficulty, which had occurred at about 6 o'clock. However, during his interview he remembered it, gave an account of it, and admitted having thrown the padlock at the boy, but declared that the gun had been knocked from his pocket in the scuffle.

[1] There was ample evidence to show that defendant was the aggressor. He testified to having ordered the sailors out of his place because one of them remarked, when Mrs. Womble was presented with a cake, "If I had a redhead like that I would buy her a cake too." Defendant testified that he considered the remark an insult. While he testified that he had had the gun in his pocket at all times, he also testified that he usually kept it in the room from which he got his coat immediately before the assault. The fact that he followed the sailors out of the place indicated that he was not averse to having further trouble with them. The gun was loaded, the safety was off, and the circumstances indicated that defendant was prepared to shoot when he followed the boys out of the place. The gun was not examined by anyone until some three hours after the affray, and from this fact it is argued that there was no evidence that it was loaded at the time it was taken from defendant. But it was a reasonable inference that it had been loaded when defendant carried it for protection earlier in the day; he did not testify that it was unloaded then or that it had been unloaded later. The manner in which it was used and the fact that the safety was off indicated that it was loaded. From the

testimony of the witness Breese which we have quoted, the jury may reasonably have inferred that defendant was in the act of raising the gun to point it directly at Breese at the time the latter grabbed it. Defendant's claim that there was no evidence that he made use of the gun in the assault would have had much more weight with the jury and here if he had offered some reasonable explanation of his conduct. His testimony that he did not pull the gun and his statement to the officers that it was knocked out of his pocket in the scuffle were not reasonable in view of the fact that defendant was the aggressor and that the safety had been released, and they were directly contradicted by the testimony of the witness Helms, who was defendant's friend. The evidence was ample to support the implied finding of the jury that the elements of the offense had been proved, namely, that defendant attempted to use the gun upon the person of the complaining witness by either shooting or striking him and that he had the ability to do so. People v. Piercy, 1911, 16 Cal.App. 13, 116 P. 322; People v. McCoy, Cal.Sup. 1944, 153 P.2d 315.

[2] An instruction was given at the request of the People which correctly defined the term "deadly weapon." It is contended that the padlock was a deadly weapon, that the jury should have been instructed that defendant was not charged with using the padlock as a deadly weapon and that he may have been found guilty because he threw the padlock, although it may have been believed that he did not use the gun. The information, which described the pistol, was read to the jury, the verdict was that defendant was guilty as charged, and in view of the evidence we think the argument is without merit.

[3] It is claimed that defendant was prejudiced by the giving of two instructions. These are not quoted in the brief nor identified in the transcript except in general terms. We understand they were the following: "In considering the following definitions you should remember that in every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. * * *" This instruction was in the language of section 20 of the Penal Code. The instruction is criticized because, it is claimed, the jury might thereunder have convicted defendant in the belief that he was guilty of criminal negligence. No useful purpose was served by including in the instruction reference to the element of criminal negligence in a case where that element was not involved. But the only disputed issues of fact were whether defendant used the gun and the manner in which he used it, and those issues were clearly defined throughout the trial. The jury could not have been misled by the use of the term "criminal negligence" in view of the evidence and the ample instructions which covered specifically the elements of the crime charged.

[4] The other instruction was the following: "In cases of assault with a deadly weapon, no specific intent is necessary to constitute the crime, and hence it is wholly immaterial whether the party was drunk or sober at the time of the commission of such offense, and intoxication is not a defense in such cases." The contention appears to be that under the latter instruction the jury might have understood that defendant could be found guilty even though he had no intent to commit an act of assault. The words "specific intent" as used in the latter instruction could very well have been amplified and their meaning made more clear, but the elements of the offense were clearly stated in other instructions and the jury were told more than once that the defendant must be acquitted unless the proof showed beyond all reasonable doubt "that the defendant actually assaulted the other person with the weapon, that is, made the assault with the weapon." Considering the evidence as to defendant's conduct, it cannot be said that the instruction was misleading or confusing.

[5] Defendant's contentions that the testimony of the witnesses Breese and Brooks was inherently improbable and that the verdict was the result of passion and prejudice are answered by what we have already said. It is contended that the court should have instructed the jury of its own motion that they should not be influenced by any feelings of passion or prejudice against the defendant. Presumably the jurors were sufficiently intelligent to know this; if they were not, telling it to them could not have helped much.

The judgment and order denying motion for new trial are affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

68 Cal.App.2d 9

In re HOWARD'S ESTATE.

HOWARD v. BENNETT et al.

Civ. 14680.

District Court of Appeal, Second District, Division 2, California.

Feb. 9, 1945.

1. Wills ⇐651

A condition in will that beneficiary who contests, assails, or questions any provision of will revokes bequest to him is valid and not against public policy.

2. Wills ⇐658

The word "contest", as used in provision of will for forfeiture of bequest if beneficiary contests will, means any legal proceeding designed to thwart testator's wishes as expressed in will.

See Words and Phrases, Permanent Edition, for all other definitions of "Contest".

3. Wills ⇐781

A devisee, claiming title to property of testator's estate must elect either to rely on his claim of ownership and waive his rights under will or to accept provisions thereof and waive his rights of ownership.

4. Wills ⇐651

The good faith of one asserting rights contrary to claims of testator's estate does not toll operation of clause in will providing for forfeiture of bequest to one asserting such rights.

5. Wills ⇐665

A testatrix' surviving husband, claiming to be owner of undivided half-interest in properties of testatrix' estate by answer in executor's action to quiet title to such properties, which will referred to as testatrix' separate property, was party to proceeding questioning validity of provisions of will within provision thereof for forfeiture of rights of any devisee becoming party to any such proceeding, and hence forfeited all his rights under will.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Lilly B. Howard, deceased, by Lillian Devereaux Bennett and another to determine heirship. From a judgment declaring that William Duff Howard, deceased's surviving husband, forfeited all interest and rights in the estate of his deceased wife he appeals.

Affirmed.

Harvey L. Silbert, Edward C. Jones, and George M. Wiener, all of Los Angeles, for appellant.

Walter C. Danielson and Rex B. Goodcell, both of Los Angeles, for respondents.

McCOMB, Justice.

These are the conceded facts:

Lilly B. Howard, wife of appellant, died testate November 9, 1938. Her will was duly admitted to probate and an inventory and appraisement was filed.

On June 9, 1941, the executors of decedent's estate filed an action to quiet title to all of the properties listed in the inventory and appraisement, claiming that such properties were the sole and separate property of decedent. Appellant was the defendant in such action. On September 29, 1941, he filed an answer by which he admitted he claimed a right, title and interest in and to all of the properties, except one, listed in the inventory and appraisement. On the same day he filed a cross-complaint in which he alleged that he owned an undivided one-half interest in the properties of the estate. When the action was tried, a judgment was rendered in behalf of the estate finding all of the real and personal properties, with the exception of some miscellaneous household furniture and a stick pin, to be property of the estate. Thereafter the present proceeding was instituted to have it declared that appellant had forfeited all of his interest in the estate of Mrs. Howard by reason of the "contest provision"[1] in her will.

[1] This is the sole question necessary for us to determine:

[1] Paragraph 9 of decedent's will read thus: "In case any legatee or devisee or beneficiary mentioned or referred to in this my Will, for whom or for whose benefit I have made any provision therein, shall endeavor in anywise to contest in any court, or before any tribunal, this will or the validity thereof, or its due and proper execution, of the provisions applicable to him or her, or any other provision of this my will, or shall commence any suit or action, or submit to any court or other tribunal, or be a party to any pleading or proceeding, which suit, action, pleading or other proceeding assails or draws in question the validity or operation of any of the pro-

Did the trial court properly find, in view of the foregoing facts, that appellant had forfeited by his acts all of his right, title and interest in or to any property of decedent's estate?

This question must be answered in the affirmative and is governed by the following pertinent rules of law:

1) A condition in a will that a beneficiary who contests, assails or draws in question any provision of a will thereby revokes a bequest made to him is valid and such a provision is not against public policy. In re Kitchen's Estate, 192 Cal. 384, 389, 220 P. 301, 30 A.L.R. 1008; In re Estate of Miller, 156 Cal. 119, 121, 103 P. 842, 23 L.R.A.,N.S., 868; In re Estate of Hite, 155 Cal. 436, 440, 101 P. 443, 21 L.R.A.,N.S., 953, 17 Ann.Cas. 993.

[2] 2) The word "contest" as used in a forfeiture provision in a will means any legal proceeding which is designed to result in the thwarting of the testator's wishes as expressed in his will. Estate of Hite, supra, 155 Cal. at page 444, 101 P. at page 446, 21 L.R.A.,N.S., 953, 17 Ann.Cas. 993.

[3] 3) A devisee or legatee who claims title to property of an estate must elect to either rely upon his claim of ownership and waive his rights under the will, or accept the provisions of the will and waive his rights of ownership. Williams v. Williams, 170 Cal. 625, 627, 151 P. 10; In re Stewart, 74 Cal. 98, 103, 15 P. 445; Morrison v. Bowman, 29 Cal. 337, 351; Estate of Moore, 62 Cal.App. 265, 274, 216 P. 981.

[4] 4) The good faith of one who asserts rights contrary to the claims of an estate does not toll the operation of a forfeiture clause. In re Kitchen, supra, 192 Cal. at page 392, 220 P. 301, 30 A.L.R. 1008.

[5] In the present case the ninth paragraph in decedent's will provided for the forfeiture of any legatee's or devisee's rights under the will, in case such devisee or legatee should "commence any suit or action, or submit to any court or other tribunal, or be a party to any pleading or proceeding, which suit, action, pleading or other proceeding assails or draws in question the validity or operation of any of the provisions of said will, or shall in any way question my acts in making this will, or any of its provisions * * *".

Clearly appellant by claiming to be the owner, through the quiet title action referred to above, of an undivided one-half interest in the properties of the estate was a "party to" a "proceeding which" drew in question the validity of the provisions of decedent's will, since in clauses of decedent's will the testatrix referred to the property as her "separate property"[2] and "my stock".[3]

Appellant having acted contrary to the forfeiture provision in decedent's will, forfeited all rights under the will and the trial court properly entered a judgment so holding.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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visions of said will, or shall in any way question my acts in making this will, or any of its provisions, then and in that event such legatee, devisee or beneficiary shall thereupon forfeit and shall thenceforth cease to have any right, title or interest in or to any portion of my estate, or any property devised or bequeathed hereunder, or any income therefrom; and any and all provisions in this will in favor of or for the benefit of such person are hereby absolutely revoked and eliminated and any and all rights or interests which such person would otherwise have had hereunder shall as wholly fail as if such person had predeceased me; and I further direct that any expense incurred by my executors in defending any contest in or about, or in respect to this will, or the provisions thereof, shall be paid from my estate."

[2] The will contained this clause: "I declare that I am married, that my husband is W. D. Howard, that I have no children, that all of the property of my estate is *my separate property*, and that my next of kin now living are my brother, Albert Austin Bennett, and the children of my deceased sister, Alberta Hays, said children being Vivian Marquis Howard and Wilma Hays Case." (Italics added.)

[3] The will also provided: "I give and bequeath all of *my stock* in the Hollywood State Bank to my nephew, Wade Emmons Bennett." (Italics added.)

67 Cal.App.2d 882

PEOPLE v. MAINHURST.

Cr. 3855.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1945.

1. Larceny ⇐56

The corpus delicti of grand theft of an automobile consists in a felonious taking of an automobile without consent of the owner. Pen.Code, § 484.

2. Criminal law ⇐563

The identity of perpetrator of crime is no part of corpus delicti.

3. Criminal law ⇐563

Corpus delicti may be proven by circumstances shown in evidence, or by inferences reasonably drawn therefrom.

4. Larceny ⇐56

In prosecution for grand theft of an automobile, evidence, independent of admissions, that defendant stole automobile against will of owner was sufficient to establish the corpus delicti. Pen.Code, § 484.

5. Criminal law ⇐517(4)

Where corpus delicti was proven prior to receipt of officer's testimony relative to defendant's admission establishing defendant's identity as perpetrator of grand theft of an automobile, admission of such testimony was proper. Pen.Code, § 484.

6. Larceny ⇐57

Evidence sustained conviction of grand theft of an automobile as against contention that evidence did not show that defendant intended to deprive owner of the automobile permanently. Pen.Code, § 484.

7. Criminal law ⇐1159(5)

The intent with which an act is done is for determination of the trier of fact from all of the evidence before the court, and such determination will not be disturbed by an appellate court, when supported by substantial evidence.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Richard L. Mainhurst was convicted of grand theft, and he appeals.

Affirmed.

George Stahlman, of Los Angeles, for appellant.

Robert W. Kenny, of San Francisco, and Everett W. Mattoon, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment of guilty of grand theft, after trial before the court without a jury, defendant appeals.

There is also an appeal from the order denying his motion for a new trial.

The evidence being viewed in the light most favorable to the people (respondent), the essential facts are:

On November 23, 1943, Mr. Karsh left his Cadillac sedan in front of 1388 West Washington Boulevard, Los Angeles. When he came out of the building he discovered that his automobile was gone. About fifteen minutes later he located his automobile at Twenty-fourth and Hoover Streets. There was no one in the car, but he saw defendant and another man walking away from his automobile. Mr. Karsh and his brother-in-law ran after defendant and his companion and when they caught up with them Mr. Karsh's brother-in-law said, "What is the idea of taking the car?", whereupon defendant's companion hit him in the mouth and a fight ensued. After the fight defendant and his associate fled. Shortly thereafter defendant and his companion were arrested in a garage in the rear of 2355 Scarff Street. When arrested defendant gave the name of "Richard Bailey". Defendant had his hat and coat off and when asked by the officer if he cared to put them on, he replied, "I might as well".

On November 24, 1943, defendant after being asked by Mr. Rombeau to tell exactly what happened, made the following statement in substance; that he (defendant) had purchased a .45 automatic at Tijuana about three months before, and that on November 23, 1943, he and a Mr. Booth had planned to go out and steal a car; that in driving around the vicinity of 1388 West Washington Boulevard they noticed Mr. Karsh's Cadillac sedan with the keys in it; that he got out of his own car and drove the Cadillac sedan to the vicinity of Twenty-fourth and Hoover Streets; that they planned to rob some person, and he had accordingly left the Cadillac sedan near the curb where they could get away in it; that as he and his

companion were walking away from the car, two men came up and started to grab them; that his companion hit one of the men after which they ran into a garage, took off their hats and coats and hid the .45 revolver under the floor in the garage.

Defendant relies for reversal of the judgment on two propositions which will be stated and answered hereunder seriatim:

First: *There was no proof of the corpus delicti.*

This proposition is untenable and is governed by the following established rules of law:

[1] 1) The corpus delicti of the crime of grand theft of an automobile consists in (i) a felonious taking, (ii) without the consent of the owner, (iii) of an automobile. (Sec. 484, Penal Code; People v. Cahill, 11 Cal.App. 685, 689, 106 P. 115.)

[2] 2) The identity of the perpetrator of a crime is no part of the corpus delicti. (People v. Meyers, 7 Cal.App.2d 351, 354, 46 P.2d 282.)

[3] 3) The corpus delicti may be proven by circumstances shown in evidence, or by inferences reasonably drawn therefrom. (People v. Wiezel, 39 Cal. App.2d 657, 664, 104 P.2d 70.)

[4] Applying the foregoing rules to the facts in the instant case it is clear that the corpus delicti was proven independent of the admissions of defendant. The evidence discloses that Mr. Karsh's automobile was taken from him without his consent and against his will.

The statements of defendant to Officer Rombeau were admissible to prove defendant's identity as the perpetrator of the crime.

[5] Since the corpus delicti was proven prior to the receipt of testimony of Officer Rombeau relative to defendant's admissions, there is no merit in defendant's contention that the statements of defendant were inadmissible because there was no proof of the corpus delicti.

Second: *The evidence is insufficient to sustain the judgment since there is no evidence that defendant took Mr. Karsh's automobile with the intent of depriving him thereof permanently.*

[6, 7] This proposition is likewise without merit. The trial judge was justified in inferring and finding from the evidence that defendant took Mr. Karsh's automobile with the intent of permanently depriving him thereof. The intent with which an act is done is for the determination of the trier of fact from all of the evidence before the court, and such determination will not be disturbed by an appellate court when, as in the present case, there is substantial evidence to sustain the trial court's finding. (People v. Jeffries, 47 Cal.App.2d 801, 808, 119 P.2d 190; People v. Palumbo, 127 Cal.App. 703, 707, 16 P.2d 316; People v. Cahill, supra, 11 Cal.App. at page 689, 106 P. 115.)

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



68 Cal.App.2d 38

CITY OF LAGUNA BEACH v. CONSOLIDATED MORTG. CO. et al.

Civ. 3273.

District Court of Appeal, Fourth District, California.

Feb. 15, 1945.

1. Dedication ⇐15, 31

In order to constitute dedication, there must be intention by owner to dedicate land to public use and acceptance either by public user or formal resolution.

2. Dedication ⇐15

Intention of owner to dedicate land to public use may be found in his acts and conduct, and may be either express or implied.

3. Dedication ⇐15

Implied intention of owner to dedicate land to public use exists when his acts and conduct indicate clearly intention to devote land to public use.

4. Dedication ⇐15

Intention to dedicate land to public use will be implied from long acquiescence in use of land for public purposes under common-law presumption of dedication by adverse user.

5. Dedication ⇐20(2)

To establish dedication of highway by user, user must have been adverse, continuous, and with knowledge of owner for required period of time.

6. Dedication ⇐41

To establish dedication of highway by user, adverse character of use and knowledge and acquiescence of owner may be inferred from circumstances.

7. Dedication ⇐44

More evidence of an intent to dedicate to public use is required in open country where public has been in habit of going at will, without any clearly defined roadway, than in city or town.

8. Dedication ⇐41

Deliberate action of all owners in a certain area for purpose of bringing general public into area and providing them with fixed route and permanent roadway gives rise to a presumption of dedication.

9. Dedication ⇐44

Evidence established dedication of easement and right of way for boardwalk upon strip of land running along ocean front by all defendant property owners except owners of lots who placed sign on inside walk shortly after new walk was constructed stating that walk was on private property and right to pass over was revocable by will of owner, which sign remained in that position up until two years before city filed action to quiet title to easement and right of way.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by City of Laguna Beach against Consolidated Mortgage Company and others to quiet title to easement and right of way for public street purposes over a strip of land running along the ocean front in the plaintiff city. From an adverse judgment, the plaintiff appeals.

Affirmed in part and reversed in part.

Jack J. Rimel, City Atty., of Santa Ana, for appellant.

Mize, Kroese & Larsh, of Santa Ana, for respondents.

Ray H. Overacker, City Atty., of Huntington Beach, O. A. Jacobs, City Atty., of Santa Ana, Clyde Woodworth, City Atty., of Inglewood, El Segundo, South Gate, and Manhattan Beach, Leo J. Friis, City Atty., of Anaheim, Elmer Guy and C. R. Allen, City Attys., both of Fullerton, Roland Thompson, City Atty., of Newport Beach, Gordon X. Richmond, City Atty., of Orange, Glenn D. Newton, City Atty., of Redding, B. Z. McKinney, City Atty., of Santa Ana, Dana William, City Atty., of Seal Beach, George E. Bradley, City Atty., of Tustin, Harold McCabe, City Atty., of Fullerton, and Richard C. Waltz, City Attorney, of Beverly Hills, amici curiae on behalf of appellant.

BARNARD, Presiding Justice.

This is an action to quiet title to an easement and right of way for public street purposes over and upon a strip of land fourteen feet wide running along the ocean front in the city of Laguna Beach. This strip is entirely covered by a wooden sidewalk or boardwalk. The entire boardwalk along this ocean front is several blocks in length but the only portion involved in this action is that within the block lying between Ocean Avenue on the north and Laguna Avenue on the south.

This block consists of fifteen lots owned by the various defendants. As originally platted the lots faced east on El Paseo Street which, in a general way, parallels the ocean line. The lots were twenty-five feet wide and extended westerly toward the ocean a distance of seventy-five feet. This left a sandy beach of considerable width between the rear of these lots and the ocean shore. How they acquired title does not appear, but it was stipulated for the purposes of this action that the respective owners of these lots also owned in fee the land between the rear of their lots and the westerly line of the boardwalk, subject to the question of the easement here claimed. The fourteen-foot strip in question curves somewhat, in accordance with the ocean line, and is between what may be called the beach and the westerly line of this block as originally platted. At Laguna Avenue on the south, the easterly line of the boardwalk is about seventeen feet from the westerly line of the block as platted, and at Ocean Avenue at the north it is some sixty or seventy feet from that line.

It appears from the evidence that at least as early as 1902 there was a narrower board walk along this beach front, between Ocean Avenue and Laguna Avenue, in approximately the same location as the present walk. This walk was continuously

used by the general public with the full knowledge of the owners of lots in this block, without objection on their part, and without permission being asked or obtained.

In 1925, the present walk was built following the line of the old walk in this block, with a slight variation, the width being increased to fourteen feet. The new walk was made of 2 x 8 planks fourteen feet long laid across five girders which rested on posts eight inches square, which were set in the sand. The cost of the walk was paid by prorate contributions made by the several property owners. At the same time the walk was extended across Ocean Avenue and on to the north for at least another block. It was also extended across Laguna Avenue to the south and a short distance farther into or along the grounds of a hotel. The city of Laguna Beach was not then incorporated and the county paid the cost of constructing this walk across the westerly ends of Ocean Avenue and Laguna Avenue. The walk was so constructed as to join with the sidewalks or walkways on those streets. The general public use of the new walk continued on an increasing scale from 1925 until this action was filed in 1942 with the full knowledge of the property owners and without any objection on their part.

The plaintiff city was incorporated in 1927. Beginning in 1933, and continuously since that time, employees of the city, under the direction of the city engineer and superintendent of streets, have at regular intervals inspected this boardwalk, replacing worn or damaged understructure and surface planks, constructing handrails and stairways leading from the surface of the walk to the sandy beach, and making minor repairs. This has been done with knowledge of the property owners and without either their permission or objection. Several of the property owners have also made minor repairs during this time, consisting mainly of driving down loosened nails and placing tin strips over knot holes. Since 1935 benches have been kept on the boardwalk facing the beach, which were generally used by the public. It does not appear who first placed benches there but since 1940 city-owned benches have been placed along the walk.

It would serve no useful purpose to summarize the evidence of the respective witnesses. The evidence shows, without conflict, that this boardwalk was continuously used by the general public for some forty years; that its use has largely increased since it was rebuilt and widened in 1925; that many of the lot owners or their tenants have constructed or placed business structures and established businesses along the boardwalk between its easterly line and the westerly line of the original lots as platted; that the walk has been used to attract customers to these businesses as well as by the general public; that while the number of people using the walk is larger in the summer season such use in continuous throughout the year; that such use has been with the knowledge of the lot owners and with their encouragement; that specific permission for such use has never been asked or given; that no objection to such use has ever been made; and that except in connection with one lot owner, which matter will be hereafter referred to, no sign or notice of any kind has ever been posted along this boardwalk to notify the public that use thereof was permissive only.

Several of the defendants testified that at the time they contributed to the reconstruction of the walk in 1925 they had no intention of dedicating their portion of the land it occupied to public use; and that they were willing to contribute their share of the expense because they believed it would "increase the convenience," increase "business", and increase "the rental or income value" of their property. There was also evidence that during later years the areas between the westerly lot lines, as originally platted, and the ocean were added to the description of the respective lots on the tax rolls. Admittedly, no extra taxes were assessed or collected because of this fact.

The court found in favor of the plaintiff as to all defaulting lot owners and in favor of all defendants who filed answers. No findings were made as to any specific facts, the findings and conclusions of law being identical and to the effect that the plaintiff is not entitled to any easement or right of way for public street purposes over, along or across those portions of the fourteen-foot strip of land and boardwalk running across the parcels of land owned by the appearing defendants, and that these defendants are, respectively, the owners in fee of these portions of the fourteen-foot strip of land and boardwalk. In a written opinion the trial judge pointed out the general rule that "the law will imply an intention to dedicate, even though such dedication is not explicitly stated, where there

has been over a long period of time acquiescence by the record title holder in the use of land for highway purposes," and that the subsequent use of the road or way by the public operates as an acceptance of the dedication when the facts indicate a setting apart of the land by the owner for the use of the public. It was then pointed out that long continued use by the public here appears and that the owners at all times had knowledge of this use and acquiesced in it. It was then stated that several cases laid down the rule that mere use alone does not disclose an intention to dedicate and that where an alleged dedication rests upon acts and conduct alone the intent to dedicate must clearly appear. The court then said that the presumption of dedication arising from long continued use without objection should be applied only where there are no facts which are inconsistent with an intention to dedicate, that a doubt appeared here with respect to such an intention since the walk was built at the expense of the property owners, since they made some of the later repairs which became necessary, and since the strip of land upon which the walk is located had been assessed to them, and that this doubt should be resolved in favor of the property owners. Judgment was entered accordingly, and the plaintiff has appealed from that portion of the judgment which was in favor of the answering defendants.

[1-6] The appellant relies on such cases as Schwerdtle v. County of Placer, 108 Cal. 589, 41 P. 448; Hartley v. Vermillion, 141 Cal. 339, 74 P. 987; People v. Myring, 144 Cal. 351, 77 P. 975; Whiteman v. City of San Diego, 184 Cal. 163, 193 P. 98; Hare v. Craig, 206 Cal. 753, 276 P. 336; and Diamond Match Co. v. Savercool, 218 Cal. 665, 24 P.2d 783, 784. In the last of these cases, the general rules are thus stated:

"To constitute a valid and complete dedication, there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use (City of Venice v. Short Line Beach L. Co., 180 Cal. 447, 450, 181 P. 658), and an acceptance either by public use or formal resolution (Brown v. Bachelder, 214 Cal. 753, 7 P.2d 1027.) The intention to which courts give heed is an intention manifested by the owner's acts and finding expression in his conduct. City of Los Angeles v. McCollum, 156 Cal. 148, 103 P. 914, 23 L. R.A.,N.S., 378. It may be either express or implied, and is implied when the acts and conduct of the owner indicate clearly an intention to devote the land to the public use. People v. Myring, 144 Cal. 351, 354, 77 P. 975, 976. The law will imply an intention to dedicate from long acquiescence in the use of land for highway purposes, for it is settled that the common-law rule as to the presumption of dedication by adverse user is applicable in this state. Schwerdtle v. County of Placer, 108 Cal. 589, 592, 41 P. 448. * * *

"Of course, where the dedication of a highway is sought to be established by user, it must be shown that the user was adverse, continuous, and with the knowledge of the owner, for the required period of time. City of San Diego v. Hall, 180 Cal. 165, 168, 179 P. 889. So far as the element of time is concerned, periods varying from five to forty years have been held sufficient. Plummer v. Sheldon, 94 Cal. 533, 29 P. 947; Barnes v. Daveck, 7 Cal.App. 487, 94 P. 779. The adverse character of the use and the knowledge and acquiescence of the owner may be inferred from circumstances, and long-continued adverse user establishes against the owner the conclusive presumption of knowledge and acquiescence."

In Barnes v. Daveck, 7 Cal.App. 487, 94 P. 779, 781, in commenting on what is required to show adverse use, the court said:

"There are presumptions arising from certain facts which are conclusive and obviate the necessity for direct evidence to the point. It is not always necessary for the public in using a roadway to make proclamation that they are using it under a claim of right where the right is asserted as flowing from long usage with the knowledge and acquiescence of the owner of the land; nor is it always necessary to show some aggressively hostile act by the public that such use was intended to be adverse to the owner. The claim of right, the adverse character of the use, and the knowledge and acquiescence of the owner of the land may be presumed from the facts and circumstances attending the use."

The respondents rely on People v. Sperry, 116 Cal. 593, 48 P. 723; City and County of San Francisco v. Grote, 120 Cal. 59, 52 P. 127, 41 L.R.A. 335, 65 Am.St.Rep. 155; Burk v. City of Santa Cruz, 163 Cal. 807, 127 P. 154; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; and Lyons v. Schwartz, 40 Cal.App.2d 60, 104 P.2d 383. In these

cases it was held either that there was no showing of general public use, that such use was merely permissive, or that any showing of use was not sufficient to compel a finding of dedication.

In Lyons v. Schwartz, supra, it was pointed out that in order to prove dedication much stronger evidence is required with respect to a country roadway than in the case of a street in a town or city. As was said in F. A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 150 P. 62, 68: "But, where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate." The matter of the manner in which the property is assessed on the tax rolls under such circumstances as here appear is immaterial on the question of implied dedication. Burk v. Santa Cruz, 163 Cal. 807, 127 P. 154; Manhattan Beach v. Cortelyou, 10 Cal.2d 653, 76 P.2d 483.

[7, 8] In determining whether the use shown indicates an acceptance of an implied intention to dedicate to public use or whether it is merely permissive, the rules laid down and some of the broad statements made in the various decisions must be considered in the light of the facts in each case. Obviously, the surrounding circumstances affect the nature and extent of the rule which is to be applied in a particular case. Naturally, more evidence of an intent to dedicate to public use is required in an open country where the public has been in the habit of going at will, without any clearly defined roadways. Even in cities and towns different circumstances call for different rules. It should take stronger evidence to show an implied dedication where people have cut across a vacant lot as a matter of convenience, and the general circumstances indicate that neither the owner nor the public ever intended to establish a road there. On the other hand, a deliberate action on the part of all of the owners in a certain area for the purpose of bringing the general public into and through that area and providing them with a fixed route and permanent roadway is a different matter and naturally gives rise to presumptions which cannot be overlooked.

The respondents argue that in all the cases in which a dedication has been upheld something other than "mere use" has appeared. In other words, that in these cases there was evidence of some act by the owner to indicate his willingness that the property be dedicated to public use. Assuming this to be true, rather convincing evidence of such acts here appears. Originally, there was no street or public way of any kind between the rear of these lots as platted and the ocean. As the use of the beach for recreation purposes increased a potential source of business for the property owners naturally developed. The fact that the nature of the traffic to be expected was pedestrian, rather than vehicular, is not important. As early as 1902 a considerable effort was made to accommodate and encourage such traffic in this particular block. In 1925, the property owners united for the purpose of improving and enlarging the facilities theretofore offered to the public and united with property owners in other blocks in extending the scope of the improvement in order to extend and increase its public use. In doing this the walk was also constructed across and beyond two public streets in such a manner as to attract pedestrian traffic from those streets. The county was induced to pay the cost of the walk across the ends of these streets and this indicates that the portion of the walk within those streets was considered as a public way and a part of the streets. If those parts of the walk were considered as a public way this fact suggests that the entire walk, built at the same time and for the same purpose, must have been so considered. The lot owners not only permitted and thus invited the general public to make use of this strip of land, but they improved it for that purpose with an expensive structure, which is comparable in nature and effect to the pavement of a street which would be appropriate in a different kind of location. The fact that the property owners paid for this improvement is, under the circumstances, suggestive of their willingness to dedicate the strip to public use rather than of a desire to retain it as private property. It was made a community affair for lot owners in that area all of whom were similarly situated, and they all participated in the common enterprise for the purpose of increasing the rental or income value of their respective properties by inducing a larger public use of this way. The city was not then incorporated, it would have been difficult to get the county to make so expensive an improvement, and the fact that the prop-

erty owners were willing to unite and improve this strip for the purpose of inducing the public to use it in the manner contemplated strongly indicates an intention to make it a public way, rather than one to limit to some permissive and temporary use. It also appears that since the reconstruction of the walk many businesses have been established along its easterly side in this block and at least one on the west side, to take advantage of the public use thus invited. One of the lot owners who promoted the project in 1925, and who raised the money for the improvement, testified that he collected all of the money in advance "because I had been stuck on one or two streets, oiling propositions of that kind." After the walk was reconstructed some of the lot owners made small repairs thereon, and after the city was incorporated the city employees made more extensive repairs and some improvements without any objection from the property owners who knew that this was being done.

These facts show something more than a mere use, such as occurs when some part of the general public begins to cross a vacant lot without permission of the owner. There was here not only knowledge on the part of the owners but an invitation and actual encouragement to a continued use by the public which is inconsistent with any idea that it was intended to be temporary and merely permissive. The fact that such a way is prepared at great expense for the very purpose of attracting the public and inducing them to travel that way in order to bring business and increased rental value to all of the parcels in a considerable area is very strong evidence of an intent to dedicate it to public use. Few, if any, of the cases cited disclose so clear an intention and willingness to dedicate property to public use as here appears.

[9] Not only do these facts clearly disclose an intention on the part of the lot owners to dedicate this strip to public use and an acceptance thereof by such use for many years, but there is no substantial evidence to indicate a contrary intention on the part of the lot owners. Some of them testified that when they contributed to the project in 1925 it was not their intention to dedicate the land to public use. This may be literally true since, in practical effect, the land for the walk had been so dedicated and used by the public for some twenty-five years at that time. What was then done was to improve and widen the existing way through that block, and to extend it to serve a larger area in order to increase its use by the public, and the property owners may not have consciously considered the matter of dedication. In any event, their actions then and through the following years are such as, under the authorities above cited, to raise a presumption of intention to dedicate which cannot be dispelled by their self-serving and incomplete testimony that they had no such specific intention while the improvements were being made in 1925. Whatever their intention at that time, their intention to dedicate this walk to public use sufficiently appears by their acts and conduct through the many years preceding the filing of this action, with one exception which will be next referred to.

A somewhat different situation appears with respect to the lots owned by the respondents N. E. West and Agnes Y. West. They own three lots and ten feet of another lot at the southerly end of the block in question, being the portion of this block which is nearest Laguna Avenue. Mr. West testified that shortly after the new walk was constructed in 1925, he placed a wooden sign on the inside or easterly line of the boardwalk on this property and about twenty feet northerly from Laguna Avenue; that the sign read "Private Property—Right to Pass Over Revocable by Will of Owner"; that this sign disappeared after a time and he put up a second sign; that this disappeared and he put up a third, which later disappeared; that these signs were in that position over a period of several years; and that he did not think there had been any such sign there during the last seven years. Mrs. Fisher testified to the same effect; that she had seen such a sign in front of the West property over a period of several years. However, on cross-examination, she was led on until she finally said that one of these signs had remained in that position up to "about three years ago." While it seems probable she was mistaken, her evidence is very definite and the trial court had the right to accept it as true. Under these circumstances and if such a sign was in that position from 1925 up to some two years before the action was filed, this fact is sufficient to support the court's finding and judgment with respect to the property owned by the respondents West.

For the reasons given, that portion of the part of the judgment appealed from

which is in favor of the respondents West is affirmed. The remaining portions of that part of the judgment appealed from are reversed, with directions to the trial court to make the appropriate findings and to enter a judgment in favor of the appellant as against all of the respondents except the Wests.

MARKS and GRIFFIN, JJ., concur.



68 Cal.App.2d 122

STEWART v. KELLY.

Civ. 14700.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1945.

Hearing Denied April 19, 1945.

1. Appeal and error ⇐977(3)

Trial court's action in granting a new trial will not be disturbed in absence of a clear showing of manifest abuse of discretion.

2. New trial ⇐27

A motion for a new trial may be granted only where mover is aggrieved, and motion will be allowed only when matters presented materially affect substantial rights of moving party.

3. New trial ⇐65

Trial court's wide discretion will not support an order granting a new trial if, upon all the evidence, jury reached only correct verdict.

4. Automobiles ⇐181(1)

"Willful misconduct", authorizing guest to recover from motorist for injuries sustained in automobile accident, involves deliberate, intentional or wanton conduct in doing or omitting to perform acts with knowledge or appreciation of the fact that danger is likely to result therefrom, coupled with conscious failure to act to end of averting injury and mere failure to perform a statutory duty is not alone "willful misconduct."

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

5. Automobiles ⇐244(20)

Evidence that motorist had been reproved by guest a short time prior to colliding with telephone pole when he took one of his hands from steering wheel, did not establish that motorist was guilty of "willful misconduct" when he thereafter took hand off wheel to jerk automatic cigarette lighter out when he deemed that guest had held it in place too long.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Elizabeth A. Stewart against John Patrick Kelly for injuries sustained in automobile accident. From an order granting a new trial, following a verdict for the defendant, the defendant appeals.

Reversed with instructions.

Everett W. Thompson of Nourse & Jones, all of Los Angeles, for appellant.

Samuel A. Rosenthal, Edward I. Pollock, and Burton B. Crane, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether appellant wilfully misconducted himself while operating his own automobile, accompanied by a favorite friend as his guest. The jury determined that he did not. The appeal is from the order of the court granting a new trial upon the insufficiency of the evidence to support the verdict. No proof other than that embalmed in the record was available.

Prior to March 28, 1943, the parties had been acquainted for 13 years. Since March, 1940, their mutual fondness had been manifested by their rides together in appellant's automobile several times weekly. She had never operated a car after meeting appellant. On the day last mentioned he called upon the lady at her home in Los Angeles and invited her to join him in an excursion to Long Beach in his sedan of the vintage of 1941. They traveled south on Figueroa Street, a four-lane concrete highway from the city for the 16 miles or more to the scene of the collision. In that vicinity a row of telephone poles, about 125 feet apart, stood four feet from and parallel with the pavement. The speed of the vehicle was estimated by respondent to have been about 45 miles an hour. It was a "bright beautiful sunny afternoon." There was no visible traffic. As they pro-

ceeded southerly along Figueroa two incidents occurred, the evidence of which must supply the proof of appellant's wilful misconduct, if any. (1) At one time in discussing his foreman, he removed his right hand from the wheel to demonstrate how he would like to "bop" the foreman's head. As he did so his automobile swerved from the paved area onto the soft shoulder of the boulevard. Respondent requested him to decelerate his speed, keep his hand on the wheel and his eye on the road. The driving then continued in a normal manner. (2) Before they had gone not to exceed a mile after the "boping" demonstration, and while they were conversing, respondent took a cigarette from her purse and pressed the Chevrolet's automatic lighter with her left hand. Having held it in place longer than appellant deemed safe for the device, with his right hand he seized her wrist, jerked it out and angrily demanded to know whether she was trying to burn out the wires. Before respondent had answered the Chevrolet swerved onto the shoulder and collided with a telephone pole, causing respondent's injuries.

[1-4] The action of a court in granting a new trial will not be disturbed in the absence of a clear showing of manifest abuse of discretion. In re Estate of Wall, 183 Cal. 431, 191 P. 687; Paddon v. Harris, 219 Cal. 665, 28 P.2d 669. But a motion for a new trial may be granted only when the mover is "aggrieved," that is, has suffered prejudice. It will be allowed only when matters presented materially affect the substantial rights of the moving party. Wall v. Equitable Life Assurance Society, 33 Cal.App.2d 112, 91 P.2d 145. If plaintiff was not aggrieved by the verdict she was not entitled to a new trial. The court's wide discretion will not support an order granting a new trial if, upon all the evidence, the jury reached the only correct verdict. Mercantile Trust Company of San Francisco v. Sunset Road Oil Company, 176 Cal. 461, 478, 168 P. 1037. The record here furnishes no substantial evidence in support of respondent's recovery.

The frequent recurrence of actions founded upon the theory of wilful misconduct in which negligence only of the operator is discernible impels us to penetrate the veil of the statute to explore the philosophy underlying the right of a guest to recover from his host for injuries resulting from the latter's wilful misconduct.

Judging him in the light of normal human behavior appellant could not have been guilty of "wilful misconduct." There was not the slightest evidence of an "entire absence of care" on his part for the safety of his friend. His call at her home to solicit her to accompany him furnished special incentive to guard against her injury. He was impelled by every instinct of courtesy and chivalry to protect her. Moreover, sitting by her side, he must have known that any detriment to her would in all probability likewise have come to him. Compelled thus by the passion for self-preservation and by his amity and friendship for the lady to proceed with care, it would have required an unusual exhibition of depravity to warrant a finding that he had wilfully misconducted himself. Judging him by the norm of sane conduct, he could not have willed a wrongful act. His character is marked by industry and gentility. He had not displayed a wantonness; he had demonstrated a zealous regard for respondent's society; he had exhibited only a desire to enlarge her pleasures. Before the will to do an act arises in the consciousness there must first have been a desire to do such act. In bringing that desire to the surface of the universe of desires, the wish is born. It is only after the wish becomes a conscious concept and predominates over all other wishes, that the will to effect it may operate. In other words, declares Professor MacKenzie,[1] "in order that an event may be willed, it has to be accepted in its concrete totality." The distinction is emphasized by Lady Anne who wished the death of Gloucester, but she "will not be executioner." Thus we conclude that within the moment of his motion to save the lighter from destruction it is not within the range of probability that appellant could have wished harm to respondent or to imperil her safety by swerving from the pavement. If he did not wish it, he could not have willed it.

[5] Turning from philosoply to stare decisis, we find that our courts have with accurate phrase defined the true meaning of wilful misconduct. It is intentionally failing to do that which should be done under circumstances disclosing knowledge that an injury to a guest will probably re-

1 "Manual of Ethics."

sult. Turner v. Standard Oil Company, 134 Cal.App. 622, 626, 25 P.2d 988. It is "conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." In re Burns, 218 Mass. 8, 105 N.E. 601, 602, Ann.Cas.1916A, 787. Wilful misconduct depends upon the facts of a particular case, but necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom, coupled with a conscious failure to act to the end of averting injury. Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447; Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172. The mere failure to perform a statutory duty is not, alone, wilful misconduct. Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194. Such failure amounts to simple negligence only. While the word "wilful" implies an intent, the intention thereby referred to relates to the misconduct and does not mean merely the unsuccessful attempt to do a lawful act. Every act of a motorist, even though it results in an accident, is intended. But because he fails successfully to perform as he intended, or accidentally veers his car from his purposed course, such failure of his attempt to do an act, proper or improper, does not constitute the wilful misconduct contemplated in the guest statute. In the recent case of Fiske v. Wilkie, 67 Cal.App.2d 440, 154 P.2d 725, 731, in which it was held that the injuries of the guest resulted from negligence, the court observed that there was no evidence of "any intentional act or omission." What the lawmakers intended by "wilful misconduct" was not negligence in a motorist's unsuccessful attempt to do an act while transporting his guest. They were not aiming thereby to prevent the doing of all acts which might be done unsuccessfully or without untoward event to the detriment of a guest. Meek v. Fowler, supra. The legislative aim was clearly to enable an innocent and confiding person to recover such damages as the latter might suffer from a malignant desire of the motorist to cause detriment to his guest or from a total abandon of moral duty resulting in injuries to the rider. The purpose was to give security against a motorist whose evil behavior flows from a consciousness that a serious injury is likely to occur to his guest. Turner v. Standard Oil Co., supra.

In Porter v. Hofman, supra, the facts parallel those here under consideration. Defendant while proceeding at 45 miles per hour turned her head while still holding the wheel to observe the conduct of two guest children on the rear seat. She lost control and the car skidded off the highway. She was innocent of wilful misconduct not only because she was conscious of no peril from her failure to look straight forward but also because she was not conscious of a failure to attempt to avert an injury. In the instant case there is not a scintilla of evidence that would reasonably warrant the inference that appellant was conscious of either a peril to be apprehended from his act or of a failure to attempt to avert an injury to respondent. On the contrary, from the zeal he displayed in encouraging her recovery by his visits with her during her convalescence, it must be concluded that he would have forcibly attempted to avert injury to her had he entertained an instant's fear for her safety.

It is contended that defendant's behavior was wilful misconduct because after he had swerved from the pavement a short time prior to the collision he had been reproved by plaintiff for having taken his hand from the wheel. But such act at its worst was evidence of neither a wicked wish, nor wantonness, nor gross negligence. It was no more than an ordinarily negligent act of the variety frequently committed by motorists of discretion and caution. If holding the steering wheel by both hands be deemed the standard of good conduct on the highway, appellant's act in either instance could have been no worse than the act of shifting gears or of opening his glove compartment to serve the comfort of himself or his companion. Reproof of a chauffeur's preceding conduct could be pertinent as proof of wilful or wanton behavior at a subsequent mishap only in the event that his first act had been quasi criminal, wanton, or grossly negligent.

The order is reversed with instructions to deny the motion.

McCOMB, J., concurs.

W. J. WOOD, J., concurs in the judgment.

Hearing denied; CARTER, J., dissenting.

68 Cal.App.2d 32

DIEHL v. HANRAHAN et al.

Civ. 12787.

District Court of Appeal, First District, Division 1, California.

Feb. 15, 1945.

Hearing Denied April 12, 1945.

1. Municipal corporations ⇐519(6)

Section of city ordinance providing that lien first in time shall have priority over all special assessments thereafter created had no application to liens created under section which provided for payment of assessments for street improvements in installments under conditions of a bond as sole measure of obligations of property owners.

2. Municipal corporations ⇐519(6)

In the absence of any statutory enactment establishing a rule of priority for special assessment and bond liens, such liens are ranked in inverse order of their creation, that is, the last in point of time is superior in rank or is first in priority.

3. Municipal corporations ⇐519(6)

Where ordinance under which street improvement bonds were issued had no provision relative to priority, and plaintiff's bond was issued on November 7, 1931, and defendants' bond on February 4, 1928, lien of plaintiff's bond was superior to that of defendants' bond. Civ.Code, § 2897.

4. Municipal corporations ⇐519(6)

Where ordinance under which street improvement bonds were issued had no provision relative to priority, and plaintiff's bond was issued on November 7, 1941, and defendants' bond on February 4, 1928, foreclosure of lien of defendants' bond and sale of the property to one of defendants did not wipe out plaintiff's rights under her bond. Civ.Code, § 2897.

5. Taxation ⇐531(2)

The holder of municipal street improvement bond, paying delinquent taxes on property securing bond, was not an intermeddler, so as to preclude right to subrogation. St.1939, p. 1326 et seq., § 3511 et seq.

6. Subrogation ⇐22

Generally, the right of subrogation is given to one who, having a lien upon specific property, discharges a prior lien thereon in order to protect his own claim, and the general rule applies notwithstanding that he was not compelled to do so.

7. Taxation ⇐531(1, 2)

One who, upon a supposition of ownership which proves to be erroneous, pays taxes, may not be reimbursed, but one who pays an obligation such as taxes in order to protect his own interest is entitled to subrogation. Civ.Code, § 2876.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by M. Diehl against R. Hanrahan, Federal Construction Company, and others, involving question of priority between two assessment liens under the San Francisco street improvement ordinance. From a judgment for plaintiff, the defendant Federal Construction Company alone appeals.

Affirmed.

Henry F. Wrigley, of San Francisco, for appellant.

Herbert Pothier and John F. O'Sullivan, both of San Francisco, for respondent.

WARD, Justice.

This appeal presents the question of priority between two assessment liens under the San Francisco Street Improvement Ordinance. It was stipulated that "ordinance No. 4720 (New Series), was enacted under the provisions of Section 33, Chapter II, Article VI of the Charter of the City and County of San Francisco, which said Charter was ratified by a Vote of the said City and County of San Francisco on May 26, 1898, and approved by the Legislature of the State of California on January 26, 1899, and which Charter went into effect on January 8, 1900, and, with amendments thereafter enacted was in effect at the time said ordinance No. 4720 (New Series), was adopted; that said section 33 was amended November 7, 1916, and, as so amended was in effect upon the date said Ordinance No. 4720 (New Series) was adopted; that said Charter, and each and all of the provisions thereof in effect on the date said ordinance No. 4720 (New Series), was adopted and on the dates it may have been amended shall be deemed in evidence."

The ordinance provides that assessments may be levied on private property to cover

the cost of street improvements, a warrant being attached to such assessment giving to the contractor or his assigns authority to demand of the property owner payment of the amount of the assessment. It is required that a diagram of the lot upon which the improvement has been made shall be attached to the warrant and assessment, and that when these are recorded, the amount assessed becomes a lien upon the property for a period of two years from the date of recordation. This lien is subordinate to all special assessment liens previously imposed upon the same property, but has priority over all special assessment liens thereafter created against it. The assessments may be paid in installments at the option of the owner and with the consent of the Board of Supervisors. In such event the property owner must execute a bond payable in installments. If default be made in the payment of any installment or interest, the board is authorized to sell the property to pay the amount due, or the person owning the bond may foreclose the lien created by the assessment.

The facts are not in dispute. Appellant traces its title to an assessment issued in 1927; respondent claims under an assessment issued in 1931. The case of each party was stipulated as follows:

As to the appellant, that on December 23, 1927, under and pursuant to the provisions of Ordinance No. 4720 (New Series), above referred to, the Board of Public Works of the City and County of San Francisco duly and regularly made and issued an assessment, diagram and warrant in favor of the Federal Construction Company in the sum of $1,796.12 due to said company for street improvement made by it upon a lot of land owned by Harriet Winter and Annie Winter; that the assessment was duly recorded and demand for payment and return thereon also duly made and recorded; that on February 4, 1928, the owners of said lot duly executed bond No. 3980 for the purpose of discharging when paid, the assessment; that only the initial payment was made on this bond, as the result of which the lot of land was offered for public sale and sold to defendant Federal Construction Company; that a certificate of sale followed, and, no redemption being had, a deed to said defendant was issued in due course and was duly recorded.

As to the respondent, the stipulation discloses the same status in relation to a similar assessment upon the same lot of land some four years later, with the additional facts that for the years 1932 to 1941 both inclusive the City and County of San Francisco levied an assessment for general taxes upon the land, which remained unpaid, and on May 13, 1942, amounted with costs, interest and penalties to the sum of $370.02, which respondent on said date paid. The lot of land had on August 29, 1933, been sold to the State of California for nonpayment of taxes for the fiscal year ending June 30, 1933, and was thereafter deeded to the state. At the time when respondent made such payment the land was subject to redemption, and such redemption was made in order to preserve respondent's claim of lien.

The main issue on appeal is—which bond has priority? The appealing defendant contends that the provisions of the ordinance making the amount assessed a lien and making that lien subsequent to prior assessments should apply as well to bonds executed by owners under the provisions of the ordinance. It argues that only one lien is created for any given work and that although such lien is subordinate to previous special assessment upon the property it has priority over all special assessment liens subsequently created against it. If this argument be correct, defendants took the property free and clear of plaintiff's lien.

[1] The ordinance is divided into two parts. Section 24, part I, relates to proceedings leading up to the assessment and the lien given therefor, such assessment to be paid in a lump sum within two years. This lien does not run to the holder of a bond. Section 34 provides for the payment of the assessment in installments under the terms and conditions of a bond as the sole measure of the obligations of the property owner. The characteristics of a lien under section 34 are independent of those of the lien imposed under section 24. Each lien is distinct and is governed by the provisions of the section creating it. Section 24 provides that the lien first in time shall have priority over all special assessments thereafter created. No such provision appears in section 34. Liens under section 24 are distinct, separate and apart from those under section 34. Balaam v. Pacific States Sav. & Loan Co., 219 Cal. 612, 28 P.2d 1053.

We are unable to find anything in Sterling Realty Co. v. Relfe, 21 Cal.2d 164, 130

P.2d 410, cited by appellant, that is of assistance to it. The question whether two liens were created under the provisions of the San Francisco Street Improvement Ordinance or only one was suggested in that case but not decided as it was unnecessary to the determination of the main question —the applicability of the statute of limitations.

In the Balaam case plaintiff and defendant each owned a serial bond under the Street Improvement Act of 1911. The point involved was whether the bonds were issued under one or another of two sections similar respectively to sections 24 and 34 in the present case. Thompson v. Clark, 6 Cal.2d 285, 295, 296, 57 P.2d 490, 496, construed the Balaam case as follows: "* * * it is the theory of our decision in the Balaam case that the lien for the amount of the assessment which exists where bonds have been issued is a different lien, with difference characteristics, than the lien for the amount of the assessment which exists where no bonds have been issued." In the Thompson case plaintiff brought an action to foreclose liens upon certain lots secured by bonds issued in 1930 to cover street improvement assessments. Defendants were the owners of bonds issued in 1926. The assessments for which defendants' bonds were issued also constituted liens upon the same lots. The trial court held (affirmed on appeal) that the liens of plaintiff were subordinate to those of defendant, but this holding was based upon an amendment (Stats.1927, p. 1406) to the 1911 act. Under that amendment bonds issued were subject to prior issue but took precedence over those subsequently issued. The bonds in the Thompson case were actually issued under the Bond Act of 1915, Stats.1915, p. 1468, although that act does not provide procedure for making assessments, the assessment being made under the Street Improvement Act of 1911.

[2, 3] The judgment here adjudged that the lien of plaintiff's street improvement bond was superior to that of defendants. Each of these bonds was issued in pursuance of section 34, which has no provision relative to priority. Plaintiff's bond was issued on November 7, 1931, and defendants' prior thereto—on February 4, 1928.

In Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296, it was held that the last lien imposed on property is paramount. In Balaam v. Pacific States S. & L. Co., supra, two bonds, held one each by the respective parties, were secured by liens created by section 66 of the Street Improvement Act of 1911. Stats.1911, p. 730. Section 66 provided that the lien should be a first lien until the obligation was paid. Following the ruling in the Woodill & Hulse Elec. Co. case, the court held, 219 P. at page 621, 28 P.2d at page 1057: "As the bond owned by the appellant was issued over a year subsequent to the issuance of the bond of respondent, it must be given priority over the bond of the respondent." The court in Smith v. Addiego, 54 Cal.App.2d 230, 129 P.2d 953, involving liens for taxes and liens for special assessments, recognized that statutory language was controlling, and determined that a tax deed under the specific provisions of Political Code section 3897, as it read, operated to extinguish a street improvement bond lien.

If any confusion existed relative to the issuance of street improvement bonds where a rule of priority is not set forth as in present section 34 of the San Francisco Street Improvement Ordinance, it was clarified in Cullinan v. Grey, 18 Cal.2d 247, 249, 115 P.2d 460, 461, as follows: "It is well established in this state by the decisions of this court that in the absence of any statutory enactment establishing a rule of priority for special assessment and bond liens, that such liens are ranked in the inverse order of their creation, that is to say, that the last in point of time is superior in rank, or is first in priority. Thompson v. Clark, 6 Cal.2d 285, 57 P.2d 490; Conley v. Hawley, 2 Cal.2d 23, 38 P. 2d 408; Balaam v. Pacific States Savings & Loan Company, 219 Cal. 612, 28 P.2d 1053; Woodill & Hulse Electric Company v. Young, 180 Cal. 667, 182 P. 422, 5 A. L.R. 1296."

[4, 5] In appellant's opening brief the following appears: "* * * but if it were to be suggested (contrary to our contention) that another and separate lien is created under the bonding provisions of the ordinance in question, when the owner elects to pay the assessment in installments, then such separate lien is created only by virtue of the voluntary, affirmative act and writing of the property owner. This being so, the matter of priorities is governed squarely by Section 2897 of the California Civil Code, which provides: '* * * Other things being equal, different liens upon the same property have

priority according to the time of their creation, except in cases of bottomry and respondentia.'; and appellant's lien, being first in point of time, is first in point of priority." It is argued that the foreclosure and sale of the lot to appellant completely wiped out respondent's rights, and that her act of voluntarily paying delinquent taxes did not give her any right of reimbursement. The act of paying the delinquent taxes was deliberate and voluntary only in the sense that respondent's position as lienholder did not legally require that she or her predecessors do so, but from a practical standpoint, if she had not made such payment and the city and county had sold the property (Political Code, sec. 3787; see, also, Revenue and Taxation Code, Div. 1, Pt. 6, Ch. 4, St.1939, p. 1326 et seq., § 3511 et seq.), she would have faced a problem somewhat similar to that in Smith v. Addiego, supra. She was not a stranger or an intermeddler.

Though Civil Code, section 2987 is not cited, a similar contention was presented in Woodill & Hulse Elec. Co. v. Young, supra, where, 180 Cal. at page 668, 182 P. at page 423, 5 A.L.R. 1296, the following appears: "The respondent's contention is that the rule generally applicable to contractual liens applies, and that the one prior in time is prior in right." The court analyzed decisions from California and other jurisdictions and determined that in liens imposed for a public purpose the last is paramount. See Billings v. Delgado, 51 Cal. App.2d 489, 125 P.2d 95; Cullinan v. Grey, supra.

[6, 7] It is the general rule that the right of subrogation is given to one who, having a lien upon specific property, discharges a prior lien thereon in order to protect his own claim, and this notwithstanding that he was not compelled to do so. One who upon a supposition of ownership, which proves to be erroneous, pays taxes, may not be reimbursed, but one who pays an obligation such as taxes in order to protect his own interest is entitled to subrogation. Civil Code, sec. 2876; Weinreich v. Hensley, 121 Cal. 647, 54 P. 254; Smith v. Addiego, supra; Page v. Podel, 4 Cal.App.2d 229, 41 P.2d 167; McMillan v. O'Brien, 219 Cal. 775, 29 P.2d 183, 91 A.L.R. 383; Fresno Investment Co. v. Brandon, 79 Cal.App. 387, 249 P. 548; 25 Ruling Case Law, pp. 1365–1366, sec. 48; 50 Am. Jur., p. 699, sec. 23.

In view of the conclusions reached herein we do not find it necessary to consider other arguments presented by respondent.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

Hearing denied; SCHAUER, J., dissenting.



67 Cal.App.2d 845

DONOVAN v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 14307.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1945.

Rehearing Denied March 5, 1945.

1. Trusts ⇨306

In action for an accounting based upon an alleged trust relationship, where defendants denied allegations that they had failed to account and alleged that an accounting had been made to plaintiff, court properly denied plaintiff's motion for interlocutory decree of accounting.

2. Trial ⇨4

In action for an accounting, where defendants set up two affirmative defenses based upon releases, court under its power to regulate order of proof was authorized to order case tried first upon the affirmative defenses. Code Civ.Proc. § 2042.

3. Appeal and error ⇨969

Where no abuse of discretion appeared in trial court's direction that case should be tried first upon defendants' two affirmative defenses, order could not be disturbed on appeal. Code Civ.Proc. § 2042.

4. Pleading ⇨291(2)

In action for an accounting, where instruments releasing defendants were set out in pleadings and were not denied by affidavit as required by statute, plaintiff thereby admitted that instruments were what they purported to be and that they were executed and delivered by parties who signed them in capacity in which they appeared. Code Civ.Proc. § 448.

5. Release ⇐55

In action for an accounting, where releases relied upon by defendants were in writing, they were presumptive evidence of a good and sufficient consideration and burden of showing want of consideration rested upon plaintiff. Code Civ.Proc. § 1963, subd. 39; Civ.Code, § 1615.

6. Evidence ⇐60, 64, 69

Where defendants set up written releases as defenses to plaintiff's action for an accounting, defendants' position was aided by presumptions that private transactions have been fair and regular, that a person intends ordinary consequences of his voluntary act, and that ordinary course of business has been followed. Code Civ. Proc. § 1963, subds. 3, 19, 20.

7. Evidence ⇐87

Presumptions that private transactions have been fair and regular, that a person intends ordinary consequences of his voluntary act, and that ordinary course of business has been followed are disputable, but when undisputed they have effect of establishing a prima facie case, even without formal introduction into evidence of the original documents. Code Civ.Proc. § 1963, subds. 3, 19, 20.

8. Evidence ⇐87

Where presumptions that private transactions have been fair and regular, that a person intends ordinary consequences of his voluntary act, and that ordinary course of business has been followed have not been disputed, they operate to shift burden of introducing evidence. Code Civ.Proc. § 1963, subds. 3, 19, 20.

9. Pleading ⇐376

Although ordinarily burden of proving an issue raised by an affirmative defense rests upon defendant, there is an exception where defense is founded on a written instrument set out in answer, and genuineness and due execution thereof are admitted. Code Civ.Proc. § 1981.

10. Evidence ⇐87

In action for an accounting based upon an alleged trust relationship, where genuineness of releases set out in defendants' pleadings as basis for their affirmative defenses was not denied by plaintiff in an affidavit, presumptions arising in favor of defendants established a prima facie case, and they were at liberty to rest until plaintiff had offered sufficient proof to counterbalance the presumptions. Code Civ.Proc. §§ 448, 1963, subds. 3, 19, 20, 39, 1981; Civ. Code, § 1615.

11. Evidence ⇐88

In action for an accounting based upon an alleged trust relationship, where genuineness of releases set out in defendants' pleadings as basis for their affirmative defenses was not denied by plaintiff in an affidavit and instruments themselves did not indicate that defendants had obtained an unfair advantage, presumption that transactions by which trustee obtains any advantage from his beneficiary are presumed to be entered into without consideration and under undue influence did not prevail over presumptions that releases were genuine and that transactions were fair and regular. Code Civ.Proc. §§ 448, 1963, subds. 3, 19, 20, 39; Civ.Code, §§ 1615, 2235.

12. Evidence ⇐87

In action for an accounting based upon an alleged trust relationship, where genuineness of releases set out in defendants' pleadings as basis for their affirmative defenses was not denied by plaintiff in an affidavit, and no evidence was offered by either party, presumptions arising in favor of defendants that transactions were regular and releases valid required rendition of judgment in their favor. Code Civ.Proc. §§ 448, 1961, 1963, subds. 3, 19, 20, 39; Civ. Code, § 1615.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Jeanette G. Donovan against the Security-First National Bank of Los Angeles and another to obtain an accounting. Judgment for the defendants, and the plaintiff appeals.

Judgment affirmed.

Homer N. Boardman, of Beverly Hills, and W. H. Gregory, of Los Angeles, for appellant.

Farrand & Farrand, Leonard B. Slosson, Ross C. Fisher, and Jennings & Belcher, all of Los Angeles, for respondents.

DESMOND, Presiding Justice.

Plaintiff appeals from a judgment rendered in favor of defendants Security-First National Bank of Los Angeles and Assets Corporation. The action was for an accounting and the complaint alleged that a

trust relationship existed between plaintiff and the defendants, that defendants had violated certain duties which they owed plaintiff as her trustee and had failed to render an accounting to her, except a certain "incomplete, untrue and incorrect statement of account." The judgment appealed from contains a preface which indicates the basis of the trial court's action, as will be seen from the following excerpt:

"The Court ordered, upon motion made by defendants, that the issues presented by the Second Defense and the Third Defense set forth in defendants' answer, be presented and tried first by the Court. Thereupon plaintiff rested without the introduction of any evidence; whereupon the defendants rested without the introduction of any oral testimony. No oral testimony having been introduced by either party, the Court ordered and directed that no Findings of Fact or Conclusions of Law were necessary or should be made.

"It appearing to the Court that the plaintiff has not served or filed an Affidavit, as required by Section 448 of the Code of Civil Procedure, denying the genuineness and due execution of the written instruments annexed to defendants' answer and referred to therein, and that plaintiff has not otherwise denied the genuineness and due execution of said written instruments; and it further appearing to the Court that said written instruments annexed to defendants' answer, and particularly those referred to in the Second and Third Affirmative Defenses thereof, are admitted and that the written instruments referred to in the Second and Third Affirmative Defenses constitute a full and complete defense to the above entitled action.

"Now therefore, it is hereby ordered, adjudged, and decreed that the plaintiff take nothing by her complaint herein [etc.]."

When the matter came on for hearing, the plaintiff moved the court for an interlocutory judgment upon the pleadings, directing the defendants to account "for the entire transaction involving the matters and things set forth in the complaint and that such accounting be made according to the rules and principles of accounting as recognized and administered by Certified Public Accountants." This motion was denied. Thereupon defendants moved for an order, which the court granted, directing plaintiff to proceed upon the issues raised by the second and third affirmative defenses. The written instruments referred to in the judgment as constituting a full and complete defense to the action were executed, according to the answer, in 1932 and 1937, respectively. The first of these, denominated a "Release" and signed by appellant and one Jack Donovan, acknowledged the receipt of $10 "and other good and valuable consideration to them in hand paid by the Security-First National Bank" and its successors and assigns, and in consideration therefor the signers to the instrument discharged the bank and its successors and assigns, including the defendant Assets Corporation, from any liability in law or in equity which they ever had "from the beginning of the world to the day of the date of these presents." This instrument was signed on May 11, 1932. The second instrument set up in the answer is an "Agreement," dated September 23, 1937, between the Assets Corporation therein termed "Corporation," the Security-First National Bank, therein termed "Bank," and the plaintiff, therein termed "Donovan," which agreement was also approved and signed by Jack Donovan. The "Agreement" recited that on November 1, 1932, plaintiff executed to the corporation a promissory note for $89,370.27, maturing May 1, 1933, with interest at 7%, which note was secured by a trust deed upon three parcels of plaintiff's property [described therein], the plaintiff being the trustor, the Assets Corporation, the beneficiary, and the Security-First National Bank, the trustee; that no payments had been made by plaintiff upon the principal or interest [which latter item, according to the Answer, exceeded $30,000] and on April 20, 1937, notice of default had been filed and trustee's sale set for September 24, 1937; that plaintiff desired the corporation to continue the sale to February 1, 1938, and in consideration of the "mutual promises and covenants" contained in the agreement "and in further consideration of the sum of $1.00 in hand paid" by plaintiff, (1) the corporation and the Bank agreed to continue the trustee's sale from September 24, 1927 to February 1, 1938, and (2) the Assets Corporation agreed to accept the sum of $70,000 cash, plus reimbursement of any amounts advanced for taxes and assessments, "in full settlement of the promissory note" and all obligations secured by the trust deed, "if, but only if, said sums are paid to it in full on or before January 25, 1938." The plaintiff agreed "as part of the consideration for the performance by the Corporation and

Bank of the terms of this agreement" she would, on January 25, 1938 "or on payment to the Corporation of the amounts provided in Paragraph 2 hereof [supra], whichever event occurs first," release the defendants "of and from all claims, demands, causes of action which she may have against them or either of them, and will cause Jack Donovan, on said January 25, 1938, or on payment to the corporation of the amounts provided in Paragraph 2 hereof, whichever event occurs first, to release corporation and Bank of and from all claims, demands or causes of action which he may have against them, or either of them, and Donovan [plaintiff herein] agrees that coincident with the execution of this agreement, she will execute and will cause Jack Donovan to execute releases in the form set forth in Exhibits 'A' and 'B' respectively attached to this agreement and that said releases, so executed, will be deposited with Title Insurance and Trust Company with instructions to deliver said releases to Corporation and Bank on January 25, 1938, or on payment to corporation of the amounts provided in paragraph 2 hereof, whichever event shall first occur." Pursuant to the foregoing terms, two general releases were signed by plaintiff and Jack Donovan, releasing the Bank and the corporation from all liability, and these, also, were made a part of the third defense. The court, as we have stated, granted defendants' motion to have the issues tried upon the foregoing defenses and placed upon the plaintiff the burden of proceeding thereon. When plaintiff declined to offer any evidence and thereupon rested her case, the respondents then likewise rested without the introduction of any oral testimony. It was upon this state of the record that the court awarded judgment in favor of defendants.

Plaintiff contends that the court erred in placing upon her the burden of proceeding under the second and third affirmative defense. She argues that "the pleadings show conclusively that *upon the face of the transactions* the respondents obtained 'advantages' over the appellant," and, because of the fiduciary relationship existing between the parties, the presumption arises that the transactions were entered into without consideration and under undue influence and the burden rested upon defendants to prove otherwise.

It seems advisable at this point to summarize the pleadings. The complaint alleged that a fiduciary relationship between plaintiff and the bank began on December 13, 1923, when she assigned to it her interest, as lessor, in a 99 year lease on her Sunset Boulevard property, which relationship "at all times" continued, the bank managing her property "as trustee," and collecting rents, the amounts of which were unknown to her; that from December 13, 1923 to November 1, 1932, she entered into various financial transactions with the bank, borrowing substantial sums of money and securing her indebtedness with mortgages upon her Sunset Boulevard, Brentwood and Santa Monica properties, specifically described in the complaint and, as additional security, assigning a $29,000 note. The complaint alleges, further, that after June 28, 1928, the Assets Corporation was the "alter ego" and agent of the bank and that it, too, "at all times continued" a relationship of personal confidence with plaintiff; that on January 1, 1929, the two defendants, with her consent, managed her Sunset Boulevard and Brentwood properties, as well as certain personal property, "as trustees," collecting the rents, the amounts of which were unknown to her; that on October 31, 1931, the assignees of the lessees of the leasehold estate conveyed to the bank their interest in the leasehold estate, together with possession, and that the bank has "ever since continuously occupied the same," all of which was concealed from the plaintiff until about March 1, 1939; that on May 6, 1932, defendants acquired possession of certain personal property while administering plaintiff's business affairs valued at $3000; that on November 1, 1932, she signed a renewal promissory note in the sum of $89,370.27, represented to her to be her indebtedness to the bank, which note was payable to the First Securities Co., [now Assets Corporation], due May 1, 1933, with interest at 7%, and as security therefor she signed a Declaration of Trust, No. B–155, which conveyed the legal title to her Sunset Boulevard, Brentwood and Santa Monica properties to the bank, in trust only, and for which transactions she alleged she received "no money, property or other present consideration"; that thereafter the defendants "continued" their management of the property "as trustees," and "continued the collection of rents, the amount being unknown to plaintiff"; that defendants "at all times" failed to render her an account, except a "certain incomplete, untrue and incorrect statement of ac-

count presented to her on March 1, 1939," specifically setting out the particulars of said account claimed to be irregular or objectionable, also that she was wrongfully charged with certain expenditures, some of which she claimed were useless and unnecessary. On information and belief she alleged that on February 1, 1939, the profits from the operation of her properties exceeded the expenses.

[1] In answer to the complaint, defendants denied that the bank "at all times" from December 13, 1923, "continued" a fiduciary relationship with plaintiff and alleged that the relationship "ceased long prior to the commencement" of the action; they admitted "that at times" during the period from December 13, 1923 to February 1, 1938, the bank collected the rents, but "at other times" plaintiff and Jack Donovan collected the rents, managed the property and occupied it; that the bank accounted and paid over to plaintiff her share of all rents and profits accruing from the property, or applied the same with her consent to the maintenance and upkeep of the property and payment of debts which she from time to time owed the bank; they denied that the amounts received by the bank were unknown to plaintiff; they denied that the Assets Corporation was the "alter ego" or agent of the bank, and admitted that the bank and the Assets Corporation "did at times" collect rents from the property, but denied that the amounts were unknown to plaintiff, and alleged that an accounting had been made to her; they denied that the deed from the assignees of the lessees of the leasehold estate was without plaintiff's knowledge or that the transaction was concealed from her at any time; they denied that the bank then entered into possession and "ever since continuously" occupied it, but on the contrary alleged that plaintiff entered into possession of the premises following the execution of the deed and remained in possession for certain periods of time thereafter; they denied the allegations of the complaint respecting the personal property of plaintiff; they denied that plaintiff received no consideration for the execution of the $89,370.27 note and the Declaration of Trust; they denied that upon the execution of the Declaration of Trust they "continued" their management of plaintiff's property, mentioned in the complaint, but alleged that "at times" prior to the execution of the Declaration of Trust plaintiff and Jack Donovan were in possession and management of the properties, and admit that upon the execution of the Declaration of Trust that defendant Assets Corporation went into possession and management of "a portion" of the real property and "at times" collected rents from certain of said properties, but denied that the bank collected rents from the property after the Declaration of Trust; they denied that the amounts were unknown to plaintiff and alleged she was "informed" and an "accounting" made to her; they denied that the statement of account was "incomplete or untrue or incorrect" in the particulars alleged in the complaint; they denied that the profits from the operation of plaintiff's property exceeded the expenses. In addition to the second and third affirmative defenses, set forth above, the answer also contained eight additional special defenses, including laches, statute of limitations, estoppel and account stated. Considering the pleadings heretofore reviewed, we are satisfied that the court properly denied plaintiff's motion for an interlocutory decree of accounting.

[2-10] That the court had power to order the case tried first upon the two affirmative defenses cannot be questioned, for the order of proof may be regulated by the trial court in its discretion (Code Civ.Proc. sec. 2042). Where, as here, no abuse of discretion appears, the order of the trial court may not be disturbed on appeal (24 Cal.Jur. 764). Since the instruments relied on in the second and third affirmative defenses were set out in the pleadings, and since they were not denied by plaintiff in an affidavit as provided in section 448 of the Code of Civil Procedure, their genuineness and due execution must be deemed admitted for all purposes of the trial, the effect of the failure to file the affidavit being to admit that the instruments were what they purported on their face to be, and that they were executed and delivered by the parties who signed them, in the capacity in which they appeared. 21 Cal. Jur. 168 and cases cited therein. Since, also, the releases were in writing they were presumptive evidence of a good and sufficient consideration (Code Civ.Proc. sec. 1963, subd. 39), and the burden of showing want of consideration would rest upon the party seeking to invalidate them upon that ground (Civil Code, sec. 1615), in this case, the plaintiff. In addition to the presumption of consideration arising from the

instruments themselves, defendants' position is aided and strengthened by other presumptions, namely, that private transactions have been fair and regular, that a person intends the ordinary consequences of his voluntary act, and that the ordinary course of business has been followed (Code Civ.Proc. sec. 1963, subds. 19, 3, and 20, respectively). These presumptions are disputable (Code Civ.Proc. sec. 1963), but when undisputed they have the effect of establishing a prima facie case (10 Cal.Jur. 784), even without the formal introduction into evidence of the original documents (Knight v. Whitmore, 1899, 125 Cal. 198, 200, 57 P. 891, and cases cited therein), and operate to shift the burden of introducing evidence (10 Cal.Jur. 782). While ordinarily the burden of proving an issue raised by an affirmative defense rests upon the defendant (Code Civ.Proc. sec. 1981), there is an exception to this rule where the defense is founded on a written instrument which is set out in the answer and where its genuineness and due execution are admitted (24 Cal.Jur. 774). An enlightening dissertation upon the subject of "Burden and Degree of Proof" is found in 10 Cal.Jur. 782 et seq. The defendants in the present proceeding had made out a prima facie case and, under the principles stated in the treatise to which we have just referred, they were at liberty to rest, at least until sufficient proof to counterbalance the presumptions raised by the written instruments had been offered and presented by the plaintiff (Scott v. Wood, 1889, 81 Cal. 398, 401, 22 P. 871), including proof of fraud, mistake, undue influence, compromise, payment, the statute of limitations, estoppel and mental incompetency (21 Cal.Jur. 168).

[11, 12] It is appellant's contention that the presumption created by section 2235, Civil Code, prevails over the presumptions which arise under the pleadings in this case, but this argument was satisfactorily answered in the negative in Estate of Roberts, 1942, 49 Cal.App.2d 71, page 80, 120 P.2d 933, 938, the court stating: "In support of the judgment respondent relies entirely on the presumption of undue influence which, as he claims, arises from the relationship of the parties, and cites section 2235 of the Civil Code in support of his argument. That section provides: 'All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.' Here we have a written instrument, a promissory note, which erects a counter-presumption of a sufficient consideration (Code Civ.Proc., sec. 1963, subd. 21; Civil Code, secs. 1614, 3105); and the burden of showing a want of such consideration is on the party seeking to invalidate the instrument. Civil Code, sec. 1615. The presumption created by section 2235 of the Civil Code does not overcome this other presumption *unless it is shown that the relationship was used by the trustee to obtain an unfair advantage.* [Italics added.] Dimond v. Sanderson, 1894, 103 Cal. 97, 101, 103, 37 P. 189; Cole v. Wolfskill, 1920, 49 Cal.App. 52, 55, 192 P. 549; Estate of Mallory, 1929, 99 Cal.App. 96, 102, 278 P. 488."

The instruments relied upon by the defendants do not, of themselves, indicate that defendants have obtained an "unfair advantage," and, in view of the presumptions which we have mentioned, in favor of the defendants, mere allegations of abuse of a fiduciary relationship, denied by defendants, can not take the place of evidence. The case of Allen v. Meyers, 1936, 5 Cal.2d 311, 54 P.2d 450, invoked by appellant as authority for her position that the burden of proof was upon the defendants, has no application to the instant cause, for there the plaintiffs offered evidence to prove that the trustee had obtained an unfair advantage and, in that situation, the burden was upon the one claiming through the trustee to satisfy the court that the transaction was supported by a sufficient consideration and was not the result of fraud or of undue influence exercised by the trustee upon his beneficiaries. Under the circumstances of the case at bar, the trial court properly rendered judgment in accordance with the presumptions, there being no legal evidence offered to overcome them (Code Civ.Proc. sec. 1961).

The judgment is affirmed.

PARKER WOOD, J., and FOX, J. pro tem., concur.

68 Cal.App.2d 128

In re REISS' ESTATE.

REISS et al. v. REISS et al.

Civ. 14553.

District Court of Appeal, Second District, Division 3, California.

Feb. 19, 1945.

1. Executors and administrators ⇐216(2)

The relief sought by petition seeking compensation from assets of estate for services rendered by attorneys in preserving assets of estate was in rem in character.

2. Executors and administrators ⇐333

On making decree distributing estate of a decedent, probate court loses jurisdiction of that property, and court has no power thereafter to order it sold or applied to payment of costs or expenses.

3. Executors and administrators ⇐216(2)

Where assets of estate had been distributed pursuant to decree of distribution which had become final, appeal from order denying attorneys' petition for compensation from assets of estate for services rendered in preserving assets was dismissed on ground that matters involved were moot because property was no longer under jurisdiction of probate court.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Rosa Reiss, wherein Mark F. Jones and Sydney Tannen filed a petition opposed by Bernard Reiss, contestant, and Max Reiss, executor, seeking compensation for services alleged to have been rendered by them in preservation of the assets of the estate, and wherein Moses Joseph Reiss was permitted to join in the petition. From an order denying the petition, the petitioners appeal, and a motion was filed to dismiss the appeal.

Motion granted and appeal dismissed.

Mark F. Jones and Sydney Tannen, both of Los Angeles, in pro. per. and for appellant Moses Joseph Reiss.

Bordon & Bordon, of Los Angeles, and Nixon A. Lange, of Huntington Park, for respondent Bernard Reiss.

Swaffield, Swaffield & Madden, of Long Beach, for respondent Max Reiss.

FOX, Justice pro tem.

This is a motion to dismiss the appeal on the ground, among others, that the matter is moot.

Petitioners, Mark F. Jones and Sydney Tannen, filed a petition seeking compensation from the assets of the estate of Rosa Reiss for services alleged to have been rendered by them in the preservation of the assets of said estate. They had represented Moses Reiss, a son of decedent, not as executor or administrator, but as one of the heirs, in certain litigation involving the property of Rosa Reiss (see Reiss v. Reiss, 1941, 45 Cal.App.2d 740, 114 P.2d 718), and in the probate proceedings. During the hearing Moses Reiss, with permission of the court, joined in the petition. The petition, however, was denied. Petitioners have appealed from the order of denial.

The said Moses Reiss (and his wife, Jeta) had entered into an agreement with petitioners Jones and Tannen (attorneys) to pay them for their legal services on his behalf 50 per cent of any and all property he "may receive" from the estate of his mother (Rosa Reiss), and to secure said petitioners in the payment of their fees he (and his wife) assigned to them an undivided 50 per cent interest in his share in his mother's estate.

At the time the petition of Jones and Tannen for compensation from the assets of the estate came before the court there was also before the court for its consideration and determination another petition, pursuant to the provisions of section 1020.1 of the Probate Code, by said Jones and Tannen for inquiry into the consideration of the said assignment of Moses Reiss (and his wife) to said attorneys with a prayer that said assignment be approved and that the court order the distribution to said attorneys of a one-sixth interest in the said estate. The assignment was approved and said petition granted.

At this same session the court also heard the final account and petition for distribution of Max Reiss as administrator of said estate and likewise heard the objections of petitioners thereto. The court settled the final account and ordered distribution of the estate which showed an appraised value of $35,050.27, one-sixth of which was or-

dered distributed to petitioners Jones and Tannen pursuant to the aforesaid assignment to them by Moses Reiss. The formal order and decree was signed by the judge May 25, 1943, and entered in the book of Probate Judgments on June 3, 1943. No appeal was taken from said order and decree, nor from any part thereof, and the same became final. The administrator, Max Reiss, after said decree became final, distributed the assets of said estate in compliance with it, and on September 15, 1943, filed his affidavit for final discharge as such administrator and the court thereupon made its order discharging him as such administrator.

[1, 2] As previously noted, petitioners sought compensation from the assets of the estate of Rosa Reiss, for services alleged to have been rendered by them in the preservation of the assets of said estate. The relief sought by such a petition is in rem in character. Warren v. Ellis, 1919, 39 Cal.App. 542, 547, 179 P. 544. No in personam judgment is sought. The fund, however, from which petitioners seek payment, no longer exists. It has been distributed pursuant to a decree of distribution which has become final. The probate court has therefore lost jurisdiction over said property. On this question the court said, in the Estate of Baird, 1919, 181 Cal. 742 at page 744, 186 P. 351, that: "Upon the making of a decree distributing the estate of a decedent, or a part thereof, the court in probate loses jurisdiction of that property, except so far as may be necessary to compel the executor or administrator to obey the decree and deliver the property to the distributee." In Aronson v. Bank of America, 1941, 42 Cal.App.2d 710, at pages 717, 718, 109 P.2d 1001, at page 1006, the court observed that: "it has been held that the decree of distribution * * * is intended to be a final disposition of the entire estate, so that nothing remains for the court to act upon * * *." In the article on Executors and Administrators in 11a Cal.Jur. § 65, pp. 125, 126, it is said that "By such decree the property is vested in the distributee, withdrawn from administration, and put beyond the control of the probate court. The court has no power thereafter to order it sold, or applied to the payment of costs or expenses." See, also, to the same effect, Executors and Administrators, 11 Cal.Jur. § 39, pp. 257, 258, and 11B Cal.Jur., § 1289, pp. 785, 786, and cases there cited.

[3] Since the property out of which petitioners seek compensation is no longer under the jurisdiction of the probate court, any further consideration of said petition by said court would be utterly useless because no effective order could be made. The matters involved in said petition have become moot and the appeal from the order denying said petition should be dismissed. Appeal and Error, 2 Cal.Jur., § 437, pp. 749, 750; § 580, pp. 981–982; Vol. 1, Cal.Jur. Ten Year Supp., § 437, pp. 465–468, and cases there cited.

The motion to dismiss the appeal from the order denying said petition is granted and said appeal is dismissed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



68 Cal.App.2d 1

WEST COAST HOME IMPROVEMENT CO., Inc., v. CONTRACTORS' STATE LICENSE BOARD OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS.*

Civ. 14805.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1945.

1. Mandamus ⇐171

Under statute the right of holder of contractor's license to continue in business after registrar's decision revoking license, and pending review thereof by the court upon posting a bond, is discretionary with the court and not a matter of right, and the question of a bond becomes important only in event the court in exercise of its discretion grants a stay. St.1939, p. 392, §§ 7100, 7101.

2. Mandamus ⇐187(6)

Trial court's action in refusing a stay of enforcement of registrar's decision revoking contractor's license pending appeal does not deprive the District Court of Appeal of its inherent power to issue writ of supersedeas. St.1939, p. 392, §§ 7100, 7101; Const. art. 6, § 4b.

* Subsequent opinion 164 P.2d 811.

3. Appeal and error ⇐1

A statutory right of appeal is not merely the right to take an appeal, but the right to have from the appellate tribunal all writs which are necessary or proper to the complete exercise of the jurisdiction set in motion by the perfecting of the appeal. Code Civ.Proc. §§ 938, 939.

4. Appeal and error ⇐477

A writ of "supersedeas" will issue in aid of appellate jurisdiction, its purpose being to preserve to an appellant the proofs of a meritorious appeal, where they might otherwise be lost to him. Code Civ.Proc. §§ 938, 939; Const. art. 6, § 4b.

See Words and Phrases, Permanent Edition, for all other definitions of "Supersedeas".

5. Appeal and error ⇐479(2)

Supersedeas is not a writ of right, but is one resting in the discretion of the appellate court to be issued in proper cases. Const. art. 6, § 4b.

6. Mandamus ⇐187(6)

Applicant for supersedeas, in aid of appeal from decision sustaining revocation of contractor's license, must show that substantial questions will be presented upon the appeal and that there are exceptional circumstances why the decree of the registrar and judgment of the trial court sustaining it should be stayed pending appeal. Code Civ.Proc. §§ 938, 939; St.1939, p. 392, §§ 7100, 7101; Const. art. 6, § 4b.

7. Evidence ⇐82, 91

That another court acting within its jurisdiction has acted with judicial discretion is presumed, and where the claim is made that such discretion has been abused some showing must be made to support the claim.

8. Mandamus ⇐173

In mandamus proceeding to review action of registrar in revoking contractor's license, petitioner was not entitled to an unqualified trial de novo to which a litigant is entitled in the superior court on appeal from a justice's court on questions of fact or on questions of both law and fact. Code Civ.Proc. §§ 938, 939; St.1939, p. 392, §§ 7100, 7101.

9. Mandamus ⇐164(4), 168(3)

In mandamus proceeding to review action of a board, neither party is bound in all particulars by the record before the board and trial court is not confined to such record nor bound by the findings and determination of the board, and, where incompetent evidence has been received by the board, petitioner should not be foreclosed from objecting on the trial to its admissibility, and, if the board improperly refused to entertain admissible evidence, petitioner should not be foreclosed from offering it at the trial. Code Civ.Proc. §§ 938, 939.

10. Mandamus ⇐187(6)

In supersedeas proceeding to restrain enforcement of a judgment denying writ of mandate to review an order of contractors' license board revoking petitioner's license, record did not present a situation wherein the writ should be granted in aid of the appellate jurisdiction so as to suspend enforcement of decision pending determination of appeal from adverse judgment in mandamus proceeding. Code Civ.Proc. §§ 938, 939; St.1939, p. 392, §§ 7100, 7101; Const. art. 6, § 4b.

Petition by West Coast Home Improvement Company, Inc., against Contractors' State License Board of the Department of Professional and Vocational Standards for a writ of supersedeas to restrain the enforcement of a judgment denying a writ of mandate and thereby sustaining an order of the respondent revoking the petitioner's license to engage in the contracting business.

Petition denied.

Jerry Giesler and Robert A. Neeb, Jr., both of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Petitioner asks for a writ of supersedeas to restrain the enforcement of a judgment of the Superior Court denying a writ of mandate and thereby sustaining an order of the Contractors' State License Board of the Department of Professional and Vocational Standards revoking a petitioner's license to engage in the contracting business. Briefly the facts are that on or about August 23, 1943, a complaint was filed before said Contractors' State Board charging the petitioner with violating the provisions of Sections 7109, 7111, 7114, 7115, 7116, 7117,

and 7118 of the Business and Professions Code, St.1939, pp. 393, 394. After the filing of said complaint and service thereof, the latter within the time required by law filed a written answer to the charges set forth in said complaint. Thereafter hearing was had as required by law before duly appointed, qualified and acting deputy registrar of contractors. The proceedings at such hearing were taken down in shorthand and thereafter transcribed. At the conclusion of the hearing, the deputy registrar presiding thereat made and signed written findings and recommendations. Thereafter on December 7, 1943, the registrar of contractors made, signed and filed a decision in said proceeding, finding the petitioner guilty of violating the aforesaid sections of the Business and Professions Code and revoking its license to engage in the contracting business in the State of California. Petitioner on December 21, 1943, filed a petition for rehearing, which was denied by the registrar of contractors on January 18, 1944. Thereafter petitioner, pursuant to the provisions of section 7099 of the Business and Professions Code, filed in the Superior Court of Los Angeles County a petition for a writ of mandate wherein it was asserted that the deputy registrar who conducted the hearing before the State Board was biased and prejudiced. Said court issued an alternative writ of mandate and upon a hearing had thereon considered the entire record of the evidence introduced at the proceeding had before the State Board. Thereafter said Superior Court made comprehensive findings and concluded that "the petitioner was afforded a full and fair hearing before the respondent (State Board), that there is adequate competent evidence to sustain the findings, decision and order revoking the petitioner's license and that the order of the respondent (State Board) was not arbitrary, capricious, illegal and fraudulent; the petitioner has not sustained the burden resting on it to plead and prove that the respondent acted contrary to the weight of the evidence or that he acted arbitrarily, capriciously, fraudulently, or illegally or in abuse of discretion or without due regard to the rights of petitioner; the court finds no reason for annulling the order of the respondent (State Board) but on the contrary, finds that the order should be sustained". Said Superior Court thereupon entered its judgment discharging the alternative writ of mandate and denying a peremptory writ.

In due course and within the time provided by law following the rendition of such judgment, petitioner herein gave notice of appeal to this court from the judgment. Following the filing of such notice of appeal and pursuant to the provisions of Section 7101 of the Business and Professions Code, petitioner made application to the Superior Court for a stay of execution in the enforcement of the judgment pending final determination of the appeal taken therefrom and in accordance with the section just cited, petitioner offered to file a bond. Petitioner's motion for a stay of execution was denied and the matter is now before us on its petition for a writ of supersedeas as sanctioned by Section 4b, Article VI, Constitution of California.

Petitioner first contends that it is entitled, as a matter of right, to the writ sought herein, because of the provisions of section 7101 of the Business and Professions Code, which reads in part as follows:

"There shall be no stay of execution or enforcement of the judgment pending such proceeding on appeal or review unless the appellant or applicant for review shall file a bond in all respects conditioned as, and similar to, the bond required to stay the effect of the registrar's decision in the first instance."

Manifestly, the foregoing provision must be read in connection with section 7100 of the same code, and to which last named section reference is made in section 7101.

Section 7100 provides:

"In any proceeding for review by a court, the court *may in its discretion,* upon the filing of a proper bond by the licensee in an amount to be fixed by the court, but not less than one thousand dollars, guaranteeing the compliance by the licensee with specific conditions imposed upon him by the registrar's decision, if any, permit the licensee to continue to do business as a contractor pending entry of judgment by the court in the case." (Emphasis added.)

We are impressed that where the legislature, in the code section, permits the licensee to remain in business prior to a decision of the court only in the discretion of the court, it certainly must be assumed that after an adverse decision the same discretion vests in the court as to whether such licensee shall be permitted to remain in business pending determination of an appeal from such adverse decision of the court.

In the instant action, the Superior Court permitted the licensee to continue in business upon posting a bond, pending the entry of judgment in the mandate proceeding, but refused to make an order after judgment staying enforcement of the same.

[1] From the foregoing sections it is evident that the right of the licensee to continue in business after an adverse decision by the registrar and pending the review thereof by the court, upon posting a bond, is discretionary with the court and is therefore not a matter of right. It seems clear to us that the intention of the legislature was that should the court in the exercise of its discretion determine that the enforcement of the registrar's decision should be stayed, then no such stay should be granted in cases where the decision of the registrar imposed "specific conditions" upon the licensee, unless a bond be posted guaranteeing compliance by the licensee with such conditions in the event the decision of the court upon review should be adverse to a licensee. In other words, the question of a bond becomes important only in the event the court in the exercise of its discretion grants a stay. We therefore conclude that the Superior Court was not, as a matter of right, required to grant the stay prayed for in the instant case.

[2, 3] However, the action of the trial court in refusing a stay of enforcement of the registrar's decision pending appeal does not deprive this court of its inherent power to issue a writ of supersedeas, because the power to issue all writs and processes necessary to the exercise of our appellate jurisdiction is conferred by section 4b of the sixth article of our State Constitution. The right of petitioner herein to appeal from the judgment rendered against it is secured to it by law. Secs. 938, 939 Code Civ.Proc. Manifestly, the right of appeal which is guaranteed petitioner by law is not merely the right to take an appeal, but as well the right to have from the appellate tribunal all writs which are necessary or proper to the complete exercise of the jurisdiction set in motion by the perfecting of the appeal.

[4] A writ of supersedeas will therefore issue in aid of appellate jurisdiction. Its purpose is to preserve to an appellant the fruits of a meritorious appeal, where they might otherwise be lost to him. It cannot, however, justly be said that the right of appeal is safeguarded if the court contents itself with a mere decision of the appeal, leaving the victorious party in the court below in either a civil or a criminal case, to execute, in whole or in part and during the pendency of the appeal, the judgment which is assailed by such appeal. The right of appeal would be but an empty thing if the appellate court could not, and in proper cases it did not, afford to the appellant a means whereby the fruits of victory were fully preserved to him in the event of a reversal of the judgment against him. Such a doctrine has been continually applied in civil cases.

[5] Our next labor therefore, is to inquire whether petitioner shows a proper case for the issuance of the writ for which it asks. As above indicated, supersedeas is not a writ of right, but is one resting in the discretion of the appellate court to be issued in proper cases, Private Investors, Inc. v. Homestake Mining Co., 11 Cal.App. 2d 488, 492, 54 P.2d 535.

[6, 7] As we have heretofore pointed out, the allowance of a stay of enforcement of the registrar's decision by the trial court in the instant action was a matter of judicial discretion. And the exercise of the power to stay must in a great degree depend upon the special circumstances of each case. It must be manifest that when the legislature gave to the trial court the discretionary power to grant a stay it was contemplated that cases might arise when such stay of execution or enforcement might and should justly be denied. Since issuance of a writ of supersedeas is discretionary, it is incumbent upon the applicant therefor to show that substantial questions will be presented upon the appeal; that some special reason exists, differing from the ordinary case revoking a contractor's license, why the decree of the registrar and the judgment of the trial court sustaining it should be stayed pending the appeal. And furthermore, that the case is an exceptional one, presenting exceptional circumstances which would justify the appellate court in setting aside the order made by the trial court in the exercise of its discretion denying a stay of enforcement of the registrar's decision pending the appeal. It will always be presumed that another court acting within its jurisdiction has acted with judicial discretion. If the claim be made that such discretion has been abused, some

showing must be made to rebut that presumption.

In the instant action, petitioner by its petition for a writ of supersedeas simply alleges:

"That the effect of the judgment of the trial court is to cause the petitioner herein to be out of business and petitioner has been in business for a period of approximately five years and has an investment in the equipment and supplies and has a continuing overhead, and that unless petitioner is permitted to continue in business pending the outcome of an appeal in this matter, petitioner will be deprived of a valuable vested right, to-wit, the right to carry on its said business as a contractor and that unless petitioner is permitted to continue in said business, petitioner will suffer great and irreparable injury."

[8, 9] Full opportunity was given at the hearing of the application to make further showing of the essential elements necessary before this writ could issue and particularly as to any substantial or debatable questions presented by the appeal taken. At that time, petitioner urged but one ground of appeal and that was that upon the hearing of the mandamus proceeding in the court below petitioner was denied a separate and independent trial, and was compelled to submit its case upon the transcript and exhibits of the hearing had before the Contractors' State License Board. However, under the law petitioner herein was not entitled to an "unqualified or unlimited trial de novo to which a litigant is entitled in the superior court on appeal from a justice's court on questions of fact or on questions of both law and fact (Code Civ.Proc. § 976), where, justifiably or not, he may present a 'skeleton' case in the lower court and reserve the real showing on the merits for the trial in the superior court." Dare v. Board of Medical Examiners, 21 Cal.2d 790, 795, 136 P.2d 304, 307. While neither party to a mandamus proceeding is bound in all particulars by the record before the Board and the trial court in such a proceeding is not confined to such record, nor bound by the findings and determination of the Board, nevertheless, in order to introduce further and additional evidence there must be a showing, for instance, that from that record it appears "that incompetent evidence had been received by the board" in which event "the complaining party should not be foreclosed from objecting on the trial to its admissibility. Also if the board had improperly refused to entertain admissible evidence the litigant should not be foreclosed from offering it at the trial. If additional evidence not included in either category be sought to be introduced by a party, the court has the right to receive it upon a showing that, in the exercise of reasonable diligence, it could not have been introduced before the board. If the credibility of witnesses before the board be brought in question in the mandamus proceeding the opportunity should be afforded for further examination or to contradict or impeach their testimony under well recognized rules of evidence and procedure." Dare v. Board of Medical Examiners, supra, 21 Cal.2d at page 799, 800, 136 P.2d at page 309. In the case just cited, it is further held that it is the duty of the petitioner to set forth in his petition for the writ his objections to the proceedings had before the board, if such proceedings are to be questioned.

Nowhere in the petition for a writ of supersedeas, nor at the argument thereon, was any showing made that the questions raised on the appeal bring this case within the doctrine enunciated in Dare v. Board of Medical Examiners, supra, or Russell v. Miller, 21 Cal.2d 817, 136 P.2d 318.

[10] By stipulation, the record of the mandamus proceeding in the Superior Court is now before us, and for the reasons just stated as well as from a reading of the transcript of the hearing and before the Contractors' State License Board, and the findings of the lower court, we are compelled to conclude that the petition filed herein is insufficient to justify the granting of a writ of supersedeas, and that it would be an abuse of discretion for us to suspend enforcement of the registrar's decision pending determination of the appeal.

We have refrained, as far as possible, from saying anything herein which might be treated as determinative of the issues to be raised on the appeal from the judgment, but, because of the rule applicable to the issuance of writs of supersedeas, it was necessary to examine the proceedings for the purpose of determining whether, according to the petition on file herein, the appeal presents "substantial questions", and also for the purpose of determining whether the instant action presents a situation wherein the writ prayed for should be

granted in aid of our appellate jurisdiction.

What we have herein stated must be confined to a consideration of the issues just mentioned, and not in any way as affecting the final determination of the appeal upon its merits.

The petition for a writ of supersedeas is denied and the alternative writ heretofore issued is discharged.

YORK, P. J., and DORAN, J., concur.



68 Cal.App.2d 894

WEST COAST HOME IMPROVEMENT CO., Inc., a Corporation, Petitioner, v. CONTRACTORS' STATE LICENSE BOARD OF DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS, Respondent.*

Civ. 14806.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1945.

Petition for writ of supersedeas.

Denied.

Jerry Giesler and Robert A. Neeb, Jr., both of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

The issues presented in the instant case are in all respects similar to those tendered in the case of West Coast Home Improvement Co., Inc., v. Contractors' State License Board of the Department of Professional and Vocational Standards, Cal. App., 155 P.2d 863.

Upon the authority of and for the reasons stated in the cited case, the petition for a writ of supersedeas herein is denied and the alternative writ heretofore issued is discharged.

YORK, P. J., and DORAN, J., concur.

* Subsequent opinion 164 P.2d 820.

PEOPLE ex rel. BENWELL v. FOUTZ.*

Civ. 14808.

District Court of Appeal, Second District, Division 1, California.

Feb. 15, 1945.

Rehearing Denied March 2, 1945.

Hearing Granted April 12, 1945.

1. Appeal and error ⇐479(2)

Granting of writ of supersedeas is discretionary. Code Civ.Proc. § 949.

2. Appeal and error ⇐479(1)

Where there was doubt as to whether elected justice of the peace, had vacated his office due to absence from state, new justice, appointed to fill vacancy declared to exist because of absence of elected justice, was entitled to a writ of supersedeas suspending effect of adverse judgment in quo warranto proceedings pending appeal therefrom. Pol. Code, § 4014; St.1943, pp. 956, 969, §§ 1063, 1770(f); Const. art. 6, §§ 1, 9, 10.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Quo Warranto by the People, on the relation of Leon Benwell, against Stanley A. Foutz to determine defendant's right to the office of Justice of the Peace of Signal Hill Township, Los Angeles County. From an adverse judgment, defendant appeals. On defendant's petition for a writ of supersedeas staying the operation of such judgment and continuing defendant as Justice of the Peace pending appeal from such judgment.

Writ granted.

Frank H. Jaques, of Long Beach, for appellant.

J. H. O'Connor, County Counsel, and S. V. O. Prichard, Asst. Counsel, both of Los Angeles, amicus curiæ on behalf of appellant.

Albert D. White and Shibley, Wanzer & Litwin, all of Long Beach, Robert W. Kenny, Atty. Gen., and Charles W. Johnson, Supervising Deputy Atty. Gen., for respondent.

DORAN, Justice.

In this petition for a writ of supersedeas the record reveals that on August 25, 1942, Leon Benwell who was regularly elected Justice of the Peace of Signal Hill Township for a term of four years, quali-

* Subsequent opinion 162 P.2d 1.

fied for the office and entered upon the duties thereof on January 4, 1943; that on August 3, 1944, said Benwell went to Mexico City where he remained until September 5, 1944; that said visit to Mexico City was not on official business nor was the consent of the Board of Supervisors to be absent such period, or any period, theretofore obtained.

That on or about August 29, 1944, the Board of Supervisors regularly appointed Stanley A. Foutz to said office to fill the vacancy resulting from said Benwell's absence, which vacancy was then and there declared to exist.

The Attorney General of the State of California filed an action in quo warranto disputing the right of Stanley A. Foutz to hold and occupy said office. Defendant Foutz answered and in substance alleged the facts as hereinbefore set forth. A demurrer to the answer was sustained without leave to amend and from the judgment that followed, defendant Foutz appealed.

The proceedings herein seek to suspend the execution of said judgment pending the aforesaid appeal.

It is contended by Benwell among other things, that, Sec. 9 of Art. VI of the Constitution is controlling hence, unless a judicial officer is absent from the state for more than sixty days, no forfeiture results from such absence; and that a justice of the peace is a judicial officer within the meaning and application of said provision. There is serious doubt as to the merits of such contention if, indeed, it has any merit at all. Article VI of the Constitution establishes the judicial branch of the state government. Certain courts are established by its provisions, others are authorized. Sec. 1 provides that "The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts, such municipal courts as may be established in any city or city and county, *and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county.*" (Italics added.) A justice court exists by virtue of an act of the Legislature only. No provision is made in the constitution except to authorize its creation. And the doubt with regard to the application of Sec. 9 to Justices of the Peace is extended by virtue of Sec. 10 wherein, with regard to the removal of certain judicial officers, is the provision that, "All other judicial officers, *except justices of the peace,* may be removed by the Senate on the recommendation of the Governor." (Italics added.) It would appear therefore that the legislature has the power to fix the tenure of office for a justice of the peace.

Sec. 1063 of the Government Code, St. 1943, p. 956, provides that "No county or township officer shall absent himself from the State for more than five days unless either: (a) Upon business for the State, county or township, (b) With the consent of the board of supervisors of the county. In no case shall such officer absent himself from the State for more than two months without the consent of the board of supervisors, with the written approval of the Governor, nor shall such absence continue for a period exceeding six months in any one year," and Sec. 1770 provides that "An office becomes vacant on the happening of any of the following events before the expiration of the term: * * * (f) His absence from the State without the permission required by law beyond the period allowed by law." See also Sec. 4014 of the Political Code.

[1, 2] Whether a writ of supersedeas should be granted is discretionary; Luckenback v. Krempel, 188 Cal. 175, 204 P. 591; Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161; Day v. Gunning, 125 Cal. 527, 58 P. 172; Sec. 949, Code of Civil Procedure. In the circumstances here presented petitioner is entitled to the relief sought.

Let a writ of supersedeas as prayed for issue.

YORK, P. J., and WHITE, J., concur.

68 Cal.App.2d 151

THOMPSON et al. v. SIMONDS et al.
Civ. 7091; Sac. 5669.

District Court of Appeal, Third District, California.

Feb. 20, 1945.

1. Judgment ⇐956(5)

In action to quiet title to water rights, evidence established that rights involved were different from rights involved in prior action wherein third party obtained judgment against plaintiffs' predecessors in title, which established third party's right to water from same creek at particular point and on which defendants relied. Code Civ.Proc. § 1911.

2. Judgment ⇐725(1)

A former judgment is deemed to have adjudicated only that which appears upon its face to have been adjudged, or which was actually and necessarily included therein or necessary thereto. Code Civ.Proc. § 1911.

3. Waters and water courses ⇐152(8)

In action to quiet title to water rights, evidence did not establish that plaintiffs and their predecessors in title were tenants of defendants' predecessors and that their use of water was permissible only.

4. Waters and water courses ⇐152(8)

In action to quiet title to water rights, evidence supported finding that plaintiffs used water for full prescriptive period after disclaiming any right of defendants' predecessors thereto. Code Civ.Proc. § 326.

5. Appeal and error ⇐1011(1)

The trial court's finding, resolving a conflict in evidence in favor of plaintiffs, was conclusive on defendant's appeal.

6. Waters and water courses ⇐152(8)

Evidence authorized finding of exclusive and uninterrupted use of water rights as basis for adverse possession.

7. Waters and water courses ⇐152(11)

In action to quiet title to water rights, injunction provisions of decree authorizing plaintiffs to restore water system on defendants' land and maintain it in substantially the same condition in which it was maintained before defendants interfered therewith, and specifically describing particular equipment, were not too broad.

8. Damages ⇐208(1)

The amount of damages is ordinarily a question of fact entirely within province of jury or of trial court, in absence of jury, especially where the law furnishes no rule for their admeasurement.

9. Appeal and error ⇐1004(1)

A court may interpose its judgment against that of jury only where verdict is so grossly disproportionate to any reasonable limits of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it was based on prejudice or passion rather than sober judgment, and the same rule applies to trial court's findings when considered on appeal.

10. Waters and water courses ⇐152(9)

$1,000 for interference with plaintiffs' water rights on defendants' land, totally disrupting plaintiffs' use, and including threats to kill plaintiff, was not excessive.

Appeal from Superior Court, Napa County; Benjamin C. Jones, Judge.

Action by Edmund L. Thompson and another against William K. Simonds and another to quiet title to water rights. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Rutherford, Rutherford & Rutherford, of Napa, for appellants.

Clarence N. Riggins, of Napa, for respondents.

ADAMS, Presiding Justice.

Plaintiffs sued to quiet title to the water of a certain creek or ravine on premises conveyed by Sarah H. Edgington and Hallie Olita Edgington to Ruth Grigsby by deed dated October 5, 1905. They asserted their right under and by virtue of a reservation of water rights in the above mentioned Grigsby deed and their subsequent acquisition of said rights by mesne conveyances. They also claimed right by prescription, alleging that for more than five years prior to December 15, 1941, they had used the water on their lands and had maintained the pipes, sluices and boxes on lands now owned by defendants, and entered on said lands whenever necessary "openly, notoriously, continuously, and adversely" to defendants and their predecessors in title, and had at all times asserted

to them their right to take said waters and to enter on the premises now owned by defendants, under the provisions of deeds set forth, under which they deraigned title.

The evidence shows that prior to May, 1905, all of the lands involved in this action belonged to Sarah H. and Hallie Olita Edgington, hereinafter referred to as the Edgingtons, and were part of a tract consisting of about 800 acres, which was crossed by the county road in a northerly and southerly direction. Prior to May, 1904, the Edgingtons gave to J. B. Gardner an option to buy the whole ranch. In May, 1905, they and Gardner deeded 135 acres on the easterly side of the road to J. W. Barnes, the deed conveying "all tenements, hereditaments and appurtenances." On October 5, 1905, the Edgingtons conveyed to Ruth Grigsby all of the land lying west of such road, the deed reserving, however, "all rights to the water of a certain creek or ravine on said premises, which said creek or Ravine extends in a northerly direction from a certain stone bridge, or culvert on the County Road at the junction of the Berryessa and Wooden Valley Roads, together with the right to fence said creek for the purpose of preventing the pollution of the water running therein, by stock or otherwise, and of entering upon said premises for said purpose and of damming said stream, laying and repairing pipes, sluices, boxes and tanks thereon, and across adjacent parts of the land hereby conveyed, and of doing any and all other acts necessary or desirable for the full use and enjoyment of the water from said creek." On November 1, 1905, the Edgingtons conveyed to Jennie E. Gardner, wife of J. B. Gardner, the remaining portion of their land lying on the east side of the county road, said deed conveying also the water right reserved in the Grigsby deed. On August 23, 1927, Jennie E. Gardner and James B. Gardner, her husband, made a conveyance of their land to James Ewing Gardner, the deed conveying also the water right described in the deed from the Edgingtons to Mrs. Gardner, and on September 26, 1930, James Ewing Gardner and his wife conveyed said land to plaintiffs, granting the water right in the same language used in the deeds above mentioned.

In 1915 the northerly portion of the Grigsby property was sold to one Thomas Moore. Said portion, on the death of Thomas Moore, descended to his son Edward T. Moore and his daughter Florence June Moore, who by deed dated December 15, 1941, conveyed same to defendants William K. Simonds and Helen I. Simonds, his wife. This deed made no mention of water rights.

Defendants in their answer to plaintiffs' complaint denied plaintiffs' right to the water claimed by them and denied that they had acquired any right by prescription, asserting that while plaintiffs had used said waters "openly, notoriously and continuously" their use was solely on permission granted by defendants' predecessors in interest, such permission being revocable at will. Defendants also relied upon a judgment in an action brought by J. W. Barnes in 1907 against J. B. Gardner and his wife, in which it was adjudged that Barnes was entitled to take water from a point in the ravine some 300 feet above the stone bridge across the county road and which enjoined the Gardners from interfering with such right.

The trial court made findings in favor of plaintiffs, finding them to be the owners of "the right to take and use all the normal flow of water from two springs situate in a certain creek or ravine on the adjoining premises" conveyed by the Edgingtons to Ruth Grigsby, together with the right to fence same for the purposes recited in the Grigsby deed. It found that defendants have no right, title or interest in any of the waters normally flowing from the said two springs. It further found that at the time plaintiffs acquired title to their property there were pipes and boxes in place conducting water from a spring in the ravine to plaintiffs' property, and that plaintiffs had also taken water from another spring situate in said ravine and had maintained pipes and boxes and had entered upon defendants' lands whenever necessary to repair pipes, etc., for the purpose of conducting said waters to their lands, and that for more than five years prior to December 15, 1941, they had used said water on their lands and maintained said pipes, etc., and had entered upon defendants' lands when necessary, "openly, notoriously, continuously and adversely" to defendants and their predecessors in title, and had asserted their right so to do under the provisions of the said deeds; and that plaintiffs' claims were acquiesced in by the predecessors of defendants for more than five years prior to December 15, 1941. Regarding the Barnes water right it was found that it was a

right to take water from the stream at a point 300 feet above a stone bridge on the county road, and that Barnes was still maintaining and using said waters, but that defendants do not own any part of the land conveyed to Barnes and are not in privity with him in any way. As to alleged payments to Moore for use of the water the court found that payments of $1 per year were made by the Gardners and by plaintiffs up to 1935, but that in 1935 such payments were discontinued and thereafter plaintiffs continued to use the water without permission from the Moores, and in 1935 had notified them that plaintiffs owned the water; and that thereafter plaintiffs had taken and used same for more than five years without interference by defendants or their predecessors in interest; and that plaintiffs were never tenants of Moore or his successors in interest.

Judgment was entered for plaintiffs, holding them to be entitled, as an appurtenance to their land, to the entire normal flow of the two springs situated upon defendants' land, and the settling boxes and the pipe line through which they conducted their water prior to the time defendants interfered with them. Plaintiffs were also given judgment for $1,000 damages, and defendants were enjoined from interfering with plaintiffs' restoration of their pipe line to the same condition, size, dimension and course that it occupied for the ten years immediately prior to defendants' entry upon the property now owned by them, and from in any way interfering with the plaintiffs and their successors in interest in taking the entire normal flow of water from the two springs and conducting the same through said pipe line to and upon the plaintiffs' property, and from in any way interfering with the plaintiffs' entering upon the land of said defendants for the purpose of inspecting said springs, settling boxes and pipe line and cleaning out said springs, settling boxes and pipe line and repairing and replacing said pipe line whenever necessary or convenient for the taking of said water from said springs to the plaintiffs' property, and from polluting said water, and from in any way interfering with the springs, water, or plaintiffs' said pipe line, or from placing valves thereon, or from obstructing the flow of said waters through said pipe line in any manner.

On this appeal it is contended by appellants that the water right reserved in the deed to Ruth Grigsby never existed, and that plaintiffs never acquired any right to the waters of the creek or ravine by virtue of any conveyance from the Gardners; that the injunction in the Barnes suit foreclosed the Gardners from taking any waters from the creek or ravine; that Gardner and Thompson were tenants of Moore in the use of the water of the springs, and the right to erect the settling box and lay the pipe line therefrom; that Thompson paid rent of $1 per year for such use to and including 1935, and that their disclaimer of title in Moore only started the five year period under section 326 of the Code of Civil Procedure; that plaintiffs' complaint on adverse possession is insufficient because exclusive and uninterrupted use was not alleged, and that Thompson did not prove exclusive and uninterrupted use for five years prior to December 15, 1942, and the court did not so find. They also contend that the judgment is too broad in giving plaintiffs the right to place "boxes, sluices and tanks any place" upon defendants' lands—stating that under their prescriptive title plaintiffs are entitled to but one sluice box—and in so far as it allows plaintiffs to use defendants' lands and gives plaintiffs the entire normal flow of the two springs; that the injunction against pollution is too strong since it prevents pasturage of animals upon defendants' land; and, finally, that plaintiffs did not submit any proof of value of the various elements of claimed damage to support the judgment for the full or any amount prayed for in the complaint.

Appellants' contention that what they call the "Gardner-Grigsby water right" never existed and that therefore plaintiffs never acquired such a right by conveyance to them of the Gardner lands, appears to be based upon the supposition that prior to the Grigsby deed all rights to the waters of the creek or ravine had been conveyed to Barnes, and that this was established in the Barnes-Gardner action. As hereinbefore stated the Edgingtons' deed to Barnes, while it antedated the Edgingtons' deed to Ruth Grigsby, did not purport to convey a water right, as such, but only the appurtenances to the land conveyed. The record in the Barnes action shows that at the time Barnes took his title he acquired the portion of the Edgington lands upon which were situated the dwelling and other buildings, and that at that time water used therein was taken from a box located in the creek about 200

feet above the Barnes property line from which box it was piped to the dwelling and the grounds surrounding it. The portion of the creek or ravine in which the box was located was within the boundary of the lands which the Edgingtons retained and which they subsequently conveyed to Ruth Grigsby, but it was some distance below the portion of the Grigsby lands subsequently conveyed to Moore and later to defendants in this action. The judgment in the Barnes-Gardner action did not purport to entitle Barnes to anything more than the right to take water from the point where the box was situated when Barnes took his title, and subject to the rights of other riparian owners on the stream, and did no more than enjoin the Gardners from diverting the waters from said Grigsby creek so as to interfere with Barnes' right. The evidence shows and the court found that Barnes and his successors in interest are now using the water right held to be appurtenant to the Barnes land, and that since the judgment in Barnes' favor their use has never been interfered with. Arnold A. Barnes, son of J. W. Barnes, the original grantee, who had lived upon the land at all times since the grant, was called as a witness for defendants and so testified. He stated that the water system is now practically the same as in 1905, that the box is situated about 200 feet above the bridge, and about 75 feet further up the stream is a small dam; that the water in the stream at that point comes down from a hillside spring into the ravine, and that the ravine is dry above it; and that from the bridge to the fence on the Simonds property up the ravine it is a mile or a mile and a half. He further said that no water taken by Thompson has interfered with their water supply. The trial court further found, what must be conceded to be the fact, that defendants in this action are not successors in interest of Barnes, and are not in privity with him in any way. Defendants' claim that plaintiffs could not have acquired any water right by reason of the conveyance to them of the water rights reserved in the Grigsby deed because such right had been conveyed to Barnes prior to the deed to Ruth Grigsby, seems to be inconsistent with defendants' present claim to water upon the lands which they now own, since they deraign title through the Grigsby deed; for if the water right could not have been reserved because it did not exist, by the same reasoning it could not have been conveyed by that deed.

[1] As to appellants' argument that the decree in the Barnes action is res judicata against the claims of plaintiffs because plaintiffs took from the Gardners by title subsequent to the decree in the Barnes action, it is not necessary to so determine as a matter of law, since, as a matter of fact we are satisfied that the evidence shows that the rights involved in that action are not identical with those involved in this one, but are separate and distinct therefrom. See Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892; Whitney v. City and County of San Francisco, 52 Cal.App.2d 363, 365, 126 P.2d 367.

[2] That only is deemed to have been adjudicated in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto, Code Civ.Proc. § 1911; South San Bernardino L. & I. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 P. 699; Takekawa v. Hole, 17 Cal.App. 653, 121 P. 296; United Bank & Trust Co. v. Hunt, 1 Cal.2d 340, 34 P.2d 1001; and it does not appear that the rights claimed by plaintiffs were so adjudged in the Barnes decree or that they were necessarily included therein or were necessary thereto. The contrary appears.

[3] Coming next to appellants' claim that plaintiffs and the Gardners before them were tenants of the Moores and that their use of water on the land acquired by plaintiffs was permissive up to and including the year 1935, and that plaintiffs did not thereafter use the water for the prescriptive period of five years, we note that defendants in their answer alleged and that in their briefs before this court they assert that in 1922 Thomas Moore and J. B. Gardner entered into a rental agreement whereby Gardner rented from Moore the right to take water from the two springs which are the source of plaintiffs' water supply, and to convey said water across Moore's land, Gardner agreeing to pay Moore $1 a year for such water and the right of way for the pipe line; and that after this agreement Gardner placed the settling box, pipes and pipe lines on the lands of Moore, and that Gardner and then Thompson paid this $1 per year in advance from 1922 to 1935. But we are un-

able to find any evidence of any such agreement, nor does the evidence show under what circumstances or on what conditions the use of the water claimed by plaintiffs was begun. Appellants called Edward Moore, son of James Moore, the original grantee from Ruth Grigsby, who testified as to the payment of the $1 per year; but Moore said he did not know who first made arrangements about the pipe line and he gave no testimony as to what the arrangements were. He said that Gardner put in the water system in July, 1922, and gave them $1 per year thereafter, as did Thompson up to 1935; but that in December, 1935, Thompson told him that he claimed to own the water and would no longer pay anything to the Moores, and that he never paid anything thereafter.

[4, 5] Appellants next argue that though Thompson in December, 1935, claimed the water as his own, and did not thereafter pay the $1 per year to Moore, five years did not elapse thereafter before defendant Simonds disputed plaintiffs' rights and interrupted their use of the water. Whether plaintiffs used the water for the full prescriptive period after disclaiming any right of the Moores thereto presented a question of fact which the trial court has found against defendants. Its findings, we think, are supported by the evidence. Both Thompson and Moore testified that in December, 1935, Thompson claimed to own the water right by reason of his deed, asserted that the Moores did not own the water, and told them that if they interfered with his use they would have to establish their rights in court; and that he would not, and did not, thereafter pay anything to the Moores. Thompson also testified that thereafter he used the water without any interruption by Moore or anyone else until defendants interrupted his use in 1942; and Moore also testified that plaintiffs continued to use the water as they had used it, and that he never had any dispute with them about it. As to when defendant Simonds first interrupted plaintiffs' use of the water Thompson testified that it was not until 1942, and that he immediately objected; and though Simonds testified that he went upon the property before he received his deed on December 15, 1941, and did certain work in and around the springs, and that shortly after he bought the property Thompson came up and told him not to interfere with the water as it was his (Thompson's), he did not cut the water off until July or August, 1942; and in so far as there is a conflict in this evidence the trial court has resolved it in favor of plaintiffs, and its finding is conclusive on this appeal.

[6] As to appellants' argument that plaintiffs did not make a sufficient showing to support a title by adverse possession because they did not prove exclusive and uninterrupted use, though defendants' answer concedes that the use was made "openly, notoriously and continuously", their argument is that the springs were not fenced and that the water thereof was used by animals pastured on the land, and by a tenant of Moore who had a cabin on the land near the springs. But the evidence as to animals pastured on the land shows that such use was only occasional, and it does not show that such animals took water from the two springs, as there was other water on the premises. The Moores never lived on the land, and while a woodcutter, who was cutting under a stumpage agreement with Moore and not as his tenant, lived there at one time in a small hut that he put up, and used some water which he dipped from plaintiffs' box, Thompson testified that this was with his consent as the woodchopper came to see him about it.

[7] As for appellants' argument that the injunction provisions of the decree are too broad, these provisions are to be given a common sense construction and so construed do no more than authorize plaintiffs to restore their water system and maintain it in substantially the same condition in which it was maintained prior to defendants' interference therewith; and the judgment specifically describes the two springs, the settling box and the pipe lines as "the two springs, settling box and pipe line continuously used and maintained by the plaintiffs * * * for more than ten years prior to December, 1941, and which plaintiffs were using when defendants first entered upon the property now owned by them."

Coming now to appellants' complaint regarding the amount awarded to plaintiffs as damages, it is not entirely clear to us what appellants' contentions are in this regard. In their opening brief they apparently contend that plaintiffs did not submit evidence that some particular property of theirs of a specific value was destroyed, so that the trial court could find with mathematical certainty that plaintiffs suffered loss in a specific sum. But in their closing brief they seem to contend that plain-

tiffs suffered no damage of any kind, or at most they should have been allowed no more than what it would cost to restore their pipe line to its original condition before appellants interfered with same.

It does not appear that appellants ever sought to have plaintiffs segregate their damages, or requested the trial court to segregate them. They did move for a new trial, one of the grounds of said motion being that the damages were excessive and without sufficient support in the evidence. The trial court denied the motion and in its order of denial, after citing cases, stated: "So in the instant case, the plaintiffs are claiming damages for the interference with their free use of their land in having their water supply disrupted periodically, objectionable mineral elements injected into it, and its pollution by diversion through a horse trough, and finally complete severance and disruption of the pipe line through which the ordinary supply of water had been maintained. These are elements of injury from which damages naturally flow, but the exact measure of which is difficult to ascertain. For the injury existing, compensation must be provided and in such case, under the authorities heretofore cited, recovery may be had under the general allegation of damage." Cases cited were Cederberg v. Robison, 100 Cal. 93, 34 P. 625; Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 494, 55 P.2d 870; People v. Miller, 41 Cal.App.2d 252, 258, 106 P.2d 239; People v. Broome, 120 Cal. App. 267, 273, 7 P.2d 757; Coleman v. Le Franc, 137 Cal. 214, 69 P. 1011; Storrs v. Los Angeles Traction Co., 134 Cal. 91, 94, 66 P. 72; Butler v. Ashworth, 102 Cal. 663, 36 P. 922; Shepard v. Milwaukee Gas Light Co., 15 Wis. 318, 82 Am.Dec. 679; Ives v. Humphreys, 1 E.D.Smith, N.Y., 196, 201; Kentucky Heating Co. v. Hood, 133 Ky. 383, 118 S.W. 337, 22 L.R.A.,N.S., 588; Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U.S. 317, 2 S.Ct. 719, 27 L.Ed. 739; Dunlap v. Loup River Public Power Dist., 136 Neb. 11, 284 N.W. 742, 124 A.L.R. 400; also 8 Ruling Case Law, 479; Sutherland on Damages, vol. 1, § 16. The gist of these decisions is that jurors, and a trial judge as well, may use their personal experiences and knowledge in arriving at the amount of damages to be awarded under the facts of a particular case, and that damages may be awarded for pain, anxiety, inconvenience, annoyance, interference with the comfort of plaintiff and his family, and disadvantage suffered by reason of a defendant's acts. Also see LeBrun v. Richards, 210 Cal. 308, 320, 291 P. 825, 72 A.L.R. 336, and Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 172, 106 P. 581, 26 L.R.A.,N.S., 183, 21 Ann.Cas. 1247, where it is said that as to such elements of damage the amount of compensation is not susceptible of proof in dollars and cents, but must be left to the sound discretion of a trial court, to be ascertained and adjudged after consideration of all the facts and circumstances established by the evidence in the case.

[8, 9] The amount of damages to be awarded in a particular case is ordinarily a question of fact, entirely within the province of a jury, or, in the absence of a jury, of a trial court, especially where the law furnishes no rule for their admeasurement (8 Cal.Jur. 877–878, § 129; Aldrich v. Palmer, 24 Cal. 513, 516, cited in Moore v. Levy, 128 Cal.App. 687, 691, 692, 18 P. 2d 362; and Mudrick v. Market Street R. Co., 11 Cal.2d 724, 735, 81 P.2d 950, 118 A.L.R. 533); and it is only where a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that a court is at liberty to interpose its judgment against that of a jury; and this rule applies equally to the findings of a trial court when considered on appeal. Martin v. Shea, 182 Cal. 130, 139, 140, 187 P. 23; Ware v. McPherson, 213 Cal. 120, 121, 1 P.2d 433; Davidson v. De Sousa, 20 Cal. App.2d 311, 315, 66 P.2d 740; Mahar v. MacKay, 55 Cal.App.2d 869, 878, 132 P.2d 42.

In Cederberg v. Robison, supra, 100 Cal. at page 99, 34 P. at page 626, the court said that it is not sufficient for an appellant to say that a jury might have found otherwise as to the amount of damages awarded, or that a verdict for a lesser amount would have been consistent with the evidence; but that it must appear from the evidence that the verdict cannot be sustained.

[10] Here the evidence shows that plaintiffs used the water for domestic purposes and also for washing a prune crop grown on their land; that defendants not only changed a portion of plaintiffs' pipe line but that at times they totally disrupted

plaintiffs' use; that they diverted the water through a horse trough on their premises, and diverted into plaintiffs' pipe line the flow of water from an iron spring which colored the water so that it stained clothes washed in it as well as the fixtures in plaintiffs' home, and that some ingredient in the water of the iron spring so clogged plaintiffs' pipe lines that water would not run through them. It further appears that defendant William K. Simonds told plaintiff Thompson not to set foot on his land or he would kill him; and that even after a restraining order had been issued by the trial court defendants persisted in interfering with plaintiffs' rights to such an extent that plaintiffs had to resort to a contempt proceeding to secure relief. Under these circumstances we cannot say that the $1,000 awarded plaintiffs by way of damages was excessive.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.



68 Cal.App.2d 82

CALIFORNIA MUT. BUILDING & LOAN ASS'N OF SAN JOSE, et al. v. MORTIMER, Building and Loan Com'r, et al.

Civ. 12808.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1945.

Hearing Denied April 16, 1945.

1. Appeal and error ⇐1207(3)

Where Supreme Court, in representative actions brought on behalf of named plaintiffs and others similarly situated but not represented in corresponding litigation, directed that any attorney's fee awarded should be paid out of that portion of fund recovered by those for whose benefit actions were brought, and trial court directed payment of fee in accordance with such holding, unrepresented beneficiaries could not challenge power of trial court to make such order.

2. Building and loan associations ⇐42(17)

Right to participate on parity with other shareholders in liquidation of building and loan association did not correspond with shareholders' right to participate in such liquidation on parity with investment certificate holders within judgment disallowing attorneys' fees from shareholders represented in "corresponding litigation".

3. Building and loan associations ⇐42(17)

Where certain shareholders' right to participate in liquidation of building and loan association on a parity with investment certificate holders was established only by judgment in action brought by plaintiffs shareholders on their own behalf and on behalf of all other persons similarly situated praying for such relief, shareholders not represented in such action were properly required to participate in payment of attorneys' fee under such judgment requiring payment of such fee by persons not represented in corresponding litigation and for whose benefit such action was brought.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Proceeding in the matter of liquidation of the California Mutual Building & Loan Association of San Jose, Cal. On application of Frank C. Mortimer, Building and Loan Commissioner of the State of California, for an order directing commissioner to deduct certain percentage from the funds payable to Mary C. Ballantyne and others as mutual shareholders for payment of attorneys' fee. From an order granting the petition, Mary C. Ballantyne and others appeal.

Affirmed.

F. W. Sawyer, of Los Angeles, for appellants.

Frank V. Campbell and Campbell, Hayes & Custer, all of San Jose, for respondents.

DOOLING, Justice pro tem.

The appellants herein were successful plaintiffs in the action entitled Allen v. California Mutual Building and Loan Association (hereinafter called the Allen case) and the judgment in their favor was affirmed by the Supreme Court. 22 Cal.2d 474, 139 P.2d 321. That judgment, so far as material to the question now presented, is here quoted:

"It is further adjudged, decreed and ordered, that each of the immediately named

hereinafter plaintiffs be and each of them is here restored to Mutual Share Holders of Mutual Shares of the defendant California Mutual Building and Loan Association * * * with equal right of payment in the liquidation of the defendant California Mutual Building and Loan Association with other mutual share holders of said Association * * * and without any right of priority in such payments over other mutual shareholders of said Association * * *."

The sole effect of this judgment as it affected the appellants herein was to place them upon a parity with all other mutual shareholders in the right, whatever that right might be, to receive payments in the course of the liquidation of the Association.

Contemporaneously with the entry of this judgment there was pending on appeal a judgment in an action entitled Adams v. California Mutual Building & Loan Association (hereinafter called the Adams case). This action was a representative one prosecuted on behalf of the named plaintiffs and all persons similarly situated. Its purpose was to establish the right of mutual shareholders to share ratably with investment certificate holders in the liquidation of the Association. After the entry of the judgment in the Allen case the Supreme Court reversed the judgment in the Adams case. 18 Cal.2d 487, 116 P.2d 75, 76. The effect of the reversal in the Adams case was to establish the right of plaintiffs therein and all others similarly situated, as mutual shareholders, to participate in the liquidation of the Association on a parity with investment certificate holders.

In its opinion in the Adams case the Supreme Court said:

"Inasmuch as these are representative actions, brought on behalf of named plaintiffs and others similarly situated but not represented in corresponding litigation, any award of counsel fees should be paid out of that portion of the fund recovered by those for whose benefit these actions were brought."

Pursuant to the directions of the Supreme Court in its order of reversal judgment was entered in the Adams case and as a part of said judgment it was determined that the attorneys in the Adams case "are entitled to receive thirteen and one-third per cent of all the funds out of the assets of said Association which may have heretofore been or are now or may hereafter become available for distribution to all plaintiffs" and the defendant Building and Loan Commissioner was ordered to pay such percentage to said attorneys. It was further determined by said judgment that all persons who appear on the books of the Association as mutual shareholders, with certain exceptions of parties plaintiff in other similar named actions which did not include appellants herein, "are deemed to be plaintiffs * * * and are entitled to receive the benefits of this judgment."

Thereafter in this proceeding, on petition of respondent Building and Loan Commissioner and after answer thereto by appellants and a hearing at which all parties were represented, the court made its order directing respondent Commissioner to deduct 13-⅓% from the funds payable to appellants as mutual shareholders for the payment of the attorneys' fee as ordered in the final judgment in the Adams case. It is this order which is now before us on appeal.

[1] Appellants attempt to level an attack on the power of the court to order the payment of any fee by others than the named plaintiffs in a case of this character. Without deciding whether it is res judicata of the rights of these parties, the language of the Supreme Court above quoted from its opinion in the Adams case at least settles for us as a matter of law that the allowance of a fee from the distributive shares of "others similarly situated but not represented in corresponding litigation" is legal and proper. We will not therefore burden this opinion by a discussion of any question concerning the legal propriety of the allowance of a fee in the manner directed by the Supreme Court in the Adams case.

[2] Laying aside such contentions the single question is presented whether these appellants, in the language of the Supreme Court in the Adams case, are persons "not represented in corresponding litigation" and "for whose benefit these actions were brought." We are satisfied that the Allen case was not "corresponding litigation" to the Adams case.

[3] It is clear from what has already been said that the judgment in the Allen case only established the right of appellants herein, as mutual shareholders, to participate in liquidating dividends on a

parity with other mutual shareholders. The judgment in the Allen case did not establish appellants' right to participate on a parity with investment certificate holders. The latter right was established for them only by the later decision in the Adams case. Without the decision in the Adams case, or other similar litigation, appellants herein to establish their parity with investment certificate holders would have been compelled to prosecute another action against the Building and Loan Commissioner. The judgment in the Adams case was therefore as beneficial to them as to any other mutual shareholder who did not himself have a judgment in another action similar to the judgment in the Adams case.

The order is affirmed.

NOURSE, P. J., and GOODELL, J., concur.



68 Cal.App.2d 12

PAGEL v. SHIPP et al.

Civ. 14512.

District Court of Appeal, Second District, Division 3, California.

Feb. 9, 1945.

1. Evidence ⇐450(5)

Community property and support agreement and declaration of trust, entered into for purpose of carrying out the agreement, were neither ambiguous nor uncertain, and therefore extrinsic evidence of intention of parties was inadmissible.

2. Husband and wife ⇐279(1)

Where community property and support agreement and declaration of trust were both essential to complete property settlement and support agreement which parties entered into, they were required to be construed together and as a whole in order that the mechanism by which property rights of parties were to be secured for the future might be made effective.

3. Husband and wife ⇐279(6)

Where community property and support agreement, requiring establishment of trust, provided that if husband failed to remedy default within 60 days after demand trustee should, at request of wife, proceed to liquidate trust property and out of proceeds establish a secondary trust, that if liquidation should yield $75,000 to secondary trust husband would be relieved of further payments to wife, and that at any time before liquidation husband had right to pay $75,000 to trustee and receive reassignment of trust assets, the right to declare a default and set the secondary trust in motion was vested exclusively in the wife.

4. Husband and wife ⇐279(1)

Where community property and support agreement, requiring establishment of trust, provided that if husband failed to remedy default within 60 days after demand trustee should, at request of wife, proceed to liquidate trust property and out of proceeds establish a secondary trust, that if liquidation should yield $75,000 to secondary trust husband would be relieved of further payments to wife, and that at any time before liquidation husband had right to pay $75,000 to trustee and receive reassignment of trust assets, the husband did not have right to deposit $75,000 with trustee and to be relieved from further payments to wife before she had declared a default.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Edna H. Pagel, formerly known as Edna H. Shipp, against Everett S. Shipp and the California Trust Company for a declaratory judgment interpreting a community property and support agreement and a declaration of trust. The action was dismissed as to the defendant trust company. From an adverse judgment, the defendant Shipp appeals.

Affirmed.

J. Edward Haley, of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondent.

FOX, Justice pro tem.

This is an action for declaratory relief. Plaintiff, the former wife of defendant, Shipp, seeks an interpretation of a community property and support agreement (hereinafter called the agreement) entered into by said parties on August 2, 1932, and

also an interpretation of a declaration of trust entered into at or about the same time by said parties and the California Trust Company, as Trustee, for the purpose of carrying out certain of the provisions of the agreement. The action was dismissed as to the defendant Trust Company. The defendant Shipp appeals from a judgment in favor of the plaintiff.

On September 15, 1932, plaintiff obtained an interlocutory decree of divorce from the defendant Shipp (hereinafter called the defendant). She was granted custody of the minor children of the parties and the agreement was approved by the court. This decree became final on September 21, 1933. At the time of the trial of this action the children had attained their majority.

The agreement, after appropriate recitals concerning the marital and family status of the parties and of their community property holdings, provides that "The party of the first part [defendant] undertakes and agrees to pay to the party of the second part [plaintiff], for and during her natural life, the sum of Three Hundred and Fifty Dollars ($350.00) per month * * *." The agreement continues in paragraphs 3 to 6 to make provision for the support and custody of the minor children and for the immediate disposition of certain community, personal and real property.

Paragraph 7 sets up a scheme for securing to the wife the payment of the monthly sum of $350. In general, it provides for the creation of a trust containing as its res certain securities which had previously been listed as community property. So long as the husband is not in default, the agreement provides he may exercise all the incidents of ownership, including the collection of dividends, voting the stock and the right, within certain specified limits, to substitute other securities. Then follows a detailed enumeration of the conditions that shall constitute a default under said trust. Number 5 of said conditions is here important and provides that a condition of default shall exist when "the party of the first part shall fail to pay for the period of sixty (60) days, after written demand, to the party of the second part, at the time specified, any of the payments herein provided to be paid by the party of the first part to the party of the second part." The agreement then provides that "Should a condition of default exist under said trust, and the party of the first part fail to remedy the same within sixty (60) days after demand for such performance, the Trustee shall, *at the request of the party of the second part* [wife], register said stocks in its name as Trustee and proceed to liquidate said trust property and convert the same into cash * * *" (italics added) and out of the proceeds of the liquidation the trustee shall retain in what is designated as a "secondary trust" $75,000 (if such an amount is realized from said liquidation) and pay any surplus to first party. Should the liquidation yield $75,000 to the secondary trust the husband would be relieved of further payments to the wife. If, however, $75,000 should not be realized from such liquidation then the husband would be required to pay such additional sums as, when added to the net income from the secondary trust, shall equal $350 per month.

Paragraph 8 reads as follows: "The party of the first part, his successors and assigns, shall, at any time before liquidation for the trust and default as herein provided, have the right and privilege of paying to the Trustee the sum of $75,000.00, and having received a reassignment of all of the trust assets, and said $75,000.00, shall be held by the Trustee in place and stead of the securities herein provided for. Should such substitution take place after the commencement of liquidation, it shall be only upon the condition that all contracts entered into by the Trustee in connection with liquidation, shall be assumed, and proper security given for such performance by first party or his successors."

The remaining paragraphs of the agreement contained nothing that is relevant to the issues here involved.

Pursuant to the agreement the parties made a conveyance in trust of the properties therein described to California Trust Company. That company then executed the said declaration of trust which follows and carries out the provisions of the agreement.

The second paragraph of the declaration of trust provides that *"so long as the Trustor, Edna H. Shipp does not instruct it to the contrary,* pursuant to her right as hereafter provided, *the Trustee shall hold the original property* deposited with it at the inception of this Trust in the name of the Trustor, Everett S. Shipp, without transferring said property on the books of the

corporation or corporations to the name of the Trustee. Insofar as the Trustee is concerned the said Everett S. Shipp, shall, until it has been notified as [sic] a default, as hereinafter provided, retain unto himself alone the sole right and privilege to vote all corporate stock and to receive all income, profits and dividends of any nature whatsoever therefrom * * *." (Italics added.) Said paragraph also provides: *"At any time the said Edna H. Shipp files with the Trustee an affidavit and certificate, stating and declaring that there has been default by the said Everett S. Shipp of one or more of the obligations imposed upon him by the terms of said Agreement, that demand has been served upon him in the manner required by the terms of said Agreement, and that the said Everett S. Shipp has not cured such condition of default in the time prescribed by said Agreement, and accompanies such affidavit and certificate with the request that the Trustee assume full management and control of the Trust Estate, then in that event the Trustee shall assume full management and control * * *."* (Italics added.) This paragraph further provides that the trustee shall proceed to liquidate the trust property and convert it into cash, $75,000 of which shall go into the secondary trust and be managed by the trustee and any surplus forthwith paid over to defendant. It is then provided that "At any time the said Everett S. Shipp and/or his successors in interest, deposits the sum of Seventy-five Thousand Dollars ($75,000.00) with the Trustee, then said Trustee is authorized to distribute the *entire balance of the Trust Estate, exceeding the secondary Trust hereunder,* to the said Everett S. Shipp, or his nominee, or successor, but it may require indemnity satisfactory to it against any claims or liabilities to which it may be then subject. Thereupon said Trustee shall assume full management and control of said sum of Seventy-five Thousand Dollars ($75,000.00) and the same shall constitute *the secondary Trust* hereunder." (Italics added.)

The remaining paragraphs of the declaration of trust deal with the mechanics of the administration of the trust res by the trustee and are not here material.

The defendant contends that under these two documents he has the right (1) to arbitrarily create a condition of default thereunder by refusing (and he in fact has refused) to pay plaintiff the sum of $350 per month and thus set in motion the secondary trust provided for therein; or (2) deposit at any time, either before or after default, the sum of $75,000 in cash, receive from the trustee the securities which he had deposited with it, and be relieved from further payments to the plaintiff.

The trial court held (1) that the right to declare a default and to set in motion the secondary trust was vested exclusively in the plaintiff; (2) that as long as plaintiff does not exercise said option the obligation of defendant to pay to plaintiff $350 per month during her natural life continues in full force and effect; (3) that defendant cannot arbitrarily create a condition of default so long as he is able to comply with the terms of said agreement providing for said monthly payments of $350 to plaintiff; (4) that in the event plaintiff exercises her option to set in motion the secondary trust, defendant may, before actual liquidation of the assets of the trust, substitute the sum of $75,000 in lieu of the property in the hands of the trustee, and in that event, or in the event that the liquidation of said property yields net proceeds in the sum of $75,000, or in excess thereof, defendant is relieved of any further obligation to pay plaintiff $350 per month; if, however, such liquidation yields a net sum less than $75,000 then defendant is obligated to pay plaintiff the difference between the income that such lesser sum shall yield in the hands of the trustee and the monthly sum of $350.00.

In our opinion the trial court correctly interpreted the agreement and declaration of trust.

[1] In arriving at its decision the trial court took the position that the said documents were neither ambiguous nor uncertain and therefore excluded extrinsic evidence of the intention of the parties. Defendant challenges this ruling. In our opinion it was correct.

[2] The agreement and the declaration of trust must be read together for they are both essential to the complete property settlement and support arrangement which the parties entered into. They must also be construed together and as a whole in order that the elaborate mechanism, by which the property rights of the parties were to be secured for the future, may be made effective.

[3] On the question as to which of the parties had the right to declare a default

and set the secondary trust in motion reference should first be made to the paragraph in the agreement that immediately follows the five paragraphs (the last of which is hereinbefore quoted) which set out in detail the various situations that must exist before a default may be declared. It is provided in that paragraph that should a condition of default exist under the trust, and the husband fail to remedy the same within sixty days after demand therefor, "the Trustee shall, *at the request of the party of the second part* [wife], register said stocks in its name" and proceed to liquidate the trust property and convert it into cash. (Italics added.) The secondary trust is thereby and thereupon put into operation. The existence of a condition of default is not sufficient to put the secondary trust in operation. Such condition must be declared and the only person mentioned in the agreement who is authorized to take such affirmative action is the wife.

Reference should next be made to the provisions of paragraph 2 of the declaration of trust hereinbefore quoted. It will be noted that under that provision the trustee is to hold the *original* trust property in the name of defendant without transferring the same on the books of the corporations to the name of the trustee *"so long as the Trustor, Edna H. Shipp does not instruct it to the contrary."* (Italics added.) In harmony with this provision is the statement in the next sentence that defendant shall retain the sole right to vote all corporate stock and receive all dividends therefrom until the trustee has been notified of a default "as hereinafter provided." The only provision *thereafter* (or elsewhere) made in the declaration of trust for notifying the trustee of a default follows in the same paragraph and is quoted herein. This provision requires the trustee to assume full management and control of the trust estate and proceed to set up the secondary trust *if* and *when the plaintiff files with the trustee* an affidavit and certificate stating the necessary facts and accompanies such affidavit and certificate with a request therefor. It is clear from these provisions that the right to declare a default and set the secondary trust in motion is vested exclusively in the plaintiff. We find nothing in either the agreement or in the declaration of trust which tends to negative this interpretation.

[4] What has been said on the previous point answers in part defendant's contention that he had the right to deposit with the trustee at any time, either before or after default, $75,000 in cash and be relieved from further payment to the plaintiff. The provision in the declaration of trust that the trustee shall hold the *original property* deposited with it at the inception of this trust in the name of defendant, without transferring it to the name of the trustee, so long as the plaintiff does not instruct the trustee to the contrary pursuant to her right so to do in the manner thereafter provided, shows clearly there was no right in defendant to substitute cash for the deposited securities until and unless a condition of default had been declared by plaintiff. The provision in the declaration of trust giving the defendant the right to deposit $75,000 with the trustee and receive back the original trust property does not appear until after the provision relating to liquidation of the trust in the event of a declaration of default. This provision for the deposit of $75,000 was unmistakably put in the declaration of trust as an alternative to the provision for liquidation of the trust estate in order to give the defendant an opportunity to get back the deposited securities which represented the majority stock of certain corporations so that he would not lose the same and thereby lose control of the corporations. That it was intended as an alternative to liquidation, and to be exercised even after liquidation had been commenced, is emphasized by the provision that upon the deposit of $75,000 in cash with the trustee, then the trustee is authorized to distribute to the defendant or his nominee "the entire *balance of the Trust Estate,* exceeding the secondary Trust hereunder." (Italics added.) It is further provided, in such event, that the trustee may require satisfactory indemnity against any claims or liabilities to which it may be then subject. This is of course for the purpose of protecting the trustee on any commitments it may have made up to that point in the liquidation of the trust. But it also serves to show that the right of defendant to make the $75,000 cash deposit with the trustee is alternative to liquidation and does not exist unless there has been a declaration of default by the plaintiff which calls for liquidation of the trust. These observations apply with equal force to the provisions of paragraph 8 of the agreement herein quoted on which defendant strongly relies. That paragraph in the agreement does not make its appearance until after the conditions of default

have been enumerated and the provisions for liquidation of the trust set forth. Here it is provided that "Should such substitution [the deposit of $75,000 in cash] take place after the commencement of liquidation" the defendant shall assume all contracts entered into by the trustee in connection therewith and give proper security for their performance. This paragraph of the agreement when read in its entirety and when considered in relation to the other provisions of the agreement is entirely consistent with the corresponding provision of the declaration of trust, and shows that the right of defendant to deposit $75,000 with the trustee and get back the deposited securities is simply alternative to the liquidation provision and not operative unless the necessary steps have been taken by the plaintiff to direct the trustee to liquidate the original trust and set up the secondary trust.

If it had been intended that the defendant should have the right at any time to deposit $75,000 in cash with the trustee and thereupon get back the trust securities it would have been very simple and easy to make that statement. If that had been the intention of the parties then the entire procedure for bringing the secondary trust into being would have been superfluous. In this connection it should also be pointed out that provision is made in the agreement (prior to the statement of what shall constitute conditions of default under the trust) for the *substitution of securities* of one corporation for those of another (within certain specified limits) upon request of the defendant. If it had been intended that defendant should have the arbitrary right to substitute *money* for *securities* this would have been an appropriate place to so provide. As it is, the provision for substituting *money* does not make its appearance until the conditions of default have been carefully defined and provision made for liquidation of the trust in the event plaintiff declares that a condition of default exists. This is an additional indication that the provision giving the defendant the right to deposit $75,000 in cash with the trustee and receive back the original trust property is an alternative to the liquidation provision.

The interpretation by the trial court of the agreement and declaration of trust is in accordance with the intention of the parties as therein expressed. The documents are clear and, when read together and in their entirety, disclose a complete picture of the adjustment of the property rights of the parties and the plan by which the monthly payments by the defendant to the plaintiff were protected and secured. There was no error therefore in excluding extrinsic evidence of the intention of the parties. Chiarello v. Axelson, 1938, 25 Cal.App.2d 157, 76 P.2d 731; Hutchinson v. Hutchinson, 1941, 48 Cal.App.2d 12, 119 P.2d 214; Barnhart Aircraft, Inc., v. Preston, 1931, 212 Cal. 19, 297 P. 20.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



68 Cal.App.2d 138

McCLATCHY NEWSPAPERS v. ROBERTSON et al.

Civ. 3151.

District Court of Appeal, Fourth District, California.

Feb. 19, 1945.

1. Partnership ⇐55

In action on open account against copartners, evidence supported finding as to existence of partnership.

2. Partnership ⇐242(5)

In action on open account, evidence did not support findings that partnership was not terminated before creditor agreed with one of the partners to extend time of payment of account, that creditor did not know that copartners had agreed between themselves to terminate partnership, and that in making extension agreement partner was acting for and on behalf of partnership.

3. Pleading ⇐427

Defense of discharge from liability on open account against partnership by creditor's agreement with partner who continued to operate business to extend time of payment knowing that partnership had been terminated was available to former copartner, though answer did not

expressly allege that partner continuing to operate business had assumed partnership obligations, where ultimate facts were sufficiently pleaded in answer, no demurrer was filed thereto, and case was tried upon such theory.

4. Partnership ⇐242(2)

Where partners agreed between themselves that one of them should assume all partnership obligations and entire responsibility for conduct of business and creditor knowing of such agreement agreed with such partner to extend the time of payment, whether former partners understood that they were partners in a legal sense was immaterial as respects discharge of other partner from liability by such extension of time.

5. Partnership ⇐242(2)

Former partner was discharged from liability on open account against partnership when creditor knowing partnership had been terminated and all partnership obligations assumed by copartner, extended the time of payment of partnership obligations, including account, and thereafter participated in assignment by such copartner for benefit of all his creditors and gave such copartner a full release. Civ.Code, § 2430.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action on an open book account by McClatchy Newspapers, a corporation, against T. Fred Robertson and others. From a judgment in favor of plaintiff against named defendant and another, named defendant appeals.

Judgment reversed with directions.

Paul Staniford, of Fresno, for appellant.

Laurence B. Myers, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action to collect on an open book account from the defendants, both individually and as copartners.

In August, 1939, the defendant Robertson became associated with the defendant McFarland, who then owned and operated a business known as "Standard Markets and Standard Food Stores." For convenience, this business and any partnership will be referred to as "Standard Stores". At that time Robertson invested $14,500 in the business, taking McFarland's note for that amount, it being understood that a corporation would be formed and Robertson would be given stock therein for his investment. He also went to work as a part-time buyer for Standard Stores. In October, 1939, he signed a Dun & Bradstreet statement which described him as a partner in the business.

On October 30, 1940, this arrangement was terminated and Robertson withdrew from the business. By mutual agreement, McFarland deeded certain real property to Robertson and in payment therefor Robertson gave McFarland $8000 in cash and cancelled the $14,500 note. McFarland assumed all debts of the business and paid a part thereof with the $8000 he had received. McFarland made this arrangement after being advised to do so by the plaintiff herein.

On February 28, 1941, certain creditors of Standard Stores, including the plaintiff, entered into an agreement with McFarland in which they agreed to extend the time of payment of all his indebtedness, including that sued upon, to March 31, 1942, with a provision for certain monthly payments in the meantime. While this agreement recited that the creditors were signing the same in consideration of the consent of Robertson thereto, it appears without contradiction that the consent of Robertson was never obtained. In spite of this fact the creditors and McFarland carried out the provisions of the agreement until October, 1941, at which time McFarland made an assignment for the benefit of all of his creditors, which assignment was accepted by the creditors, including the plaintiff. The trustee disposed of the assets and the plaintiff received $1904.20 as its share. In accordance with the assignment agreement the plaintiff then executed a full release of McFarland doing business as Standard Stores.

This action was then brought against the defendants individually and as copartners in the Standard Stores. The defendant Robertson set up as an affirmative defense that any partnership relationship had been dissolved and terminated on October 30, 1940, that this was known to the plaintiff, and that he had been released from any liability by the extension granted

McFarland through the agreement of February 28, 1941. A similar affirmative defense was based upon the assignment for the benefit of creditors, the sale of the assets and the release given upon receipt of a pro rata share of the proceeds.

The court found that at all times material here the three defendants were copartners doing business under the name of Standard Stores; that the plaintiff had no knowledge of any termination or dissolution of said partnership; that said partnership was not dissolved or terminated prior to February 28, 1941; that on that date the plaintiff entered into an agreement with Standard Stores extending the time within which its obligation could be paid; and that at that time McFarland was acting for the copartnership. It was then found that on October 30, 1941, McFarland assigned the assets of Standard Stores to a trustee for the benefit of the creditors; that the plaintiff received its pro rata share; that McFarland instructed the trustee to obtain a satisfaction from the creditors in his individual behalf; that when he made this assignment McFarland was acting for all of the defendants although he professed to be acting only for himself; that the plaintiff executed a release discharging McFarland from all its claims against him; and that this release did not apply to or benefit the other individual defendants. Judgment was entered in favor of defendant McFarland but in favor of the plaintiff as against Robertson and White for the balance of the amount claimed. From this judgment the defendant Robertson has appealed.

The appeal is based on the grounds that certain findings of the court are not sustained by the evidence and that the appellant was discharged from any and all debts owed by the partnership since the partnership was dissolved, the respondent was informed of that fact, and thereafter the respondent entered into an agreement extending for more than a year the payment of its claim and then participated in the assignment proceedings and shared in the proceeds thereof.

[1, 2] While it appears that neither the appellant nor McFarland realized that the relationship existing between them between August, 1939, and October, 1940, constituted a partnership the evidence is sufficient to support the court's finding that such a partnership then existed. However, the court's findings to the effect that this partnership was not terminated prior to February 28, 1941, that the plaintiff did not know during any of the times mentioned in the complaint that the defendants had agreed between themselves to terminate the partnership, and that in making the extension agreement of February, 1941, McFarland was acting for and on behalf of the partnership, are not supported by the evidence. The appellant testified clearly and definitely with respect to the arrangement made in October, 1940, by which he withdrew from the business and turned over an additional $8000 to McFarland; that it was agreed that McFarland would take full responsibility for Standard Stores and the appellant would be relieved of all concern in that regard; that thereafter he had no further business relationship with McFarland; that there was a verbal agreement that McFarland would assume full responsibility for all operations from then on; that McFarland knew that from then on the appellant was not to be troubled with the obligations; that McFarland assumed these obligations; and that, thereafter, the respondent never presented a bill to him.

McFarland fully corroborated this testimony, going more into details. He testified that he had talked over the entire matter with the respondent before making the deal with Robertson and that the respondent advised him to make this arrangement, that he fully understood that the old debts were his responsibility and had agreed that no responsibility for this indebtedness would devolve upon the appellant, and that he so informed Mr. Engstrom, the business manager of the plaintiff, and Mr. Sells, its credit manager.

Mr. Engstrom testified that in October, 1940, he talked the matter over with McFarland who made it clear to him that Robertson had severed all connection with the Standard Stores; that from then on he dealt with McFarland as an individual in the operation of the Standard Stores; that from that time on he believed that McFarland was the Standard Stores, believed that McFarland was solely responsible for the obligations of the Standard Stores and looked to McFarland for the payment of the account in question; and that Mr. Sells, respondent's credit manager, was present when McFarland explained his arrangement with Robertson.

There is no evidence to a contrary effect in the record and it appears, without contradiction, and in fact was admitted by the respondent's business manager, that he was informed at the time that Robertson had withdrawn from the business and that McFarland had assumed and was responsible for the existing and future obligations, and that he then looked solely to McFarland for the payment of this account. Thereafter, and knowing these facts, the respondent gave McFarland a year's extension of time, on certain partial payments, and then will full knowledge of the situation participated in the assignment proceedings and gave McFarland a full release.

[3, 4] The respondent contends that the defense of extension of time of payment is not available to the appellant because the answer did not allege that McFarland had assumed the obligations of the partnership and, further, that the evidence fails to establish that fact. The first of these contentions is without merit. The ultimate facts were sufficiently pleaded in the answer, no demurrer was filed, and the case was tried upon the theory raised by the answer that any obligation of the appellant had been assumed by McFarland with the knowledge of the respondent, and that the extension of time had thereafter been given. The respondent's second contention is based upon certain testimony of the appellant on cross-examination. When asked what arrangements he had made with McFarland toward paying off the old obligations he replied that he had made none, and that he trusted in McFarland's ability "to work the thing out." When asked if any papers had been executed for the dissolution of the partnership he replied "No, because we had never made any papers to begin with. There wasn't anything to dissolve, as I considered it." The fact that these parties did not understand that they were partners, in a legal sense, is immaterial. It fully appears that they agreed that McFarland should assume entire responsibility, past and future, and that the respondent fully understood this fact. Appellant's testimony that no particular arrangements were made, as to just when or how the old obligations would be paid by McFarland, is neither inconsistent with the other evidence nor does it constitute any substantial evidence to the contrary.

[5] The essential findings of the court are entirely unsupported, and under the evidence and the plain provisions of section 2430 of the Civil Code the appellant was discharged from liability on this claim by the acts of the respondent.

The judgment against the appellant is reversed with directions to make appropriate findings and to enter judgment in his favor.

MARKS and GRIFFIN, JJ., concur.



CALIFORNIA PHYSICIANS' SERVICE v. GARRISON.*

Civ. 12764.

District Court of Appeal, First District, Division 2, California.

Feb. 15, 1945.

Rehearing Denied March 17, 1945.

Hearing Granted April 12, 1945.

1. Appeal and error ⇐1122(2)

The function of an appellate court is to review judgment of trial court on the record made for that purpose and it is only in rare cases, and to prevent miscarriage of justice, that statute authorizing appellate court to make new or additional findings will be applied. Code Civ.Proc. § 956a.

2. Appeal and error ⇐1122(2)

Where appellant makes application for findings additional or contrary to those made by trial court for purpose of a reversal, reviewing court's statutory power to make such findings should be exercised only when upon full consideration of record party against whom judgment is for first time entered in trial court could not successfully meet contentions of his adversary upon retrial. Code Civ.Proc. § 956a.

3. Appeal and error ⇐1122(2)

Generally, reviewing court will use statutory power to make findings additional or contrary to those made by trial court sparingly and only when purpose of new findings is to constitute basis for affirmance of judgment or for reversal thereof with

* Subsequent opinion 172 P.2d 4.

directions to trial court to enter judgment for appellant. Code Civ.Proc. § 956a.

4. Appeal and error ⇐891, 1122(2)

Under Code provision authorizing reviewing court to make findings additional or contrary to those made by trial court, the door is open for application thereunder to both appellant and respondent, but the application to take additional testimony for purpose of reversal of judgment will be granted only in exceptional cases. Code Civ.Proc. § 956a.

5. Appeal and error ⇐1122(2)

In action by non-profit physician's service corporation against State Insurance Commissioner for declaratory judgment, fact that after judgment for plaintiff it had engaged in new activities did not authorize appellate court to make findings additional or contrary to those made by trial court. Civ.Code, § 593 et seq.; Code Civ.Proc. §§ 956a, 1060; St.1935, p. 501, § 106; St.1937, p. 2438 et seq., § 11491 et seq.

6. Insurance ⇐2

In determining whether non-profit physician's service corporation furnishing professional medical and surgical services to beneficiary members who paid monthly dues was engaged in insurance business so as to be subject to laws relating to insurance, court was concerned with plan as a whole. St.1935, p. 501, § 106; Civ.Code, § 605c.

7. Appeal and error ⇐1154

Where portion of judgment in declaratory judgment action went beyond the issues tendered at trial before the court on stipulated facts, appellate court directed modification of such portion of judgment to confine determination to the case as it was tried on the pleadings and on stipulation of facts.

8. Action ⇐6

Under Code provision that remedy through declaratory relief is cumulative, the denial of such relief on ground that plaintiff has ample remedy under general laws or that it is unwise to permit judicial proceedings which has effect of putting judicial approval upon a controversial type of new business enterprise cannot be sustained. Code Civ.Proc. §§ 1060 et seq., 1062.

9. Appeal and error ⇐949

The trial court's determination as to granting or refusing declaratory relief will not be disturbed on appeal unless a clear abuse of its statutory discretion to grant or refuse such relief is shown. Code Civ. Proc. §§ 1060 et seq., 1061.

10. States ⇐191(1)

Where governmental bodies are already subject to suit, procedural statutes such as declaratory judgment statute may be made applicable to such bodies without causing any interference with rights of sovereignty. Code Civ.Proc. § 1060 et seq.

11. States ⇐191(1)

Where acceptance of liability and subjection to suit on part of a sovereign body is found elsewhere in state statutes, and declaratory judgment procedure is not barred by provisions of waiver of immunity, a determination of legal issue in an action for declaratory relief does not constitute an "impairment of governmental sovereignty". Code Civ.Proc. § 1060 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Impairment of Governmental Sovereignty".

12. States ⇐191(1)

The statute authorizing State Insurance Commissioner to "prosecute and defend any and all suits and other legal proceedings" is a waiver of sovereign immunity from suit. St.1939, p. 2633, § 1037(f); Gen. Laws 1937, Act 5233, § 19 et seq.; Pol.Code, § 4003.

13. Injunction ⇐74
Mandamus ⇐12
States ⇐191(2)

An action lies against public officer or public agency to compel performance of official duty, or to restrain performance of an act not authorized by law and such action is not a "suit against the state" in violation of sovereign immunity principle.

See Words and Phrases, Permanent Edition, for all other definitions of "Suit Against the State".

14. States ⇐191(1)

The State Insurance Commissioner is not immune from suit in matters pertaining to exercise of his official duties and cumulative remedy for declaratory judgment sought by non-profit physician's service corporation that services furnished by such corporation to beneficiary members paying monthly dues for medical and surgical services did not constitute "insurance" under supervision of Commissioner is a proper procedure. St.1939, p. 2633, § 1037(f);

Gen. Laws 1937, Act 5233, § 19 et seq.; Pol.Code, § 4003; Civ.Code, § 593 et seq.; Code Civ.Proc. § 1060 et seq.

15. Physicians and surgeons ⇐2

A non-profit physician's service corporation which furnished medical and surgical services through its professional members to beneficiary members who paid monthly dues for such membership and services was within statute authorizing non-profit health service corporations to defray or assume cost of professional services of licentiates on complying with certain prerequisites without being subject to prohibition against corporation's practicing of medicine as against contention that such statute did not validate activities of such corporation because it merely authorized incorporation for purposes stated whereas corporation was organized two years before enactment thereof. Civ.Code, §§ 593a, 605c.

16. Insurance ⇐2

A non-profit physician's service corporation which furnishes medical and surgical services through its professional members to beneficiary members who pay monthly dues and in which professional membership is open to any physician or surgeon licensed to practice in state and to abide by rules and whose compensation for services to beneficiary members shall be paid on pro rata basis out of monthly funds collected from members is not engaged in "insurance" business and therefore not subject to supervision by State Insurance Commissioner.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurance".

Appeal from Superior Court, San Francisco County; C. J. Goodell, Judge.

Action by California Physicians' Service, a non-profit corporation, against Maynard Garrison, as Insurance Commissioner of the State of California, for a declaratory judgment that plaintiff's business and operations does not constitute insurance under supervision of Commissioner of Insurance nor the corporate practice of medicine and surgery. Judgment for plaintiff, and defendant appeals.

Judgment modified, and as so modified, affirmed.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr. and Harold B. Haas, Deputy Attys. Gen., State of California, for appellant.

Hartley F. Peart and Howard Hassard, both of San Francisco, Musick, Burrell & Pinney, Howard Burrell, and Anson B. Jackson, Jr., all of Los Angeles, for respondent, amici curiae.

NOURSE, Presiding Justice.

The plaintiff sued under section 1060 of the Code of Civil Procedure for a declaratory judgment. The cause was tried upon a stipulation of facts and a judgment for plaintiff was entered. The appeal was taken on the clerk's transcript.

The plaintiff was incorporated in 1939 as a non-profit corporation under the provisions of section 593 et seq. of the Civil Code. The membership of the corporation is divided into three groups—(1) administrative members comprised of physicians and others in whom is vested the administrative control of the corporation. These are elected by the professional members periodically, and these administrative members in turn elect the board of trustees. (2) Professional members are duly licensed physicians and surgeons practicing in this state. (3) Beneficiary members are those who, upon payment of monthly dues, are entitled to secure from any professional member necessary medical and surgical services. Professional membership is open to any physician or surgeon licensed to practice his profession in this state upon his agreeing to abide by the rules of the corporation that all compensation for services rendered a beneficiary member shall be paid upon a pro rata basis out of the monthly funds collected from the beneficiary members. It is stated in the respondent's brief for the purpose of showing the success of the plan and the importance of the litigation that approximately five thousand of the licensed physicians and surgeons practicing in the state are members of the organization, and that more than one hundred thousand persons have become beneficiary members, this number increasing at the rate of about fifteen hundred each month.

The facts upon which the cause was tried are stated in a comprehensive stipulation which tendered the issues to the trial court as of the date of November 16, 1942, the date upon which the judgment was entered. From this stipulation it appears that "the

fundamental purpose of plaintiff is to provide an organization through which the physicians of California can render their professional services to groups of persons of low income for compensation within the means of such groups. * * * each professional member has undertaken to render such needed medical services to beneficiary members of plaintiff as may properly be requested of him and has undertaken that as compensation for any medical service that he may render, he will look solely to the available funds of California Physicians' Service, provided only, that each professional member is free to exercise his individual right to refuse to accept any person as a patient." Special attention was given to the advantages of group medical service and many beneficiaries were enrolled by the "group" method meaning "employees of a common employer, members of a professional organization, members of a lodge, members of a social club or any other existing entity having a means of collecting the monthly dues required for beneficiary membership."

In 1941 the plaintiff entered into a contract with the Federal Farm Security Administration to furnish medical services and hospital care to rural families. What, if any, services have been performed under the contract does not appear in the record.

A controversy has arisen between the plaintiff and the defendant relative to their respective rights and duties and is stated as follows: "Defendant contends that the business and operation of California Physicians' Service constitute the transaction of disability insurance as classified and defined in Section 106 of the Insurance Code [St.1935, p. 501] and that said activities of plaintiff constitute the corporate practice of medicine and surgery, while, on the other hand, plaintiff contends that its business and operations comprise the performance of a personal service by its professional members to its beneficiary members for which plaintiff acts as the mediator or agency for the payment of compensation for such services."

A supplemental statement of facts contains the certificate of the State Board of Medical Examiners showing plaintiff's compliance with the provisions of section 593a of the Civil Code.

Upon the facts thus stated and upon the controversy thus outlined the trial court decreed as follows:

"1. That rendition of medical and surgical services by the professional members of plaintiff, California Physicians' Service, and the acceptance of payment for such services by said professional members from funds contributed by the beneficiary members of plaintiff in the manner and within the limits set forth in the articles of incorporation and by-laws of California Physicians' Service, does not constitute the transaction of an insurance business under the insurance laws of the State of California;

"2. The objects and purposes set forth in the articles of incorporation of plaintiff, California Physicians' Service, and particularly in Article Two thereof, are lawful objects and purposes and the performance or undertaking by plaintiff of any or all of said objects does not and will not violate any of the provisions of the laws of the State of California relating to the business of insurance;

"3. The rendition of medical and/or surgical services by plaintiff or by plaintiff's professional members does not constitute a violation of the principle that a corporation may not engage in or be licensed to practice one of the learned professions, towit: law, medicine, dentistry, architecture, etc.; and

"4. Such sums as are collected by plaintiff to be used in the manner and for the purposes outlined in the articles of incorporation of plaintiff cause plaintiff to be subject to regulation by the Attorney General of the State of California in the manner provided and under the provisions of Sec. 605c of the Civil Code of the State of California."

This was the case made in the trial court upon which the judgment was based. In his opening brief the appellant attacked the judgment upon the certified record. Thereafter the respondent set forth new matter covering activities such as hospitalization to rural families under the Farm Security contract, which apparently were assumed by the corporation after the judgment was entered. (Reference is made in the stipulation of facts to the contract to provide "hospital care" to rural families, and reference is made to the articles of incorporation of respondent. This exhibit is not in the record, but it is undisputed that the cause was tried on the issues framed in its pleadings.) In his reply brief the appellant indulged in further statements of fact beyond the scope of the record and both

parties have asked us to proceed under section 956a of the Code of Civil Procedure and make new findings. The suggestions in the briefs were not followed by motion or a tender of evidence beyond the stipulation upon which the judgment rests, and none of the provisions of Rule 23(b) of the Rules on Appeal have been followed. Appellant's argument on this phase of the case, presented for the first time in his reply brief, is that, if respondent is in fact providing hospitalization for some of its beneficiary members, it must comply with the provisions of section 11491 et seq. of the Insurance Code, St.1937, p. 2438 et seq. The suggestion and the argument accompanying it, prompted the filing of a brief by amici curiae in behalf of the Hospital Service of Southern California, a nonprofit corporation which, it is said in the brief, is operating in much the same manner as is the respondent. This brief presents the new point that respondent would be denied equal protection of the law if denied the right to continue its operations. It is supported by an elaborate statement of facts, all of which are outside of the record, relating to other organizations which are operating in a manner somewhat similar to respondent and Hospital Service.

[1] It is settled law that the function of an appellate court is to review the judgment of the trial court upon the record made for that purpose. It is only in rare cases, and to prevent a miscarriage of justice, that the provisions of section 956a, C.C.P. will be applied. There are several cases in our appellate courts holding that such proceedings will be taken only to enable the reviewing court to affirm the judgment and put an end to the litigation. See In re Estate of Wirt, 207 Cal. 106, 111, 277 P. 118; Monson v. Fischer, 107 Cal.App. 55, 289 P. 899; Clough v. Allen, 115 Cal. App. 330, 1 P.2d 545; Kier Corporation v. Treasure Oil Co., 57 Cal.App.2d 829, 838, 136 P.2d 59.

[2-4] In would appear that the statement in Re Estate of Wirt, supra, was qualified by the later opinion of the Supreme Court in Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, 975, and that the other cases are based upon a misconception of the rule announced in the later case. This rule, as we understand it, is that when the application is made by the appellant under the section for the purpose of a reversal the power of the reviewing court should be used sparingly and "should be exercised only when, upon a full consideration of the record, the party against whom the judgment is for the first time entered in the trial court could not successfully meet the contentions of his adversary upon a retrial", and that as a general rule the reviewing court would use the "new power" sparingly and "only when the purpose of the new findings was to constitute a basis for an affirmance of the judgment or a basis for a reversal of the judgment with directions to the trial court to enter a judgment for the appellant." Summarizing the elaborate statement in the Tupman case the rule seems to be that the door is open under the code section to both appellant and respondent, but that the application to take additional testimony for the purpose of a reversal of the judgment will be granted only in exceptional cases.

[5] Aside from the form of the application it does not appear that this is a proper case to take new evidence or to make new findings. The suggestion is based upon the statement that since the date of the judgment respondent has engaged in new activities consisting in providing hospitalization for some of its beneficiary members, contracts with federal agencies to furnish rural health service, and emergency service in connection with federal war housing projects. It does not appear whether the evidence would show that hospital service is provided through hospitals owned and operated by the corporation, through leases of hospital space, or by contract to pay the charges fixed by the hospitals. In this connection appellant states in his brief filed after the oral argument that: "There is no showing of any contracts with hospitals in the record and the writer of the brief can positively assert that, at least until very recently, there has been none between C.P.S. and the hospitals."

Exhibit "O" is a contract with the Farm Security Administration, an agency of the federal department of agriculture. It was executed more than a year after the complaint herein was filed. It declares its purpose to be to provide adequate health care for rural families and designates respondent as the agent for its professional members and such hospitals as signify a willingness to participate in the program. The contract has many conditions and exceptions. The respondent corporation does not covenant to secure the participation of hospitals in the program. The service

is made available only to those who are eligible for loans from the Farm Security Administration. The latter does not undertake to make such loans unless the Congress makes special appropriations for that purpose. It is stated that the contract is merely experimental and neither party is bound for any extended period of time. It does not appear whether the contract is now or was at the time of the time of the trial in operation or effect. It is clear therefore, as stated by appellant, that the record does not disclose whether any contracts with hospitals were in operation and effect, and it must be conceded that such issue was not tendered to the trial court in a manner to permit a decision on it.

[6] The question as now raised is "incidental" and it was so treated in Jordan v. Group Health Ass'n, 71 App.D.C. 38, 107 F.2d 239, 244. In a note appended to that decision it is said: "Appellant singles out the feature of hospitalization for special condemnation. It is clearly incidental in the general scheme as are Group Health's clinical and other services rendered directly. They constitute facilities with which the primary task is done. We think the plan must be taken as a whole, not split up into disconnected parts." Though it is not clear from the published report this note seems to have been made by the author of the opinion because in the body of the opinion appears: "As we have said, it is the plan as a whole, not artificially disjointed and segregated single phases of it, with which we are concerned." In this connection the court discusses the "incidental" functions of such an organization including first aid and preventive relief as a necessary element of the obligation of the association to provide "medical service."

These views are pertinent here because it must be conceded that some forms of hospital service are no different than medical and surgical service, and that some forms of contracts to indemnify or pay the actual cost of such service are insurance. But it must also be conceded that if the activities of the corporation as outlined in the case made and tried do not put the corporation under the Insurance Code the judgment must be affirmed unless the other grounds raised are material. Thus if the judgment is sound upon the record made the question of "other activities" subsequent to the trial should be left to future litigation, because it is patent that the respondent may be operating legally in all respects to the matters tried without regard to subsequent activities which may or may not be beyond the scope of its rights under issues presented to the trial court.

[7] The appellant raises the additional point that the judgment goes far beyond the facts before the court in deciding in paragraph 2 thereof that the performance or undertaking by plaintiff of any or all of the objects set forth in plaintiff's articles of incorporation will not violate any of the laws of California relating to the business of insurance. We are in accord with his view that this is beyond the issues tendered and will direct a modification of this portion of the judgment to confine the determination to the case as it was tried on the pleadings and the stipulation of facts.

On the case made by the record the appellant has urged three grounds for a reversal of the judgment: that declaratory relief is not a proper remedy, that the respondent is engaged in the corporate practice of medicine, and that it is engaged in the insurance business.

[8, 9] It is argued that provisions of section 1060 et seq. of the Code of Civil Procedure are not applicable to a state agency or public officer. The argument falls in two separate lines. First, that it is unwise to permit a judicial proceeding which has the effect of putting judicial approval upon a controversial type of new business enterprise. Second, that since the state and its agencies are not specially mentioned the procedure violates the rule of immunity of the sovereign from suit. In support of the first point Hayden Plan Co. v. Wood, 97 Cal.App. 1, 275 P. 248, and Hayden Plan Co. v. Friedlander, 97 Cal. App. 12, 275 P. 253, are cited. The first case was one against the state superintendent of banks seeking a determination that the type of business proposed by the plaintiff did not come under the supervision of the commissioner. The court denied the relief sought on the ground that plaintiff had an ample remedy under the general laws and that no question of public interest was involved. The second case was one against the corporation commissioner and followed the same course. In each the court apparently overlooked the express provision of section 1062 that the remedy through declaratory relief is cumulative and not restrictive of any other remedy provided by law. Wollenberg v. Tonningsen, 8 Cal.App.2d 722, 48 P.2d 738; Gunn v. Giraudo, 48 Cal.App.2d 622, 120 P.2d

177. The ruling that the remedy should be denied in both cases because no question of public interest was involved is not controlling. Section 1061 provides that the court may refuse to grant the relief if not necessary or proper under all the circumstances. In view of the discretion here imposed in the trial court its determination will not be disturbed on appeal unless a clear abuse of that discretion is shown. Cal.Jur. 10 yr. Supp. Vol. 5, p. 109. In the two cases cited the relief was denied in the trial court and the affirmance of the judgments was in effect a determination that this discretion was not abused. Here the trial court, in the exercise of that discretion, determined that it was a proper case for declaratory relief and the public interest involved in the controversy is conceded.

[10, 11] To the second point the appellant cites Bayshore Sanitary Dist. v. San Mateo County, 48 Cal.App.2d 337, 119 P.2d 752; Irvine v. Sacramento, etc., Drainage Dist., 49 Cal.App.2d 707, 122 P.2d 320. In the first case it was held that the use of the term "person" in the code sections was too general to include the state or any of its political subdivisions citing Balthasar v. Pacific Electric Ry. Co., 187 Cal. 302, 202 P. 37, 19 A.L.R. 452, and Lossman v. City of Stockton, 6 Cal.App.2d 324, 44 P.2d 397. The second case merely followed on the authority of the former. No petition was filed in either case to transfer the cause to the supreme court, but within a year after the first decision the supreme court rejected these views and expressly overruled both cases in Hoyt v. Board of Civil Service Comm., 21 Cal.2d 399, 405, 132 P.2d 804, 806. It was there held that the rule of sovereign immunity applied only in the interpretation of statutes giving the right to sue, that the declaratory relief statute involved matters of practice and procedure only that: "Where governmental bodies are already subject to suit, however, it is clear that procedural statutes may be made applicable to such bodies without causing any interference with rights of sovereignty. Cf. Superior Oil Co. v. Superior Court, 6 Cal.2d 113, 118, 56 P.2d 950. If an acceptance of liability and subjection to suit on the part of a sovereign body is found elsewhere in the statutes of the state and the declaratory judgment procedure is not barred by the provisions of the waiver of immunity, we think it clear that a determination of the legal issue in an action for declaratory relief in no way constitutes an impairment of governmental sovereignty."

[12-14] Here the insurance commissioner is authorized to "prosecute and defend any and all suits and other legal proceedings." Insurance Code, sec. 1037 (f), St. 1939, p. 2633. The language generally used to waive the right of sovereign immunity as to cities and counties is that they may "sue and be sued." Deering's Gen. Laws 1937, Act 5233, sec. 19 et seq.; Pol.Code, sec. 4003; and see the numerous Municipal Charters. This language is of a kind with that noted in the Insurance Code. Furthermore it is settled law that an action will lie against a public officer, or a public agency, to compel the performance of an official duty, or to restrain the performance of an act not authorized by law. Such action does not offend the sovereign immunity principle. It was so held in Los Angeles County v. Riley, 20 Cal.2d 652, 662, 128 P.2d 537, 543, where the court said: "The rule is well established in this state that where the action is one simply to compel an officer to perform a duty expressly enjoined upon him by law, it may not be considered a suit against the state. 23 Cal. Jur. 583; Board of Directors v. Nye, 8 Cal.App. 527, 97 P. 208; Kingsbury v. Nye, 9 Cal.App. 574, 99 P. 985; U'Ren v. State Board of Control, 31 Cal.App. 6, 159 P. 615." For these reasons it must be held that the insurance commissioner is not immune from suit in matters pertaining to the exercise of his official duties and that the cumulative remedy for a declaratory judgment is a proper procedure.

[15] The argument that the respondent is engaged in the corporate practice of medicine is supported by citation of Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67; People ex rel. State Board of Medical Examiners v. Pacific Health Corporation, 12 Cal.2d 156, 82 P.2d 429, 119 A.L.R. 1284; Benjamin Franklin Life Assur. Co. v. Mitchell, 14 Cal.App.2d 654, 58 P.2d 984, and similar cases all holding that a corporation may not engage in the practice of such professions as law, medicine or dentistry. Respondent does not dispute the rule of the cases cited but contends that its practices are specially sanctioned by section 593a of the Civil Code enacted in 1941. Appellant expressly concedes that this new section was "intended to apply to respondent." This section reads:

"A nonprofit corporation may be formed under this article for the purposes of defraying or assuming the cost of professional services of licentiates under any chapter of Division 2 of the Business and Professions Code or of rendering any such services but it may not engage directly or indirectly in the performance of the corporate purposes or objects unless:

"(1) At least one-fourth of all licentiates of the particular profession become members;

"(2) Membership in the corporation and an opportunity to render professional services upon a uniform basis is available to all licensed members of the particular profession;

"(3) Voting by proxy and cumulative voting are prohibited; and

"(4) A certificate has been issued to the corporation by the particular professional board, whose licentiates have become members, finding compliance with the foregoing requirements.

"Any such nonprofit corporation shall be subject to supervision by the particular professional board under which its members are licensed and shall also be subject to the provisions of Section 605c of this code. This section, except as expressly permitted herein, does not authorize the formation of any corporation for the purpose of rendering the professional services regulated by Division 2 of the Business and Professions Code."

Section 605c referred to therein provides for supervision by the attorney general of the conduct of a non-profit corporation which holds property "subject to any public or charitable trust." It was stipulated that respondent held a certificate from the Board of Medical Examiners of full compliance with the section, and the trial court found that its operations brought it within the terms of section 605c.

Respondent relies upon the statement in People v. Pacific Health Corporation, supra [12 Cal.2d 156, 82 P.2d 431], that the rule against corporate practice of medicine did not apply to fraternal, religious, hospital, labor and similar benevolent organizations furnishing medical services to members; that the distinguishing feature was whether the corporation or association was organized for profit; that the activities of these nonprofit organizations were "not comparable to those of private corporations operated for profit and, since the principal evils attendant upon corporate practice of medicine spring from the conflict between the professional standards and obligations of the doctors and the profit motive of the corporation employer, it may well be concluded that the objections of policy do not apply to nonprofit institutions. This view almost seems implicit in the decisions of the courts and it certainly has been the assumption of the public authorities, which have, as far as we are advised, never molested these organizations." To the same effect are United States v. American Medical Ass'n, 72 App.D.C. 12, 110 F.2d 703, 714; and Group Health Ass'n v. Moor, D.C., 24 F.Supp. 445.

Appellant argues that section 593a cannot have the effect of validating the activities of respondent since it merely authorizes the incorporation for the purposes stated, whereas respondent was organized two years prior to the enactment. If this case involved prosecution for acts committed before the statute was passed there would be some merit in the argument. But it is concerned only with a declaration of the right of respondent to continue under the section free from the supervision of the appellant. Since it is conceded that the legislature intended the statute to apply to respondent it is a fair inference that the legislature had some knowledge of the practice and mode of operation of the respondent and hence that, if there were any uncertainty as to the rule of the cases cited, the legislative intent was to permit the respondent to continue in those activities under the terms of the code section.

[16] Finally it is argued that the respondent is engaged in the insurance business and hence subject to the supervision and control of the appellant. The respondent's reply takes two lines of argument. First, that its method of operations is not that of insurance. Second, that if it be such it is not subject to the supervision of the insurance commissioner.

Insurance is defined in section 22 of the Insurance Code as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." St.1935, p. 498. It is defined in 29 Am.Jur. p. 47 as "an agreement by which one person for a consideration promises to pay money or its equivalent, or to perform some act of value, to another on the destruction, death, loss, or injury of someone or something by specified perils." The appellant cites no author-

ity directly in point. His argument is that the obligation to the beneficiary members assumed by respondent looks like insurance and should be so interpreted. On the other hand the respondent argues that it is similar to a producer-consumer cooperative organization, that it does not indemnify or compensate for the cost of an illness or injury, that it does not assume any risk, that its professional members do not assume any risk, that the beneficiary members do not receive any indemnity or compensation. The respondent emphasizes that its obligation is that of an agent to collect and administer the funds, to pay its professional members upon the unit basis out of these funds only, but that the beneficiary members receive the professional services notwithstanding the condition of the treasury. The respondent denies the implication in appellant's brief that the beneficiary members must look to the pooled fund for indemnity against medical bills and emphasizes that they merely pay for such services on a periodic basis rather than in a lump sum.

As the operations of respondent are comparatively new there is little authority on the direct question whether these operations are to be classed as insurance. The decided cases favor the position of respondent. Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838, involved a portion of the San Francisco charter providing compulsory health service to all municipal employees paid by monthly pay roll deductions on all salaries to maintain a fund to cover medical, surgical and hospital care. Physicians eligible to render service were paid on the unit system similar to that used by the respondent. In an action brought to test the validity of the charter the state insurance commissioner appeared specially to raise the question whether the activities proposed were a form of insurance and as such subject to the state insurance code. The court rejected the contention saying that the Insurance Code dealt only with the private business of insurance.

In Commissioner of Bank and Insurance v. Community Health Service 129 N.J.L. 427, 30 A.2d 44, 45, the sole question was whether the corporation was engaged in the insurance business. It was incorporated to provide medical services to its subscribers. It made contracts with licensed physicians to render professional services for a stipulated compensation. The subscribers were entitled to the services whether or not they needed them. The corporation did not undertake to pay such debt as the subscribers might incur and did not indemnify them against any loss. The court there said: "Neither as between the corporation and the physician, nor as between the physician and the subscriber is the compensation or any other element of the arrangement between them affected by any contingency, hazard or risk." In holding that the business conducted by the corporation was not one of insurance the New Jersey court cited with approval State ex rel. Fishback v. Universal Service Agency, 87 Wash. 413, 151 P. 768, Ann.Cas.1916C, 1017; Sisters of Third Order of St. Francis v. Guillaume's Estate, 222 Ill.App. 543; and Stern v. Rosenthal, 71 Misc. 422, 128 N.Y.S. 711.

In Jordan v. Group Health Ass'n, 71 App. D.C. 38, 107 F.2d 239, a declaratory judgment was sought against the insurance commissioner of the District of Columbia to determine whether the activities of the Association were subject to the supervision of the commissioner. The Association was a non-profit corporation organized to provide without profit medical services, surgery and hospitalization for its members. Its membership was limited to civil service employees of the executive branch of the government and its general plan was similar to that provided in the San Francisco charter. In holding that the Association was not engaged in the insurance business the Circuit Court of Appeals for the District of Columbia had this to say: "Although Group Health's activities may be considered in one aspect as creating security against loss from illness or accident, more truly they constitute the quantity purchase of well-founded, continuous medical service by its members. Group Health is in fact and in function a consumer co-operative. The functions of such an organization are not identical with those of insurance or indemnity companies. The latter are concerned primarily, if not exclusively, with risk and the consequences of its descent, not with service, or its extension in kind, quantity or distribution; with the unusual occurrence, not the daily routine of living. Hazard is predominant. On the other hand, the cooperative is concerned principally with getting service rendered to its members and doing so at lower prices made possible by quantity purchasing and economies in operation. Its primary purpose is to reduce the cost rather than the

risk of medical care; to broaden the service to the individual in kind and quantity; to enlarge the number receiving it; to regularize it as an every-day incident of living, like purchasing food and clothing or oil and gas, rather than merely protecting against the financial loss caused by extraordinary and unusual occurrences, such as death, disaster at sea, fire and tornado. It is, in this instance, to take care of colds, ordinary aches and pains, minor ills and all the temporary bodily discomforts as well as the more serious and unusual illnesses. To summarize, the distinctive features of the cooperative are the rendering of service, its extension, the bringing of physician and patient together, the preventive features, the regularization of service as well as payment, the substantial reduction in cost by quantity purchasing, in short, getting the medical job done and paid for; not, except incidentally to these features, the indemnification for cost after the service is rendered. Except the last, these are not distinctive or generally characteristic of the insurance arrangement. There is, therefore, a substantial difference between contracting in this way for the rendering of service, even on the contingency that it be needed, and contracting merely to stand its cost when or after it is rendered." And again 71 App.D.C. at page 47, 107 F.2d at page 248: "But obviously it was not the purpose of the insurance statutes to regulate all arrangements for assumption or distribution of risk. That view would cause them to engulf practically all contracts, particularly conditional sales and contingent service agreements. The fallacy is in looking only at the risk element, to the exclusion of all others present or their subordination to it. The question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose." We find in that case the express admission 71 App. D.C. at page 47, 107 F.2d at page 248), "that the identical plan and service rendered here would not be 'insurance' or 'indemnity' if offered by an organization owned, operated and controlled by physicians. It would then be a contract 'for service on contingency', though the same element of risk and avoidance of its possible consequences would be present." Other authorities giving support to these views are State v. Universal Service Agency, 87 Wash. 413, 151 P. 768, Ann.Cas.1916C, 1017, supra; and Commissioner of Bank and Insurance v. Community Health Service, 129 N.J.L. 427, 30 A.2d 44.

There is no essential difference between the Group Health Association, the San Francisco Health Service, and California Physicians' Service in so far as the scheme of operations is concerned except that in the first two the administrative management is in a board selected by the beneficiary members, whereas in the latter it is in a board selected by the professional members. All are non-profit, semi-charitable organizations conducted for the primary purpose of affording necessary medical care to those of small income. None is organized to insure good health or freedom from disease. All primarily provide service as distinguished from indemnity. We are satisfied that upon the authorities cited it must be held that respondent is not engaged in the insurance business and is not subject to the supervision of the commissioner under the Insurance Code.

The judgment is modified by substituting for paragraph two thereof the following: "The objects and purposes set forth in the articles of incorporation of plaintiff, California Physicians' Service, and particularly in Article Two thereof, are lawful objects and purposes and the performance or undertaking by plaintiff of any or all of said objects in the manner set out in said written stipulation of facts dated June 16, 1941 does not and will not violate any of the provisions of the laws of the State of California relating to the business of insurance."

The judgment as modified is affirmed each party to bear its costs.

STURTEVANT, J., and DOOLING, J. pro tem., concur.

Hearing granted; TRAYNOR and SPENCE, JJ., not participating.

68 Cal.App.2d 20

POTASZ v. POTASZ.

Civ. 14727.

District Court of Appeal, Second District, Division 2, California.

Feb. 13, 1945.

Hearing Denied April 12, 1945.

1. Bastards ⇐65

Evidence sustained finding for defendant in proceeding to have defendant declared the father of minor plaintiff.

2. Bastards ⇐92

In a proceeding to establish parentage, the trier of facts has the duty to determine the fact of parentage from all the evidence, and a finding on such fact supported by substantial evidence will not be disturbed on appeal.

3. Appeal and error ⇐989

Conflicting and contradictory testimony not believed by the trial judge must be disregarded on appeal.

4. Bastards ⇐73

In proceeding to have defendant declared the father of minor child, a new trial on ground of newly discovered evidence was properly denied plaintiff, where the alleged new evidence was merely cumulative, and plaintiff failed to show that she could not have produced such evidence at time of the trial.

5. Bastards ⇐92

In action to have defendant declared the father of a minor child, judgment for defendant reciting that minor plaintiff was in court "in person" at time of the trial was not prejudicially erroneous merely because the minor plaintiff did not appear in court but was represented by guardian ad litem.

6. Judgment ⇐525

Recitals which precede a judgment, even though erroneous, do not affect the validity of the judgment itself.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Thomas Ahlborn Potasz, a minor, by Mable Ahlborn, his guardian ad litem, against Thomas M. Potasz to have defendant declared the father of the minor plaintiff. From a judgment for defendant, plaintiff appeals.

Affirmed.

McLaughlin & McGinley, of Los Angeles, for appellant.

Joe Wapner and Isador Gralia, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in a proceeding to have defendant declared the father of plaintiff, Thomas Ahlborn Potasz, plaintiff appeals.

The evidence being viewed in the light most favorable to defendant (respondent), and pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the material facts are these:

On September 8th and 9th, 1941, defendant had sexual relations with Mable Ahlborn, mother of the plaintiff. On both occasions defendant used contraceptives. At the time defendant was impotent. Plaintiff was born on April 17, 1942.

There are three questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Was there substantial evidence to sustain the trial court's findings:*

a) "That it is not true Plaintiff, Thomas Ahlborn Potasz, a minor, is the illegitimate son or legitimate son of defendant, Thomas M. Potasz, and it is further untrue that defendant is the father of said Plaintiff, Thomas Ahlborn Potasz."

b) "The Court further finds that it is untrue that Thomas Ahlborn Potasz was conceived as the result of one or a series of acts of sexual intercourse indulged in by defendant, Thomas M. Potasz and Mable Ahlborn, at a time when neither defendant or said Mable Ahlborn were married, or at any other time, or at all."

[1, 2] This question must be answered in the affirmative and is governed by this rule: In a proceeding to establish parentage it is the duty of the trier of fact to determine the fact of parentage from all the evidence, and a finding on such fact supported by substantial evidence will not be disturbed on appeal. Arais v. Kalensnikoff, 10 Cal.2d 428, 434, 74 P.2d 1043, 115 A.L.R. 163.

In the present case defendant testified that he attempted sexual relations with Miss Ahlborn on two occasions only, to wit, the night of September 8th and the morning of September 9th, 1941; that on such occasions he used rubber contraceptives and and he was unable to complete the act of penetration on either occasion because he lost his erection. He also testified that he was impotent due to an injury he had received when he was a child.

A pathologist, Dr. George B. Setzler, made an examination of defendant's semen and testified that in his opinion it was extremely doubtful if defendant in 1941 could have impregnated a female.

[3] The foregoing testimony constituted substantial evidence to sustain the findings of the trial court set forth above. It would not serve any useful purpose to set forth the testimony of Miss Ahlborn which contradicts defendant's testimony. As such conflicting and contradictory testimony was not believed by the trial judge, it must be disregarded by this court.

Second: *Did the trial court commit prejudicial error in denying plaintiff's motion for a new trial?*

[4] This question must be answered in the negative. On plaintiff's motion for a new trial there were presented a number of affidavits containing evidence which was either cumulative of evidence received at the trial or which could have been produced at the time of the trial.

The trial court's ruling was correct in view of the established rule that a new trial will not be granted on the ground of newly discovered evidence where (1) the evidence is merely cumulative of the evidence received during the trial, (Van Der Veer v. Winegard, 41 Cal.App.2d 518, 521, 107 P.2d 97) or (2) the moving party fails to show that he could not have produced his alleged newly discovered evidence at the time of the trial. Joseph v. Vogt, 35 Cal.App.2d 439, 442, 95 P.2d 947; In re Estate of Hunt, 33 Cal.App.2d 358, 361, 91 P.2d 609.

[5, 6] Third: *Was the judgment prejudicially erroneous in reciting that plaintiff was present in court "in person" at the time of the trial when in fact plaintiff did not appear in court at the time of the trial but was represented by his guardian ad litem?*

This question must be answered in the negative. Recitals which precede a judgment, even though erroneous, do not affect the validity of the judgment itself. Green v. Swift, 50 Cal. 454, 455; Jacobs v. Norwich Union, etc., 4 Cal.App.2d 1, 4, 40 P. 2d 899.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.



67 Cal.App.2d 855

BROWNE v. FLETCHER AVIATION CORPORATION.

Civ. 14500.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1945.

Rehearing Denied March 5, 1945.

Hearing Denied April 5, 1945.

1. Contracts ⇐245(2)

Preliminary proposals in negotiations for contract are merged in parties' written agreement and cannot be given effect to add to, alter, or modify, plain terms thereof.

2. Contracts ⇐175(3)

Testimony of aviation corporation's officers as to test pilot's agreements before execution of written contract for test piloting of gliders manufactured by corporation for Army Air Corps and settlement agreement between corporation and Air Corps for reduction of their contract price did not show that consideration for testing manually controlled and radio controlled gliders was severable.

3. Evidence ⇐448

Testimony of aviation corporation's officer as to oral understanding, during negotiations with test pilot for written contract to test gliders manufactured by corporation for Army Air Corps, that pilot would have to fly ten hours to earn consideration specified in contract, was incompetent to alter terms of contract, which clearly provided for pilot's rendition of testing services for single consideration, not on hourly basis.

4. Contracts ⇐190, 280(1)

A written contract, prepared by aviation corporation and providing that other party thereto should supply all test piloting necessary under corporation's contract to manufacture gliders for Army Air Corps, required such party to do only necessary test flying required by Air Corps contract, which stipulated that tests should not exceed ten flight hours, so that performance was complete when Air Corps declared three test flights of one glider for three hours sufficient.

5. Contracts ⇐309(1)

Extreme hardship, justifying relief from contractual obligation where performance thereof has become impossible or purpose of contract has been frustrated, cannot exist where party seeking relief has received full consideration due him, nor unless circumstances nearly or completely destroy purpose of both parties.

6. Contracts ⇐309(1)

An aviation corporation, completing its contract with Army Air Corps for manufacture, sale, and delivery of gliders, one of which was tested by test pilot under contract with corporation before Air Corps notified corporation that further tests would not be required, could not defeat pilot's recovery of entire consideration specified in testing contract on ground of impossibility of further performance thereof, though tests lasted for only three hours, instead of maximum period of ten hours specified in Air Corps contract.

7. Contracts ⇐309(1)

Where contract for test piloting of gliders manufactured by aviation corporation for Army Air Corps gave corporation no right to deduct any sum from pilot's specified compensation if Air Corps was satisfied with less than maximum ten hours of testing specified in its contract, corporation waived such right, and pilot's recovery of full contractual compensation for making test flights of single glider for only three hours before Air Corps notified corporation that no further tests would be required could not be defeated on ground that such modification of Air Corps contract frustrated object of test piloting contract and excused corporation's further performance thereof.

8. Contracts ⇐309(1)

A promisor, seeking to excuse himself from performance of his contractual obligations on ground of frustration of purpose of contract by third party's act, must prove that risk of frustrating event was not reasonably foreseeable.

9. Contracts ⇐229(1)

A provision of contract between test pilot and aviation corporation for testing of gliders, manufactured by corporation for Army Air Corps, that pilot should be paid on hourly basis for work done if contract were terminated by parties' consent, did not limit pilot's recovery of compensation to value of his services for number of hours actually flown in testing only one glider before Air Corps acknowledged satisfaction of its contract, thereby rendering further services by pilot unnecessary, as such acknowledgment was not mutual termination of Air Corps contract by parties thereto.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by La Verne W. Browne against the Fletcher Aviation Corporation for a balance due under a contract for testing a glider manufactured by defendant for the Army Air Corps, in which defendant filed a cross-complaint for an amount claimed to have been paid plaintiff in excess of the amount earned by him. Judgment for plaintiff, and defendant appeals.

Affirmed.

Albert Launer, of Fullerton, Cosgrove & O'Neil, of Los Angeles, and Leonard A. Diether, of Pasadena, for appellant.

Dixon & Howell, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff, a test pilot, brought suit for $2,500 against defendant, a manufacturer of aircraft, as the balance of an agreed price for the testing of a glider which defendant was manufacturing for the Air Corps of the War Department. Plaintiff upon full performance of his contract was to receive $5,000 for his services, he was paid $2,500, and was sued by cross-com plaint for the sum of $1,000 which defendant claimed to have paid him in excess of the amount he had earned. Judgment was in favor of plaintiff on his complaint and the cross-complaint, and defendant appeals. Defendant's contract with the War Department called for ten gliders to be furnished, at $8,725 each, and a glider traile

at $1,500, or a total of $88,750. The gliders and the trailer were delivered and accepted. In negotiations with the War Department following completion of the contract, defendant agreed to accept a reduction of $2,500 in the contract price and was paid $86,250.

Defendant's contract with the Air Corps called for testing only the first glider and provided in part as follows: "Reference Paragraph 7, after acceptance of the first Glider, the Contractor shall perform flight tests under the supervision of the procuring agency. These tests shall be performed at Muroc Bombing Range, Muroc, California and shall include the checking of the towing, climbing, and gliding characteristics as well as the functioning of the Government-furnished Television, Radio and Servo Equipment installed therein. The Air Corps shall provide the towing airplane and pilot, tow cables, releasing devises [devices], and personnel to service the Television, Radio and Servo Equipment. The tests shall not exceed ten (10) flight hours and shall be conducted at the risk of the procuring agency notwithstanding the provisions of paragraph F-17A of A.C. Specifications R-1800-D dated 12-1-38 and amendment No. 6, dated 11-1-41."

The contract between plaintiff and defendant, in its material provisions, reads as follows: "For the sum of five thousand ($5,000.00) dollars, I, La Verne W. Browne, agree to supply all the necessary test piloting called for under United States Army Air Force Contract w 535 ac 26734. These tests shall be performed at Muroc Bombing Range, Muroc, California, and shall include the checking of the towing, climbing, and gliding characteristics as well as the functioning of the Government furnished Television, Radio and Servo Equipment installed therein. The tests shall not exceed ten (10) flight hours. * * * This agreement may be cancelled by mutual agreement of the parties hereto and it is further agreed that on payment of monies due for test flying on a pro rata basis (ratio of hours flown to total ten (10) flight hours) at the time of termination will complete the obligation of both parties. Fletcher Aviation Corporation agrees to pay the five thousand dollars in the following manner: Two thousand five-hundred ($2,500.00) dollars prior to the flight tests and the remaining two thousand five-hundred ($2,500.00) dollars at the completion of this contract."

The evidence disclosed that if the glider should be flown before the radio equipment was installed, it would be controlled manually by the pilot. The radio equipment was for control of the glider by someone who would operate a radio control from another plane or from the ground, although a pilot would be aboard the glider and would be able to exercise manual control if necessary. Plaintiff made three manually controlled test flights under the supervision of the Army Air Corps on April 26 and 27, 1942, without any of the special equipment having been installed, a total of three hours being required for such flights. He was at all times ready, able and willing to make further test flights, as defendant was to have them made, but the Air Corps furnished no television, radio or Servo equipment, requested no further tests, and on January 5, 1943, after it had accepted delivery of the gliders and trailer, notified defendant that no other or further flight tests would be requested, and none were requested, of either defendant or plaintiff.

Defendant advanced three theories of nonliability: (1) That plaintiff did not fully perform his obligation; (2) that the modification of the government contract omitting further flight tests made further performance of the Browne contract impossible, and (3) said modification frustrated the object and purpose of the Browne contract and excused further performance of that contract on the part of defendant.

In the argument of its first point defendant challenges the sufficiency of the evidence to support the court's finding that plaintiff fully performed the contract on his part. In determining whether the evidence justified this finding, we must first examine the contract to see what services plaintiff agreed to perform. Defendant's contention is twofold: (a) That plaintiff's services could not have been completed without the making of two kinds of tests, manual and radio controlled, and (b) that they could not have been completed without test flying the glider for a full ten hours. Plaintiff's contention is that his contract was completed when the Air Corps accepted as sufficient the test flights that had already been made and waived the right to require further testing.

[1, 2] Upon the trial testimony of defendant's officers was introduced to the effect that in the negotiations which preced-

ed the execution of the contract, plaintiff agreed to test the glider under manual control for $2,500, and raised his price to $5,000 when it was learned that the Air Corps contract would call for testing under radio control, and one of them testified that it was understood that one type of test would entail approximately equal time with the other. Plaintiff testified that there was no such agreement or understanding. Defendant insists that the testimony of its officers was introduced for the purpose of proving that the contract could not be performed by plaintiff without tests being made of the special equipment. At the same time it disclaims a purpose to prove that plaintiff was to receive $2,500 for the manual flying and $2,500 for the radio controlled flying. When settlement was made with the Air Corps, defendant's intention apparently was to withhold $2,500 from plaintiff's compensation because he had not made the radio controlled tests, and it is clear from the testimony of defendant's officers and from their conduct as well, that when they undertook to allocate one-half of plaintiff's compensation to each type of testing they intended to rely upon the alleged oral negotiations, and not upon any provision of the written agreement. Whatever the preliminary proposals may have been, they were of course merged in the written agreement and could not be given effect to add to, alter or modify its plain terms. At the time of trial the claim was made that plaintiff was working upon an hourly basis and had earned only $1,500, but defendant, nevertheless, maintains that the fact that a deduction was agreed to in the settlement with the Air Corps is corroborative evidence that plaintiff's contract was not fully performed. Defendant says in its reply brief: "The plaintiff's obligation to flight test the glider under the Browne Contract was the same as the defendant's obligation under the Government Contract, and the fact that the defendant and the Army Air Corps agreed to such a reduction in the contract price is corroborative evidence that the plaintiff did not fully perform the flight tests called for under the terms of the Browne Contract." Plaintiff was not a party to that settlement and was not consulted about it. The construction which the Air Corps placed upon the contract and which was acquiesced in by defendant, or vice versa, is entitled to no consideration in an analysis of the contract. In making settlement with defendant, the Air Corps sought a reduction of $10,000 in the contract price on account of the elimination of some of the testing and of an additional $8,000 because defendant was not required to install the special equipment. Defendant's consent to a deduction of $2,500 in order to compromise the claim of the Air Corps for $18,000 would appear to account for its resistance of plaintiff's claim, but the contract cannot, of course, be rewritten to enable defendant to recoup a loss which it voluntarily accepted. By the clear terms of plaintiff's contract his services were to be rendered for a single consideration of $5,000. And if the court had believed the testimony of defendant's officers as to the oral negotiations, there was nothing in that testimony and nothing in the circumstances of the settlement with the Air Corps which would have warranted a construction of the written agreement under which the consideration would be severable.

[3] Again, defendant contends that plaintiff was required to make test flights for the full ten hours which the Air Corps could have insisted upon. One of defendant's officers testified, without objection, that it was understood in the negotiations that plaintiff would have to fly ten hours in order to earn $5,000, and it is upon this theory that defendant seeks return of $1,000 of the $2,500 already paid. The evidence of the alleged oral negotiations was incompetent to alter the terms of the written contract and the writing does not admit of the construction that plaintiff was to be paid upon an hourly basis. More is said later of this contention of defendant in discussing the cross-complaint.

[4] Plaintiff's construction of the contract is that he was only required to do the "necessary" test flying required by the Air Corps contract. In this he is correct, as the agreement provides that he was required "to supply all the *necessary* test piloting called for under United States Army Air Forces contract w 535 ac 26734." (Italics added.) A proper construction of defendant's contract with the Air Corps is that tests were to be made for ten hours, or for such lesser time as would be satisfactory to the Air Corps. No specific tests were stipulated in either contract. The uncertainty as to the nature and the extent of the tests that would be required was evidenced by the stipulation that they should not exceed ten flight hours. Plaintiff's con-

tract was prepared by defendant and the use of the qualifying word "necessary" clearly implied that the parties had in mind that full ten hours' testing might not be necessary. The Air Corps, having supervision of the tests, could, at any stage thereof, accept those already made as performance by defendant of its contract and could waive any further tests. Performance by defendant of its contract with the Air Corps, and performance of plaintiff's contract as well, was complete when the Air Corps declared the tests to be sufficient, and it is wholly immaterial that this occurred before any of the special equipment had been installed for testing. The finding that plaintiff fully performed his services under the contract was justified by the evidence.

[5, 6] Defendant's next points, namely, alleged impossibility of further performance, and alleged frustration of the object and purpose of both parties to plaintiff's contract, are discussed together in defendant's brief and we will so consider them. The principles under which relief may be granted where further performance has become impossible and those which apply where some occurrence that was not reasonably foreseeable has defeated the object and purpose of a contract were fully considered and discussed in the recent cases of Lloyd v. Murphy, Cal.Sup. 1944, 153 P.2d 47, and Mitchell v. Ceazan Tires, Ltd., Cal.Sup.1944, 153 P.2d 53. They need not be repeated or discussed at length by us, for there are obvious reasons why they cannot be successfully invoked by defendant. One reason is that plaintiff fully performed the contract upon his part. A case of extreme hardship which will justify relief where performance has become impossible, or the purpose of the parties in entering into the contract has been frustrated, cannot exist where the party seeking relief has received the full consideration due him, nor unless the circumstances nearly or quite completely destroy the purpose both parties to the bargain had in mind. Williston on Contracts, 1938 Ed., Vol. Six, p. 5481. Defendant received full value for the sum it agreed to pay plaintiff. There was no failure of consideration in that respect. The glider was tested, defendant's contract with the Air Corps was completed, the ten gliders and the trailer were delivered, accepted and paid for in an amount which was satisfactory to defendant. To be sure, the tests lasted for only three hours, but further tests would have been of no advantage or value to defendant. There is no impossibility of performance where one party has rendered services as agreed and nothing remains for the other party to do but pay the agreed compensation.

[7, 8] When the Air Corps accepted the tests as sufficient to furnish all of the information it required, the purpose of the employment contract was fully accomplished. Another answer to the claim of frustration is that the contract did not give defendant the right to deduct any sum from the amount of plaintiff's compensation in the event the Air Corps was satisfied with less than the maximum amount of testing, and it must be deemed to have waived that right. Defendant's argument is essentially the following: It was expected that the Air Corps would require both manual and radio controlled tests for the full ten hours and that plaintiff therefore would be required to make such tests; that the waiver of some of the tests was unexpected and beyond the control of defendant, and that plaintiff, having been relieved of his obligation to make those tests, should not be paid the full sum he would have been entitled to if he had made them. It may be that the Air Corps was entitled to credit under its contract with defendant in case it did not require full ten hours of testing. The entire contract was not received in evidence and we do not know whether there was such a provision, but it is a common one in construction contracts. If it was not in the Air Corps contract, the waiver of some of the tests by the Air Corps would not have entitled it to a reduction in the contract price, but even then the wording of the contract was a plain warning to defendant that ten hours' testing might not be required. A provision for credit to be given the Air Corps in that event would only have been an additional warning. Defendant contracted for plaintiff's services at a flat price, knowing that the maximum services contracted for might not be required. No attempt has been made to reform the contract upon equitable grounds, and no such grounds exist. It cannot be reformed through the use of the doctrine of commercial frustration. Even where further performance by the party seeking relief will result in extreme hardship and the purpose to be accomplished by the con-

tract has been defeated, which conditions do not exist here, he must bear the loss unless he succeeds in proving that the frustrating event was not reasonably foreseeable. As stated in Lloyd v. Murphy, supra, 153 P.2d 47, at page 50: "The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable * * *." The special equipment was no part of the glider; it was optional with the Air Corps whether it would be furnished and installed. Defendant had been making planes for the Army Air Corps and should have known that the Government's programs, plans and requirements in the matter of the production of aircraft for war purposes are not fixed and inflexible. The truth of this fact should have been the more obvious where the contemplated tests were in advanced and experimental fields. We cannot see that defendant proved that the ultimate decisions of the Air Corps were not reasonably foreseeable.

[9] One additional argument is made by defendant in support of its demand under the cross-complaint. Its agreement with plaintiff provided for payment upon an hourly basis for the work that had been done in case of termination of the contract by consent of the parties. It is argued that the value of plaintiff's services was fixed by this provision and that plaintiff earned only $1,500 at the hourly rate and was overpaid to the extent of $1,000, which he should return. A sufficient answer is that there was no termination of the agreement by mutual consent. The action of the Air Corps in acknowledging satisfaction of its contract with defendant, which rendered unnecessary further services by plaintiff, was in no sense a mutual termination of plaintiff's contract by the parties thereto. If defendant had prevailed upon its cross-complaint, it would have received at least $2,500 from the Air Corps, as its cost of test-flying the glider, and would have recovered $1,000 of that sum from plaintiff upon the theory that he had been overpaid.

We are of the opinion that the judgment is a correct and just determination of the case and that it should be affirmed.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

68 Cal.App.2d 86

In re DEAN'S ESTATE.

LINDSAY v. DEAN.

Civ. 14513

District Court of Appeal, Second District, Division 3, California.

Feb. 16, 1945.

Hearing Denied April 16, 1945.

1. Joint tenancy ⇐3

A joint tenancy interest must be created in accordance with provisions of Civil Code requiring express declaration that joint tenancy is being created, except that a joint tenancy in a bank deposit may be created also under provisions of Bank Act. Civ.Code, § 683.

2. Joint tenancy ⇐3

A provision of signature card, signed by husband and wife so that husband might have access to safe deposit box, stating that survivor should be sole renter of box with exclusive right of access thereto and possession of contents thereof, did not create a joint tenancy as to contents of box. Civ.Code, §§ 683, 686.

3. Joint tenancy ⇐3

The words "joint tenants", at top of signature card signed by husband and wife obtaining safe deposit box followed by words "one signature required—right of survivorship", did not amount to an express declaration that contents of box were to be held in joint tenancy and did not create joint tenancy as to contents thereof. Civ.Code §§ 683, 686.

4. Joint tenancy ⇐3

The heading of signature card which bore words "joint tenants" followed by words "one signature required—right of survivorship" was inconsistent with language in body of writing stating that survivor should be sole renter of safe deposit box with exclusive right of access thereto and possession of contents thereof, and, taken as a whole, language of card did not establish intention of parties to create a joint tenancy in ownership of contents of box. Civ.Code, §§ 683, 686.

5. Joint tenancy ⇐3

Evidence that decedent while seriously ill in sister's absence signed with her husband a signature card in order that husband might have access to safe deposit box held in names of decedent and sister, that

husband carried out decedent's instructions concerning contents of box, and that husband after decedent's death swore to inventory of estate including contents of box, sustained finding that decedent did not transfer contents of box to herself and husband as joint tenants, but that transfer was for convenience only during decedent's illness. Civ.Code, §§ 683, 686.

6. Evidence ⇐461(1)

Where signature card signed by decedent and her husband to enable husband to obtain access to safe deposit box held in names of decedent and her sister was ambiguous as to intent to create a joint tenancy, court properly received parol and documentary evidence relating to circumstances to determine decedent's intention in signing card. Civ.Code, §§ 683, 686.

7. Gifts ⇐49(3)

Evidence relating to action of decedent in signing signature card to enable husband to obtain access to safe deposit box held in names of decedent and her sister, and to signing of letter authorizing transfer of safe deposit box to husband, taken in connection with subsequent acts of decedent in giving some of property in box to other persons, was insufficient to establish gift to husband of contents of box.

8. Executors and administrators ⇐59

Evidence that decedent while seriously ill signed with her husband a signature card to enable husband to obtain access to safe deposit box to which decedent and her sister had joint access, that husband complied with decedent's request concerning contents of box, and that husband, after decedent's death, while acting as executor listed as property of estate securities which had been in box, and made no claim of ownership of contents of box until he had lost contest of decedent's will, sustained finding that listing of contents of box in inventory was not through inadvertence or misunderstanding.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Proceeding in the matter of the estate of Martha Dean, also known as Martha Metzger Dean, wherein Dr. Lloyd E. Dean filed objections to the account of Virginia H. Lindsay, executrix. From an adverse judgment, Dr. Lloyd E. Dean appeals.

Judgment affirmed.

See also 62 Cal.App.2d 418, 144 P.2d 849.

Sherman & Sherman and Glenn M. Still, all of Los Angeles, for appellant.

A. W. Lane and M. E. Lane, both of Glendale, for respondent.

PARKER WOOD, Justice.

This is an appeal from a judgment that appellant was not the owner of the contents of a safe deposit box, which he alleged he owned by reason of a joint tenancy agreement with the decedent.

Lloyd E. Dean, the appellant, and Martha Dean, the decedent, were married in 1923. In 1931 Mrs. Dean rented a safe deposit box in a bank, and the "signature card," purporting to state that the box was held in joint tenancy, was signed by Mrs. Dean and her sister, Virginia H. Lindsay, who resided in the State of New York. Separate property of Mrs. Dean which included stocks, bonds, promissory notes, and jewelry, was placed in the box. In 1933 that box was surrendered, and another box in the same bank was rented by Mrs. Dean. Another signature card, purporting to state that the box was held in joint tenancy, was signed by her and her sister, and the property was transferred to the new box. Mrs. Dean went to a hospital for medical treatment a few days before January 19, 1942, and her physician told her that she could not get well. On January 19, 1942, she desired to see some of the things that were in the box, but being very ill she could not go to the bank, and her sister, who had joint access to the box, had not arrived from New York. On that day, January 19th, she requested appellant to bring certain things from the box to her, and she signed a letter, written by appellant and addressed to the bank, which stated: "I hereby authorize you and request that you turn over to my husband Dr. L. E. Dean the long brown envelope marked 'F. H. A.' containing Fidelity Building & Loan book and other papers, and any or all other contents as requested." He presented the letter to the bank on that day, and the bank told him that it could not comply with the request "in that way," that "they had certain forms, certain ways of doing things, and it would probably have to be done that way." The bank gave him a card and said further "if she wanted to have it transferred, or have it put in joint tenancy, then I [he] could enter the box."

He then returned to the hospital and told Mrs. Dean that the bank "could not grant her request in that letter, in that way," that if "she wanted to make a joint tenancy card, I [he] could enter the box and get whatever I [he] wanted to, or whatever she wanted, out of it." She and appellant then, on January 19, 1942, signed the card which he had brought from the bank, and he thereupon delivered it to the bank and opened the box and took the Federal Savings & Loan pass book to her. He had never been authorized to open that box before that time. That card signed by them was in substance as follows:

"Joint Tenants (One signature required—Right of Survivorship)

"Bank of America National Trust and Savings Association

"Date—1-19-1942

"Safe Deposit Box No. 2758

"Subject to the conditions and regulations printed on the back of the receipt for rent of above numbered safe deposit box * * * the undersigned jointly and severally hereby further *agree* with said bank and with each other *as follows*:

"(1) That right of access to said box and the contents thereof and to remove all or any part of said contents and/or surrender of said box shall be had by either of us without consent of or notice to the other of us * * *;

"(2) That in the event of the death of any person entitled at any time to access of said box, the survivor(s) will notify said bank at once * * * and, in the absence of such notice, the bank shall be entitled * * * to act as if such decedent were alive; further, that *the survivor(s) will and shall for every purpose be the sole renter(s) of said box, with the exclusive right of access thereto and possession of the contents thereof;*

"(3) That we will indemnify the bank against all loss and liability * * * by reason of its reliance upon any of the conditions * * * contained herein * * * including the bank's permitting access to said box * * * after the death of any person entitled to access * * *;

"(4) That we will hold you free from any claim on the part of either of us because of any use or disposition at any time by either * * * of us of any of the contents of said * * * box;

"(5) That the bank is authorized to charge the rent * * *

"(6) That this agreement and the conditions * * * on said receipt * * * are binding on our respective heirs * * *

"We hereby acknowledge delivery to us of the aforesaid receipt for rent and of two keys to said box.

"Mrs. Martha Dean
"Dr. L. E. Dean

"Witness: R. McComb"

(Italics added.)

On January 20th she signed another letter to the bank, written by appellant, which stated: "I hereby request and authorize you to transfer my safety deposit box number 2758 from my name and that of my sister, Mrs. J. D. Lindsay, to that of the bearer of this note—my husband, Dr. L. E. Dean." He then presented that letter to the bank, and on that day, January 20th, an "individual" signature card was signed by him, and the safe deposit box was transferred to the name of appellant only. Thereafter and until the death of Mrs. Dean on January 30, 1942, appellant opened the box on 4 different days at the request of Mrs. Dean, and took therefrom and delivered to her the jewelry, certain bonds, and a note for $800 payable to Mrs. Dean which had been signed by her sister, Mrs. Lindsay. Mrs. Dean gave the jewelry and the note to her sister, and told appellant to return the bonds to the box, except one bond which she thought should be sold, and as to that one she told him to keep it "in his possession." When she gave the note to her sister, Mrs. Dean signed on the back of it under writing placed thereon by appellant "transferring it into the name" of her sister, and then "handed" the note to her.

Appellant and Mrs. Lindsay were appointed executor and executrix, respectively, of Mrs. Dean's will. Both of them signed and swore to the inventory of the estate on April 7, 1942, which included the contents of the safe deposit box. On May 13, 1942, in a petition for authority to exchange securities they listed, as property of the estate, the securities which had been in the safe deposit box. Mrs. Lindsay, as executrix, filed a first account current and petition for fees on June 9, 1943. On June 25, 1943, appellant filed objections to the

account, and alleged that the contents of the safe deposit box, listed in the inventory as assets of the estate of the approximate value of $12,000, were his sole and separate property ever since Mrs. Dean transferred the safe deposit box to the names of herself and appellant as alleged joint tenants. He alleged further that through inadvertence and misunderstanding he joined in listing the contents of the box in the inventory.

The court found that the property listed in the inventory was the separate property of decedent and that none of it was owned by appellant; that decedent did not transfer the contents of the safe deposit box to herself and appellant as joint tenants; that said transfer was for the purpose of convenience only of decedent while she was in the hospital and that said box and contents were transferred to the possession of appellant as agent only and for the benefit of decedent; and that the listing of said contents in the inventory was not through inadvertence or misunderstanding of appellant.

[1] Appellant contends that the signature card signed by him and decedent discloses there could be only one "true intention in the minds of the parties in signing such a card and that is that it is intended to create a joint tenancy in said box and its contents with the right of survivorship." A joint tenancy interest must be created in accordance with the provisions of Section 683 of the Civil Code, except that a joint tenancy in a bank deposit may be created also under the provisions of the Bank Act. A bank deposit is not involved herein. Said Section 683 provides: "A joint interest is one owned by two or more persons in equal shares, by a title created by a single * * * transfer, *when expressly declared in the* * * * *transfer to be a joint tenancy,* or by transfer from a sole owner to himself and others * * * *when expressly declared in the transfer to be a joint tenancy* * * *." (Italics added.) Section 686 of the Civil Code provides: "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership * * * or *unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three,* or unless acquired as community property." (Italics added.) In Dalton v. Keers, 1931, 213 Cal. 204, 2 P.2d 355, wherein the question was whether real property was held in joint tenancy, the court said at page 207 of 213 Cal., at page 357 of 2 P.2d: "It is clear that the contract now under consideration did not create a joint tenancy * * *. This is true, not because of the use of the disjunctive, but by reason of the fact that *the instrument itself did not so declare.*" (Italics added.) It was said further therein at page 208 of 213 Cal., at page 357 of 2 P.2d: "In any event the interest, if any, which the purchasers acquired under the contract of purchase was not a joint tenancy, under the express language of sections 683 and 686 of the Civil Code * * *."

[2] A question therefore arises as to whether it was expressly declared on the signature card, above set forth and under which appellant asserts ownership, that the property was to be held in joint tenancy. The words "Joint Tenants" appear at the top of the card as a caption. Below the caption, that is, in the body of the writing on the card wherein the signers recite that they agree "as follows" to certain specific matters, the words "joint tenants" or "joint tenancy" were not used, and no express declaration was made in the body of the writing that the title to the property was to be held jointly or in any manner, or that the survivor should be the owner of the property. There is a declaration, however, in the body of the writing that the survivor shall be the sole renter of the box "with the exclusive right of access thereto and possession of the contents thereof." Appellant's contention that said last mentioned provision shows the intention to establish ownership cannot be sustained. That provision relates to the status of the survivor in connection with the rental of and access to the box and to his status in regard to possession of the contents. Neither the word "title" nor the word "ownership" is used in that provision or used at all on the card. Said provision is a part of a paragraph of the writing which relates to absolving the bank from liability for the acts of the survivor in removing property from the box, and since the right of access to the box and to possession of the contents by the survivor would afford such protection to the bank, it was not necessary, insofar as the bank was concerned, to include in the printed form a provision as to the title to or the ownership of the contents of the box. It appears from the whole context of that

paragraph that the provision concerning access to the box and possession of its contents was made for the protection of the bank and was not intended to be, and was not, a declaration as to title or ownership of the contents of the box. The body of the writing therefore did not expressly declare that the contents of the box should be held in joint tenancy. (The rent receipt referred to on the card was not offered or received in evidence.)

[3] At the top of the card, preceding the portion of the printed form which has been referred to herein as the body of the writing, the words "Joint Tenants," in capital letters 1/16 of an inch in height, appear as a caption or headline. In parentheses in the same line with those words are the following words: "One signature required —Right of survivorship." That caption and those words in parentheses did not amount to an express declaration that the contents of the box were to be held in joint tenancy. It cannot be determined from the caption and those words in parentheses what, if anything, was to be held in joint tenancy.

[4] It therefore appears that the caption and the body of the writing are inconsistent with each other. The caption refers in general language to a joint tenancy, whereas, the body of the writing, which is a specific statement of the agreement, does not mention a joint tenancy at all. Considering the caption and the body of the writing together and as a whole, as appellant asserts should be done in order to ascertain the "true intention in the minds of the parties," it appears that it was not expressly declared on the signature card that the property in the box was to be held in joint tenancy; and it appears further that the writing was uncertain and ambiguous as to whether it was the intention of the parties to create a joint tenancy in the ownership of the contents of the box or to become co-renters with the right of joint access to the box and to possession of the contents.

In the case of Security-First Nat. Bank v. Stack, 1939, 32 Cal.App.2d 586, 90 P.2d 337, which involved the ownership of the contents of a safe deposit box under an alleged joint tenancy, the material provision in the body of the signature card therein is identical with a provision on the card herein. That provision was (32 Cal. App.2d at page 591, 90 P.2d at page 340): "'Upon the death of either of us, the survivor is and shall for every purpose be the sole renter of said box, with the exclusive right of access thereto and possession of the contents thereof.'" The appellant therein contended that the provision created a joint tenancy in the contents of the box. The court said (32 Cal.App.2d at page 591, 90 P.2d at page 340): "Such contention may be disposed of briefly with the observation that by the terms of the rental agreement the survivor acquired merely access to the box and possession of the contents. The title to the contents manifestly cannot be affected by such phraseology, under the circumstances here presented." It should be noted further that the caption of that card, as shown by the reporter's transcript therein (p. 176), conformed with the subject matter of that provision, in that the caption was: "Co-renters Agreement (survivor to have exclusive right of access)." Under the interpretation of that provision in the Stack case, supra, regarding access to the box, which provision is identical with the provision on the card herein regarding access to the box, it appears that the caption on the card herein, "Joint Tenants," etc., does not conform with the subject matter in the body of the card herein.

Appellant relies upon In re Estate of Gaines, 1940, 15 Cal.2d 255, 100 P.2d 1055, wherein it was held that the property in a safe deposit box was held in joint tenancy. That case is distinguishable from the present case, in that, the signature card therein was not uncertain or ambiguous. The court said at page 260 of 15 Cal.2d, at page 1058 of 100 P.2d: "The joint tenancy cards signed by the parties with reference to both the safe deposit box and the bank accounts would, *standing alone,* be sufficient to create joint tenancies, that is, joint interest with right of survivorship to the whole." (Italics added.) In that case the signature card, as shown by the clerk's transcript therein (p. 70), was in part as follows: "We, the undersigned joint renters of box number 165 in the Safe Deposit Department * * * hereby agree each with the other * * * we have rented said box as *joint tenants with right of survivorship,* and that *all property contained therein* and which hereafter may be placed therein during our tenancy, *is and shall be the property of us,* the undersigned, as such *joint tenants,* with full rights of possession to the survivor(s) in

case of death of either of us * * * and the surviving *joint tenant* * * * shall not remove any of the contents * * * until said bank is authorized to permit such removal, in accordance with law." (Italics added.) On the signature card in that case it was expressly declared, in strict compliance with Section 683 of the Civil Code, that the property in the box should be owned by the parties in joint tenancy. In the present case the signature card, "standing alone," was not sufficient to create a joint tenancy, but was uncertain and ambiguous.

The case of Young v. Young, 1932, 126 Cal.App. 306, 14 P.2d 580, 583, cited by appellant, which involved the ownership of the contents of a safe deposit box, is also distinguishable from the present case. The card therein recited: "'We hereby declare that all the *contents of said safe* now or hereafter placed therein, *are our joint property* and that *the title and right of ownership* thereto and to the whole thereof *rests in the survivor of us as his or her separate property.*'" (Italics added.) The intention to create a joint interest in the contents was declared in that instrument, and no uncertainty was involved therein.

[5] The 3 witnesses at the trial were called by appellant. No witnesses were called by respondent. Oral and documentary evidence was received on cross-examination, over the objection of appellant, concerning the circumstances under which the signature card of January 19th was made. In addition to the evidence specifically mentioned above there was other evidence relating to the intention of decedent. On January 19th decedent wrote and signed a letter as follows, addressed to the bank but not delivered: "Will you please let my husband Dr. L. E. Dean have the contents of my Safety Deposit box #2758 *so I can inspect same.*" (Italics added.) On that day she wrote and signed a letter, as follows, addressed to a securities broker but not delivered: "Will you please have these securities that I am sending over re-registered in my sister's name, Mrs. J. D. Lindsay, Burt, N. Y." At that time all securities of decedent were in the safe deposit box. An unpaid promissory note in the sum of $6,050, made by appellant in 1932 and payable within 6 months to decedent, was in the box. Appellant testified that on January 19th, in response to an inquiry by appellant as to what she wanted to do with that note, she told him "to destroy" the note (and he did destroy it). It appears, however, that she did not have the note brought to her and did not "hand" it to him or write thereon "transferring it into" his name, in accordance with the procedure she had followed when she gave the $800 note to her sister. She did not give him any of the property which he brought to her from the box. He testified that he "understood that she wanted it [the things from the box which he brought to her] for the purpose of turning over for distribution to her relatives, her nieces and her sisters." The Federal Savings and Loan deposit which had been in the names of appellant and decedent as joint tenants was, according to appellant's testimony, transferred to his name in order that he might pay her funeral expenses. He testified that in July, 1941, when she had a serious surgical operation, she changed her personal checking account into a joint tenancy account and from that account he paid only hospital and doctor bills. He testified that when he told her what the bank's requirement was, as above stated, relative to authorizing him to open the box, that she "just indicated that she would do it [sign the card], or was willing," but he did not "recall that she made any specific remark." A lady, who had been a friend of decedent and appellant for many years, testified that she visited decedent at the hospital on several occasions; that decedent said, "'I have not a joint account with the doctor [appellant]'"; that the witness said to decedent, "'That will help out, if you want to do anything with the money, because with the joint account he would be tied up, like I was with my mother'"; that the witness said further to the decedent, "'If you have anything you want the doctor to attend to, put it in his name now'"; that on another occasion decedent said, "'I want to talk things over. I have talked to the doctor.'" —"'You know, I think he has got a good idea about that joint account, and I am going to have it attended to'"; that on another occasion decedent said, "'I have settled that. Lloyd [appellant] has everything straightened out,'" and the witness said, "'About the features of the joint account?'" and decedent said, "'Yes, I fixed it. I turned that safety deposit box over to him'"; that on another occasion when she asked decedent if she had everything fixed the decedent said, "'Yes, I will have

everything put in Lloyd's name, so he can handle everything. * * * I am putting everything in the doctor's hands so he can take care of them.'"

It is conceded by appellant that until January 19, 1942, the property in the box which appellant is claiming was the separate property of Mrs. Dean. The evidence shows that during a period of more than 10 years preceding January 19, 1942, she did not allow appellant to have access to her safe deposit box; that when she knew she could not get well she wanted to inspect certain things which were in the box, and wanted some of them for the purpose of giving them to her sisters and nieces; that since her sister, who had joint access to the box was not available, it was necessary in order to obtain the things from the box that she authorize some other person to obtain the things for her; that when her proposed method of authorization, i. e., by letter to the bank, was rejected by the bank, she signed "without any specific remark" the printed card which appellant told her would authorize him to "enter the box and get whatever" she wanted; that in the letter of January 20th wherein she asked the bank to transfer "my" box from "my name and that of my sister" to appellant she did not recognize or regard the card which was signed on the preceding day as a joint tenancy agreement; that on and after January 19th she continued to regard the contents of the box as her separate property, in that, she directed appellant on 5 different days to bring things from the box to her, and she gave some of them to her relatives, directed that some of them be returned to the box, and directed that a bond (which she thought should be sold) be kept "in his possession"; and that appellant did not recognize or regard the card of January 19th as a joint tenancy agreement and on the contrary treated it as her separate property, in that, he listed the property in the inventory of the estate about 2 months after her death, and listed it as property of the estate in a petition to exchange securities filed about 3 months after her death. He did not assert a claim of ownership of the property until approximately 17 months after her death. In her will she gave the $6,050 note, made by appellant, to her relatives.

[6] Appellant asserts that the court did not admit the parol evidence or admit the exhibits in evidence for the purpose of explaining the provisions of the card, but that such evidence was admitted "under the mistaken impression that the evidence went to the weight of the testimony as a whole." When the letter to the bank, which was not delivered, and the letter to the securities broker, which was not delivered, were offered in evidence, appellant objected and the court said that they would show her intent whether they were delivered or not, and that the objections go to the weight of the evidence rather than to its admissibility. It appears, contrary to appellant's contention, that the court received parol evidence, and received documentary evidence in addition to the signature card of January 19th, for the purpose of considering it in determining the intention of the decedent in signing the card. The card being uncertain and ambiguous, such evidence was received properly. The evidence was sufficient to support the findings of the court.

In 32 California Law Review 301, under the topic, "The Unintentional Creation of a Joint Tenancy in the Contents of a Safe Deposit Box," cases from various jurisdictions relating to the question herein are cited.

It is of interest to note that the appellant herein was the appellant also in Re Estate of Dean, 62 Cal.App.2d 418, 144 P.2d 849, wherein he had contested a petition to probate an alleged lost or destroyed will of decedent. The trial court therein found that the original will was lost or fraudulently destroyed by the contestant, and the court admitted a copy of the will to probate. The judgment therein was affirmed. The opinion states (62 Cal.App.2d at page 423, 144 P.2d at page 851,) that on January 27, 1942 (which was 8 days after the signature card herein had been signed), Dr. Dean prepared a will for decedent, allegedly at her request, which provided in part that she appointed him and Mrs. Lindsay "to administer all my affairs from now on * * * and *in accordance with my directions and their knowledge of my wishes as already expressed or as may yet be expressed, to distribute* all *my* remaining worldly goods." That document indicates that appellant herein had been instructed by decedent as to the distribution of her property, and that it was not her intention to enter into a joint tenancy agreement with him when she signed the card. It is also of interest to note further that appellant herein did not assert

a claim of ownership of the contents of the box until he had lost his contest of her will in the trial court.

[7] Another contention of appellant is that if the property did not become his property by reason of a joint tenancy agreement, then it became his property by gift on January 20th when the box was transferred to his name by himself upon the written request of decedent. Whether it was decedent's intention to make a gift of the property to him was a question of fact for the trial court. The acts of decedent after January 20th in giving certain parts of the property to other persons were inconsistent with the theory of a gift of all the property to appellant on January 20th. The evidence was sufficient to support the findings to the effect that the property was not given to appellant.

[8] The finding of the trial court that the listing of the contents of the box in the inventory was not through inadvertence or misunderstanding is supported by the evidence.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.



68 Cal.App.2d 143

ERTMAN v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12774.

District Court of Appeal, First District, Division 2, California.

Feb. 20, 1945.

Rehearing Denied March 22, 1945.

See 156 P.2d 940.

1. Judges ⇐30

Any attempted exercise of jurisdiction by judicial officer without territorial limits of his jurisdiction is a nullity.

2. New trial ⇐163(1)

An order granting new trial became effective when signed and delivered to court clerk by trial judge and was valid as to question of his jurisdiction to make it, though not filed in clerk's office until later date, on which judge was absent from state. Code Civ.Proc. § 660.

3. New trial ⇐162(1)

An order granting defendant a new trial was not void as a whole because it contained condition permitting plaintiff to consent to reduction of jury's verdict in his favor on day subsequent to 60 day period allowed by statute for filing of motion for new trial. Code Civ.Proc. § 660.

4. New trial ⇐162(1)

The trial court, in granting defendant a new trial, unless plaintiff remitted portion of verdict in his favor, had power to grant plaintiff five days to make such election, but could not continue time therefor beyond statutory 60 day period for filing of motion for new trial. Code Civ. Proc. § 660.

5. Mandamus ⇐15

A plaintiff, making no election to remit portion of jury's verdict in his favor at any time, was not prejudiced by invalid condition of order granting defendant new trial unless plaintiff consented to reduction of verdict within time extending beyond 60 day period allowed by statute for filing of motion for new trial. Code Civ.Proc. § 660.

6. Mandamus ⇐3(1), 4(1)

Mandate is a cumulative remedy, which may issue where no other adequate remedy lies, and court to which petition therefor is addressed in first instance has power to determine whether remedy by appeal is adequate in particular case.

7. Mandamus ⇐4(1)

Mandamus may not be resorted to as substitute for adequate legal remedy by appeal or otherwise.

8. Mandamus ⇐4(1)

A plaintiff's loss of right to appeal from order granting defendant a new trial and denial of motion to vacate such order because of neglect or delay does not require granting of writ of mandate to compel issuance of writ of execution on judgment set aside by such order.

9. Mandamus ⇐187(9)

In original mandamus proceeding to compel municipal court to issue writ of execution on judgment set aside by order granting new trial, District Court of Appeal must assume that question, directly put in issue by answer to petition, as to whether petitioner's right to appeal to su-

perior court from such order or denial of his motion to vacate it was adequate remedy barring mandamus was determined adversely to petitioner by trial court.

10. Mandamus ⇐7

The extraordinary writ of mandate is not a writ of right, but one of discretion.

11. Mandamus ⇐187(2, 9)

A decision of court, to which petition for writ of mandate is addressed in first instance, that writ should not issue because petitioner has another plain, speedy and adequate remedy in ordinary course of law, is appealable, but carries presumption of regularity, though open to attack for error. Code Civ.Proc. § 1086.

12. Mandamus ⇐187(9)

Where no error of law appears in record on appeal from municipal court's minute order denying petition for writ of mandate and attack on order is limited to claimed abuse of discretion, bare assertion of such abuse is insufficient to warrant reversal of order.

13. Mandamus ⇐4(1)

The superior court's finding that plaintiff in municipal court action had speedy and adequate remedy by appeal from municipal court's order granting defendant new trial, so as to require denial of plaintiff's petition for writ of mandate to compel municipal court to issue writ of execution on judgment set aside by such order, was not error, in view of current practice of giving appeals from municipal court speedy hearing and determination. Code Civ. Proc. § 1086.

Appeal from Superior Court, San Francisco County; Peter J. Mullins, Judge.

Proceeding by Fred H. Ertman for a writ of mandate to compel the Municipal Court of the City and County of San Francisco to issue a writ of execution on a judgment which was set aside by an order granting a new trial. From an order denying the petition, petitioner appeals.

Affirmed.

Abraham Setzer, of San Francisco, for appellant.

Morris Oppenheim and Henry W. Robinson, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The petitioner sought a writ of mandate to compel the respondent to issue a writ of execution upon a judgment which was set aside by an order granting a new trial. The petition attacked the validity of the order granting a new trial. The respondent defended the order and raised the separate defense that petitioner had an adequate remedy by appeal. A minute order denying the petition was entered and from this order the petitioner has appealed.

Petitioner as plaintiff had a verdict upon a trial to a jury in the municipal court. The defendants' motion for a new trial was granted on the ground of insufficiency of the evidence by an order signed by Judge Kaufman on October 6, 1943, with directions to his clerk to file it on October 14, unless the judge directed him otherwise. Judge Kaufman then left the state of California and was in Mexico on the day of October 14. The order was filed on that day. It was a conditional order granting the motion for a new trial unless the plaintiff within ten days thereafter consented to a reduction of the verdict. The sixtieth day, or the last day upon which the motion for a new trial could have been granted under section 660 of the Code of Civil Procedure, was October 19th. Hence the effect of the conditional order was to attempt to give the plaintiff five additional days within which to consent to a reduction of the verdict. The petitioner took an appeal to the superior court from the order granting a new trial and moved to vacate it in the municipal court upon grounds which were thereafter pleaded in his petition for a writ of mandate. The motion was denied and the record is silent as to further proceedings on the motion and on the appeal from the order granting a new trial.

On his appeal here from the order denying his petition for a writ of mandate the appellant advances three grounds for a reversal which we will consider in the order presented.

[1, 2] First, can a judge of the municipal court perform the judicial act of granting a motion for a new trial while outside the territorial limits of the state. The question was directly answered in People v. Ruef, 14 Cal.App. 576, 626, 114 P. 48, 54, where the court held that any attempted exercise of jurisdiction by a judicial officer without the territorial limits of his

jurisdiction is a nullity. In accord are 14 Cal.Jur. p. 803; 30 Am.Jur. p. 745; 21 C.J.S., Courts, § 91, p. 141. The respondent concedes that a judicial act performed beyond the territorial limits of the court is invalid but argues that here the judicial act was fully performed when Judge Kaufman passed on and "determined" the motion for a new trial while he was in the limits of his jurisdiction on October 6th. Attention is directed to the peculiar wording of section 660 of the Code of Civil Procedure giving the court sixty days to "pass on" a motion for a new trial, and providing that if the motion is not "determined" within sixty days it becomes automatically denied. Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138; Holland v. Superior Court, 121 Cal.App. 523, 9 P.2d 531; and Willis v. Superior Court, 214 Cal. 603, 7 P.2d 303, are all in accord with this contention, and the Willis case is authority for the proposition that, under the wording of this code section, the order granting a new trial becomes effective when signed and the date of its filing in the clerk's office is not essential to its validity. Upon these authorities it would seem to follow that the order made by Judge Kaufman on October 6, which was admittedly signed by him on that day and then delivered to the clerk, was a valid and effective order in so far as the question of the jurisdiction of the judge to make it is concerned. If it lost its validity because of the absence of the judge from the state on the day it was filed with the clerk, a question upon which there is no authority, the judgment herein must be affirmed nevertheless for the reasons hereinafter stated.

[3-5] Second, appellant contends that the order granting a new trial must be held void because it contained a condition permitting him to consent to a reduction of the verdict on a day subsequent to the sixty day period. It would seem more logical that if the court attempted to impose a condition upon the order which it had no power to impose the condition alone should fall rather than the order as a whole. It is manifest from the language of the order that the court intended to grant a new trial unless a portion of the verdict was remitted. It had the power to grant the plaintiff five days to make an election, but could not continue that time over the sixty day period. But the plaintiff did not make an election to remit at any time and was therefore not prejudiced by the invalid part of the order. If the superior court held adversely to the petitioner on that ground it is not necessary for us to decide whether that holding was error because the order which is the subject of this appeal must be affirmed for the reasons hereinafter stated.

[6] Third, the question argued in the briefs as to the propriety of proceedings for a writ of mandate is not the true question presented by the record. The appellant, relying upon the majority opinion in Kahn v. Smith, 23 Cal.2d 12, 142 P.2d 13, argues that proceedings in mandate are always proper notwithstanding the existence of the remedy by appeal. The respondent, relying upon the minority opinion in the same case and the unanimous opinion of the court in Andrews v. Police Court, 21 Cal.2d 479, 133 P.2d 398, 145 A.L.R. 1042, argues that the remedy by appeal is adequate and that mandamus should not lie in any case where an appeal would present the same questions of law. But the true question is what is the function of the reviewing court when the court in the exercise of its original jurisdiction has found another remedy to be adequate. It must be borne in mind that the Andrews case came to the supreme court on an appeal from a judgment of the superior court denying a petition for a writ of mandate whereas the Kahn case came to that court upon an original application for a writ. The difference in procedure is significant because mandamus is not a writ of right, but one of discretion. Thus the Andrews case tendered to the supreme court the single issue whether the trial court committed prejudicial error in denying the petition, whereas the Kahn case tendered the issue whether the supreme court, in the exercise of its original jurisdiction had the *power* to entertain the proceedings in view of the remedy by appeal. The ultimate decision in the Andrews case was that the superior court did not commit error in denying the writ on the ground that the petitioner had his remedy by appeal. The majority of the court in the Kahn case held that the remedy by appeal did not bar the petition for mandate. The effect of both lines of cases is that mandate is a cumulative remedy which may issue where no other adequate remedy lies, and the court to which the petition is addressed in the first instance has the power to determine whether under all the

circumstances the remedy by appeal is an adequate remedy in the particular case. Thus all the cases cited in the majority opinion in Kahn v. Smith [23 Cal.2d 12, 142 P.2d 14] to the proposition that "while mandamus does not lie if there is another adequate remedy, an appeal is not regarded as adequate in this type of case" were original proceedings in either the supreme court or the district court of appeal. No one is authority for the proposition argued by appellant that in no case will an appeal be deemed an adequate remedy. The contrary was held in Irvine v. Gibson, 19 Cal. 2d 14, 118 P.2d 812; Lincoln v. Superior Court, 22 Cal.2d 304, 311, 139 P.2d 13; and Petaluma, etc., Dist. v. Superior Court, 194 Cal. 183, 228 P. 24, all of which were original proceedings in the supreme court.

[7-10] But the case which controls the question presented here is Andrews v. Police Court, 21 Cal.2d 479, 133 P.2d 398, 145 A.L.R. 1042. Unlike the others cited this was an appeal from a judgment of the superior court denying a petition for a writ of mandate. In that case the court said (21 Cal.2d at page 480, 133 P.2d at page 398): "Mandamus may not be resorted to as a substitute for an adequate legal remedy by appeal or otherwise. (Citing cases.) * * * If, as here assumed, the judgment is void on its face, appellant could have appealed from the order of the respondent police court denying his motion to vacate the judgment." That is the situation here. The appellant appealed to the superior court from the order granting the motion for a new trial. He moved to vacate the order and was given a full hearing upon which the questions raised in this proceeding were heard and determined. He had the right to appeal from the denial of that motion. It is alleged in the answer to the petition that he did not appeal but the record does not otherwise disclose whether he did or not, or what became of his appeal from the order granting the motion for a new trial. If he has lost either right by neglect or delay that fact does not "require" the granting of the writ of mandate. Andrews v. Police Court, supra. Now the question whether this right of appeal from either of the orders mentioned was an "adequate" remedy was one committed in the first instance to the court where the petition for a writ of mandate was filed. The question was directly put in issue by the answer to the petition and we must assume that the trial court determined it adversely to petitioner. (The appeal here is taken on the minute order denying the writ. The record does not contain any findings or any formal judgment.) The doctrine that the extraordinary remedy by mandate is not a writ of right, but is one of discretion, is universally followed. 34 Am.Jur. p. 834; 16 Cal.Jur. p. 768; Ault v. Council of City of San Rafael, 17 Cal. 2d 415, 417, 110 P.2d 379; Stracke v. Farquar, 20 Cal.2d 82, 124 P.2d 9; Sipper v. Urban, 22 Cal.2d 138, 141, 137 P.2d 425.

[11-13] Upon the authority of the cases cited the correct rule seems to be that when the court to which the petition for a writ of mandate is addressed in the first instance determines that the petitioner has another "plain, speedy, and adequate remedy, in the ordinary course of law", Code Civ.Proc., § 1086, its decision that the writ should not issue is based upon a finding of fact supported by all the circumstances of the particular case. When such a decision comes out of the superior court it is like any other judgment subject to appeal to a reviewing court, but, like all other judgments, it carries the presumption of regularity though open to attack for error. If no error of law appears in the record and the attack is limited to a claimed abuse of discretion in denying the writ applied for something more than the bare assertion of abuse of discretion must be made. Here we must assume, since there is no showing to the contrary, that the trial court denied the writ because it found the petitioner had a speedy and adequate remedy by appeal. In view of the current practice by which appeals from the municipal courts are given a speedy hearing and determination it must be apparent that if the respondent court found that appellant had another adequate remedy it committed no error in this respect, at least, no error is shown on this record.

The judgment is affirmed.

GOODELL, J., and DOOLING, J., pro tem., concur.

68 Cal.App.2d 98

HERMAN v. GLASSCOCK.

Civ. 14504.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1945.

Hearing Denied April 19, 1945.

1. Appeal and error ⇐931(1), 1010(1)

On appeal the intendments favor the judgment, and the finding is sufficiently supported if record contains substantial evidence and reasonable inferences favorable to respondent may be drawn.

2. Appeal and error ⇐717

The court's language in discussing evidence at conclusion of trial may not be resorted to in construing court's finding where finding is unambiguous, and the record supports it.

3. Trial ⇐388(1)

The "finding" is ascertainment of facts by judge, the court's decision upon the facts, and court's best judgment of what entire evidence establishes.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding".

4. Trial ⇐388(1)

The purpose of trial court's finding is to make case easily reviewable by exhibiting exact grounds upon which judgment rests.

5. Trial ⇐388(1)

It is mandatory that superior court make and file its finding of the ultimate fact on each material issue created by pleadings.

6. Appeal and error ⇐717

The judge's reasoning in announcing his decision is not such part of record as may be used to establish a fact in case when findings are filed.

7. Assault and battery ⇐35

In action for battery, where plaintiff testified as to objective symptoms, he was properly permitted to testify that two tendons of his left hand had been severed by injury inflicted by defendant's pocket knife, and it was unnecessary to call an expert to establish that fact.

8. Damages ⇐185(1)

Where symptoms detailed to court by lay witness are wholly subjective, court may not make finding of permanency of injury without aid of expert testimony.

9. Assault and battery ⇐35

In battery action, evidence establishing extent of plaintiff's injury was not insufficient because plaintiff failed to present at trial physicians who treated him.

10. Judgment ⇐255

A litigant should not be denied relief to extent of his proof merely because he has alleged facts requiring expert testimony, or because pleading contains one or more counts for which no proof is offered, but he is entitled to judgment upon facts alleged and proved without regard to allegations not found to be true.

11. Assault and battery ⇐39

Where court found that defendant inflicted an ugly and painful wound upon plaintiff with a knife following quarrel after minor automobile collision on public highway, allowance of exemplary damages was proper.

12. Assault and battery ⇐39

The allowance of exemplary damages is proper when battery has been wantonly and maliciously committed.

13. Assault and battery ⇐42

Whether battery has been wantonly and maliciously committed, so as to justify allowance of exemplary damages, is question for trier of facts.

14. Assault and battery ⇐39

If dangerous weapon was used in making wanton and unprovoked assault and serious injury was caused, exemplary damages should be given to discourage use of dangerous weapons.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Jack Herman against Gerry A. Glasscock to recover damages resulting from a battery. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Cannon & Callister, of Los Angeles, for plaintiff and respondent.

Porter C. Blackburn, of Los Angeles, for appellant.

MOORE, Presiding Justice.

In an action for damages resulting from a battery, judgment went against defendant in the sum of $1,000 as a compensatory award and $1,000 for punitive damages. Defendant grounds his appeal upon the claims (1) that the evidence is insufficient to support the compensatory relief and (2) that plaintiff, having been the aggressor in the encounter, is not entitled to damages by way of punishment.

On the morning of August 21, 1941, both parties were proceeding in their automobiles eastward along Olympic Boulevard in Los Angeles. At the intersection of La Brea Avenue defendant's car struck and injured the rear right fender of plaintiff. From the point of collision the parties proceeded parallel to each other for about one mile. The temper of one was aroused by the injury done his property while the temper of the other was stirred by the intemperate language addressed to him by his agitated disputant. In the war of words one was denounced in epigramatic terms as a son of Abraham, who in turn reviled his adversary with the terse epithet which signifies the want of an immediate legitimate paternal ancestor. When they arrived at the first automatic traffic signal, at Highland Avenue, plaintiff's car stopped immediately behind that of defendant. The latter alighted, walked back and drove his pocket knife into plaintiff's left hand which was resting on the door of his own conveyance. Defendant re-entered his own vehicle and proceeded on his way to the intersection of Rimpau Boulevard with plaintiff in pursuit. The traffic having again come to a halt, plaintiff disembarked, and, holding his injured hand, ran forward to defendant, exhibited the wound and invited the defendant to inspect his handiwork. Ignoring the injured member defendant hastily made his departure as the signal changed to "go" while plaintiff directed his course to the Wilshire Police Station. First aid was there rendered to the unfortunate man after which he was conveyed by ambulance to the Georgia Street Receiving Hospital. The index finger and its tendons had been cut. The surgeons undertook to service the maimed organ by applying sixteen stitches to the gash. At the time of the trial the strength in plaintiff's hand had materially lessened, his arms tired easily, and he did not have much use of his index and second fingers, which he could not close. Neither could he feel the second knuckle. The plaintiff testified that, in addition to the wound and its treatment at the hospital, he had hardly slept two hours a night during the seven weeks following the assault; that he suffered almost a year with his hand and 25 months later his two injured fingers were still stiff and the use of the arm was impaired. He detailed the time lost from his work and the expense of his physician, but inasmuch as no finding is made of any special damage, discussion of those items will be omitted.

Defendant contradicted plaintiff upon the point as to which was the aggressor. He testified that the first time either left his automobile was at the Rimpau intersection where plaintiff came to defendant and "jammed his fist through the car"; that he had to dodge to prevent plaintiff's striking him in the face; that plaintiff's hand came up and "automatically struck the knife" which defendant had taken from his pocket when he saw plaintiff approaching.

However, the trial court having heard all of the witnesses made its finding that "the defendant willfully and maliciously made an assault upon the plaintiff herein by taking his pocket knife and severely cutting plaintiff's left hand, severing two tendons, to the plaintiff's loss in the sum of $1,000.00."

[1] Defendant attacks this finding on the ground that the evidence is "too weak upon which to base an award for compensatory damages for permanent injury." Such assignment will be considered in the light of the doctrine that the intendments favor the judgment and that the finding is sufficiently supported if the record contains substantial evidence and reasonable inferences favorable to respondent may be drawn. Bellman v. San Francisco High School District, 11 Cal.2d 576, 581, 81 P.2d 894; Hind v. Oriental Products Co. Inc., 195 Cal. 655, 661, 235 P. 438.

[2-5] Notwithstanding that there is no finding that plaintiff suffered a permanent injury defendant attempts to establish that the $1,000 award was based upon a finding of permanent injury. In order to do this he invokes the language of the court in discussing the evidence at the conclusion of the trial. No such resort may be had where the finding is unambiguous and the record supports it. The finding is the ascertainment of the fact by the judge. Garden Cemetery Corporation v. Baker, 218 Mass. 339, 346, 105 N.E. 1070, Ann.Cas.1916B,

75. It is the court's decision upon the facts. Williams v. Giblin, 86 Wis. 648, 57 N.W. 1111. It is the court's best judgment of what the entire evidence establishes. Marks v. Dorkin, 104 Conn. 660, 133 A. 915. Its purpose is to make the case easily reviewable "by exhibiting the exact grounds upon which the judgment rests." Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922. Under our system it is mandatory that the superior court make and file its finding of the ultimate fact on each material issue created by the pleadings. Haffeneger v. Bruce, 54 Cal. 416. It follows that the function of the finding is paramount, in presenting a fact in the case.

[6] The reasoning of the judge in announcing his decision is not such part of the record as may be used for the purpose of establishing a fact in the case when findings are filed. Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273; In re Lasker, 51 Cal.App.2d 120, 122, 124 P.2d 72; Goldner v. Spencer, 163 Cal. 317, 320, 125 P. 347; In re Estate of Felton, 176 Cal. 663, 169 P. 392. Since the entire record of the evidence and the findings are before us the language employed by the judge in his extemporaneous announcement of his findings can serve no office. The vocal meditations of the jurist in deriving his determination of the ultimate fact is a personal privilege and is not to be taken as a part of the legal record to be confused with his "opinion" whereby he applies the law to the facts found. His soliloquy concerning the pros and cons of the evidence might be a protracted rehearsal and appraisal of the testimony of each witness or an abbreviated censure of both parties to the action. But such utterance would have no more virtue in illuminating the appellate court than would the discussions of jurors in reaching their verdict. If a witness be inconsistent or inject incompetent testimony it is the function of the trier of facts to strain the dross from the refined and thereupon to determine the ultimate fact as the basis for decision.

[7, 8] Defendant attacks the finding on the further ground that the testimony of plaintiff that two tendons of his left hand were severed by the cut was such as he was not competent to give; that it required the testimony of an expert to prove that a tendon of the hand has been severed. With this contention we do not agree. If it appears from the testimony of an injured laymen that he has suffered a cut across his hand; that its surgery required 16 stitches; that two fingers are stiff after the lapse of two years following the assault, it is no abuse of the judicial function to find that one or more tendons had been severed. Such a fact is one within the grasp of the common mind and does not require expert proof. It is true that where the symptoms detailed to the court by a lay witness are wholly subjective as in the cases cited by defendant (Webb v. Union Ry. Co. of New York City, 44 App.Div. 413, 60 N.Y.S. 1087; Vaden v. Holmes, 39 Cal.App.2d 580, 103 P.2d 1002; Pine v. Rogers, 182 Okl. 276, 77 P.2d 542, 115 A.L.R. 1146; Oliveira v. Warren, 24 Cal.App.2d 712, 76 P.2d 113), the court would not be warranted in making a finding of the permanency of the injury without the aid of expert testimony. But the finding of severed tendons was not based upon proof of subjective symptoms: rather upon the history of an ugly wound, of its surgery, of its resultant pain, of its protracted stiffness. Such testimony may be given by a nonexpert whose senses are adequate to the purpose. The last-mentioned authorities except the Oliveira case are not pertinent. In each of them, the court instructed the jury that the amount of recovery might be based upon pain and suffering which the plaintiff would be certain to suffer in the future from his injuries although there had been introduced no evidence of a permanent injury. The Oliveira case affirmed plaintiff's recovery for future pain and suffering.

[9, 10] Neither is there any virtue in the claim of defendant that the testimony of plaintiff should be distrusted because he did not present at the trial the physicians who had treated his hand. No litigant should be denied relief to the extent of his proof merely because he has alleged facts which require expert testimony, or because his pleading contains one or more counts for which no proof is offered. He is entitled to a judgment upon those facts alleged and proved without regard to the allegations not found to be true. If defendant at the trial deemed himself aggrieved by reason of the failure of plaintiff to have his physician present at the trial it was incumbent upon him so to declare and to request a continuance for the purpose of enabling him to introduce the expert's testimony. Because of his chagrin at plaintiff's recovery in spite of his failure to prove the permanency of his injuries, defendant may not now invoke the pre-

sumption that the evidence offered should be viewed with distrust because the proof was less satisfactory than that which a physician might have given. No other proof was necessary to establish the finding made. Even though the physician had testified to the absence of a permanent injury the court would not for that reason have been required to deny recovery for the injuries described in the finding.

[11-14] Defendant must fail in his contention that the award of exemplary damages was not justified. The court found that defendant inflicted an ugly and painful wound upon plaintiff with a knife following a quarrel. This clearly implies a finding that defendant, on a public highway, was the aggressor in maiming a person who had done him no wrong and whose behavior when assaulted did not invite physical punishment. The allowance of exemplary damages is proper when a battery has been wantonly and maliciously committed. Marriott v. Williams, 152 Cal. 705, 93 P. 875, 125 Am.St.Rep. 87. It is a question for the triers of the facts. If they believe that a dangerous weapon was used and that the assault was wanton and unprovoked and caused serious injury, they should give exemplary damages to discourage the use of dangerous weapons. Porter v. Seiler, 23 Pa. 424, 62 Am.Dec. 341.

The judgment is affirmed.

W. J. WOOD, and McCOMB, JJ., concur.



67 Cal.App.2d 840

In re RABINOWITZ' ESTATE.

ROBBINS v. NEWMAN.

Civ. 14692.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1945.

Hearing Denied April 5, 1945.

1. Judgment ⇐363

The trial judge is justified in setting aside a judgment or order under Code provision only when it appears to his satisfaction that judgment has been entered through mistake, inadvertence, surprise, or excusable neglect. Code Civ.Proc. § 473.

2. Appeal and error ⇐982(1)
Judgment ⇐363

The granting of order setting aside a judgment or order because of mistake, inadvertence, surprise, or excusable neglect rests largely in trial court's discretion, whose ruling will not be disturbed on appeal unless abuse of discretion clearly appears. Code Civ.Proc. § 473.

3. Wills ⇐355

Plaintiff's failure to have his witnesses in court at time appointed for trial of will contest was not due to "mistake, inadvertence or excusable neglect" within Code provision authorizing setting aside order of nonsuit entered because of such reasons. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake, Inadvertence, or Excusable Neglect".

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Proceeding in the matter of the estate of Sarah Rabinowitz, deceased, wherein Sol Robbins filed a petition contesting the will of deceased, opposed by Rose Sally Neuman. From an order denying petitioner's motion to set aside an order granting a motion for a nonsuit, petitioner appeals.

Affirmed.

Sol Robbins, pro se, for appellant.

Jerome Weber, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order denying plaintiff's motion, made under the provisions of section 473 of the Code of Civil Procedure, to set aside an order granting a motion for a nonsuit in a will contest.

These are the essential facts:

On May 22, 1942, the trial court granted defendants' motion for a nonsuit in a will contest. Thereafter this order was reversed by the District Court of Appeal and a new trial was ordered. Estate of Rabinowitz, 58 Cal.App.2d 106, 135 P.2d 579.

On April 27, 1944, the case was called for a retrial, the jury impaneled and sworn

in, and plaintiff was directed to proceed with his case. Plaintiff called as his first witness Rose Sally Neuman, one of the defendants. She was not in the court room, nor had she been subpoenaed to appear at the trial. The trial judge then directed plaintiff to proceed with his case, whereupon plaintiff stated that he had no other witness. Thereafter defendants' motion for a nonsuit was granted. On May 25, 1944, plaintiff made a motion under section 473 of the Code of Civil Procedure to set aside the order of April 27, 1944, granting defendants' motion for a nonsuit. This motion was denied.

This is the only question necessary for us to decide:

Did the trial court err in denying plaintiff's motion under section 473 of the Code of Civil Procedure to set aside the order of April 27, 1944, granting defendants' motion for a nonsuit at the trial of the will contest?

[1] This question must be answered in the negative. It is only when it appears to the satisfaction of the trial court that a judgment has been entered through mistake inadvertence, surprise, or excusable neglect that the trial judge is justified in setting a judgment or order aside under the provisions of section 473 of the Code of Civil Procedure.

[2] The granting of such an order rests largely in the discretion of the trial court, whose ruling will not be disturbed on appeal unless an abuse of discretion clearly appears. Coleman v. Rankin, 37 Cal. 247, 248; Morton v. Morton, 117 Cal. 443, 446, 49 P. 557; Clark v. Clark, 56 Cal.App.2d 324, 326, 132 P.2d 527.

[3] In the instant case the only material facts appearing in the affidavit filed by plaintiff in support of his motion are those set forth above. Clearly none of such facts would have supported a finding that the order of nonsuit was granted on the ground of mistake, inadvertence, surprise or excusable neglect.

The failure of plaintiff to have his witnesses in court at the hour appointed for trial was in no sense due to "mistake, inadvertence or excusable neglect" but rather to plaintiff's lack of diligence, gross negligence, or miscalculation. Coleman v. Rankin, supra, 37 Cal. at page 249.

For the foregoing reasons the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

CALIFORNIA REPORTER

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SECOND SERIES

25 Cal.2d 918

COCA-COLA CO. v. STATE BOARD OF EQUALIZATION.

L. A. 18990.

Supreme Court of California.

Feb. 9, 1945.

As Modified on Denial of Rehearing March 8, 1945.

1. Statutes ⇐219

The contemporaneous administrative construction of an enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.

2. Licenses ⇐15(1)

The purchase of wooden barrels and kegs from January 22, 1936, to August 29, 1939, by a company for use in selling its beverages was not subject to retail sales tax, where company made no reservation of title to containers upon sale of its products to jobbers and made no charge for containers. Gen.Laws 1937, Act 8493, § 3 and Supp.1941 §§ 2(b, c), 17; Gen.Laws Supp. 1939, Act 8493, § 27; St.1941, p. 532 et seq., § 6001 et seq.

3. Statutes ⇐230

Amendments to Retail Sales Tax Act would be presumed to have been made with full knowledge of construction which had been placed upon Act by the Board of Equalization. St.1941, p. 532 et seq., § 6001 et seq.

4. Statutes ⇐220

Fact that there was no modification in the Retail Sales Tax Act which would require an interpretation of a "retail sale" or "sale at retail" contrary to that placed upon it by Board of Equalization, could be considered in determining meaning of terms intended by Legislature. Gen.Laws 1937, Act 8493, § 3 and Supp.1941 § 2(b, c).

5. Statutes ⇐147, 220

Amendment to Retail Sales Tax Act, adopted in 1943, specifically exempting nonreturnable containers when sold without contents to persons who place contents in the container and sell contents together with container could be considered in determining scope of Act prior to the amendment, in view of fact that court could infer that legislative intent in adopting amendment was to clarify rather than change the existing law. Gen.Laws 1937, Act 8493, § 3 and Supp.1941 § 2(b, c); St. 1943, p. 2456, § 6364.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by the Coca-Cola Company against the State Board of Equalization of the State of California to recover sales tax paid under protest. From a judgment for defendant, the plaintiff appeals.

Reversed.

Earle M. Daniels, Julius V. Patrosso, and Hallam Mathews, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The Coca-Cola Company, under protest, paid the amount of a sales tax which had been levied against it on account of the purchase of wooden barrels and kegs in which it sold its products. This action followed, and the question presented for decision upon the company's appeal from an adverse judgment concerns the application of the Retail Sales Act of 1933, Stats. 1933, ch. 1020, p. 2599; Deering's Gen. Laws, 1937, Supp.1941, Act 8493; now Sales and Use Tax Law, Revenue and Taxation Code, div. II, pt. 1, St.1941, p. 532 et seq., to such transfers.

By the terms of the statute as in effect at the time of the transactions in question a tax is imposed upon retailers "for the privilege of selling tangible personal property" (§ 3). "Sale" is defined as "any transfer of title or possession, or both * * * for a consideration" (§ 2, subsec. b); "retail sale" or "sale at retail" as "a sale to a consumer or to any person for any purpose other than for resale in the regular course of business" (§ 2, subsec. c), and "retailer" as "every person engaged in the business of making sales at retail. * * *" (§ 2, subsec. c.) The burden of proving that a sale of tangible personal property is not taxable is upon the vendor, unless he takes from the vendee a certificate that the property is purchased for resale (§ 17). "If a purchaser who gives such a certificate makes any use of such property other than retention, demonstration, or display while holding it for sale in the regular course of business, such use shall be deemed a retail sale by such purchaser * * *."

At the time of the sales upon which the state has made assessments, the appellant was engaged in the business of manufacturing and selling at wholesale the syrup which is the base of the drink sold under the trademark of "Coca-Cola." In containers of various types, the syrup was sold to jobbers who in turn sold it in the original packages to retailers for use in making and dispensing the drink from soda fountains or less elaborate equipment. The Coca-Cola Company purchased the barrels and kegs from manufacturers in California. There was no reservation of title to the containers upon the sale of syrup to a jobber, nor was any charge made for the container.

The state bases its assessments upon the amount of the sales made by the manufacturer of the barrels or kegs, but charges Coca-Cola Company with liability for the tax because the appellant gave certificates of resale in the form prescribed by the statute. Under these circumstances, the parties agree, the responsibility for the payment of any tax legally collectible may be placed upon the Coca-Cola Company.

The theory of the levy against the appellant is that by its use of the articles they became "self-consumed merchandise" subject to the sales tax. It is conceded that the amount of the assessment is properly computed, that the appellant paid the tax and, after proper and timely application for a refund thereof, its claim for refund was denied.

Although there is considerable conflict in the authorities concerning the time when the sale of a container at retail occurs, in 1936 the Board of Equalization, acting in accordance with the authority vested in it by section 27 of the Retail Sales Act, supra, adopted a rule which declared the policy it would follow in administering the California statute. That rule, in varying form, was in force at the time of the transactions which are the basis of the appellant's claim for refund. From January 22, 1936, to August 29, 1939, this rule, in so far as is pertinent, read as follows: "Gross receipts from sales of containers such as fruit boxes, burlap sacks, bottles, cans and packing cases to growers, packers, bottlers and others who place the contents in the containers are not taxable if the containers are sold with the contents. * * * If, however, the containers are not sold with the contents, as is generally the case with * * * containers upon which deposits are taken to insure their return, the gross receipts from the sale of containers are taxable." At all times subsequent to August 29, 1939, this ruling, in so far as material to the present case, read as follows: "The term 'containers' as used herein means the articles and devices in which tangible personal property is placed for shipment and delivery. * * * The term 'returnable containers' as used herein means those containers which are returned by the buyers of the contents and re-used by the packers, bottlers or sellers of the commodities contained therein. A container is classed as a returnable container if title to the container is retained by the packer, bottler, or seller of the contents or if the packer, bottler, or seller of the contents charges a deposit on the container. * * * The term 'nonreturnable containers' as used herein means those containers which are sold with the contents and are not returned by the buyers of the contents for re-use by the packers, bottlers, or sellers of the contents. * * * Gross receipts from sales of nonreturnable containers to persons who place commodities to be sold in such containers are sales for resale and, accordingly, are not taxable." (Rule 10.)

[1, 2] Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and

courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. Shealor v. City of Lodi, 23 Cal.2d 647, 145 P.2d 574; People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25; Riley v. Thompson, 193 Cal. 773, 227 P. 772; Riley v. Forbes, 193 Cal. 740, 227 P. 768. But the Board of Equalization now takes the position that its adoption of rule 10, construing the sales tax law to exempt the sale of nonreturnable containers to original users, was erroneous and contrary to the terms of the act. In any event, the board adds, the particular sales now in controversy are not within the meaning of the rule, for it does not appear that the barrels or kegs containing syrup were nonreturnable. However, the rule does not purport to exempt the sale of nonreturnable containers from taxation; it merely interprets the statute by explaining that the sale of "nonreturnable containers to persons who place commodities to be sold in such containers" is not a retail sale and is therefore not taxable. There is no provision in the statute requiring a tax to be paid upon such transactions and the sales of barrels and kegs by the cooperage companies to the Coca-Cola Company clearly fall within the board's rule.

The only evidence concerning the appellant's business practices in regard to containers is the testimony of its auditor. He stated that the company reserved no title to the containers and made no separate charge for them. The contracts and invoices of the company confirm this fact. There is nothing to show that Coca-Cola Company ever required a deposit upon its containers or gave a credit for their return, or, indeed, that the kegs and barrels were in fact returned or returnable. Moreover, according to the record, the action was tried upon the theory that the containers were nonreturnable.

[3, 4] The Legislature has frequently amended the Retail Sales Tax Act, including section 2, which, among other things, defines "retail sale" and "sale at retail." Stats.1933, p. 2599, Stats.1937, p. 2223, Stats.1939, p. 2170. It may be presumed that these amendments were made with full knowledge of the construction which had been placed upon the statute by the Board of Equalization, yet there was no modification in the legislation which would require an interpretation of the legislation contrary to that placed upon it by that body. This is a factor that may be considered in determining the meaning of the terms intended by the Legislature. Federal C. Comm. v. Columbia Broadcasting System, 311 U.S. 132, 61 S.Ct. 152, 85 L.Ed. 87; Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368; Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 59 S.Ct. 423, 83 L.Ed. 536; Old Colony R. Co. v. Commissioner of Int. Rev., 284 U.S. 552, 52 S.Ct. 211, 76 L.Ed. 484; People v. Southern Pac. Co., 209 Cal. 578, 290 P. 25; Colonial Mut. Comp. Ins. Co., Ltd., v. Mitchell, 140 Cal.App. 651, 36 P.2d 127; Godward v. Board of Trustees, 94 Cal.App. 160, 270 P. 725. And particularly because of the amendment made at the last session of the Legislature, the board's construction of the act should be decisive of the present litigation.

[5] Unquestionably because of controversies such as the one now before the court, in 1943 the Legislature amended the statute to expressly exempt nonreturnable containers. The new provision, section 6364 of the Revenue and Taxation Code, St.1943, p. 2456, reads as follows: "There are exempted from the taxes imposed by this part the gross receipts from the sale of * * * (a) Nonreturnable containers when sold without the contents to persons, who place the contents in the container and sell the contents together with the container. * * * As used herein the term 'returnable containers' means containers of a kind customarily returned by the buyer of the contents for reuse. All other containers are 'nonreturnable containers.'" This change may be considered in determining the scope of the tax statute at the time of the transactions here involved for in view of an amendment to the Retail Sales Tax Act at a time when certain groups were resisting collection of taxes assessed against them, the court could infer a legislative intent to clarify rather than change the existing law. Standard Oil Co. v. Johnson, 24 Cal.2d 40, 147 P.2d 577; Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425.

The judgment is reversed.

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concurred.

CARTER, Justice.

I dissent. In my opinion the transaction was clearly taxable under the statute for the following reasons: (1) the rule of the Board of Equalization exempting the trans-

action from the tax was in excess of its powers. (2) The Record fails to show that the barrels were not returnable to appellant, hence, under both the rule of the board, assuming it is lawful, and the 1943 amendment to the statute, the transaction was taxable. (3) The 1943 amendment was a change in the law, not a clarification.

The transaction involved is simple. The manufacturers of the barrels in California sold them to appellant, Coca-Cola Company. That company used them as containers for its product and in turn sold the product. Ordinarily the tax would have been payable by the manufacturer of the barrels for the sale by it to appellant was for other than resale. The barrels were sold to appellant for use by it. However, the manufacturer received from appellant a resale certificate, that is, a written statement that appellant was buying the barrels for resale. The effect of that certificate is that "If a *purchaser* who gives such a certificate makes *any use* of such property other than retention, demonstration, or display while *holding it for sale* in the regular course of business, *such use shall be deemed a retail sale by such purchaser* as of the time such property is first used by him and the cost of such property to him shall be deemed the gross receipts from such retail sale. If the sole use of such property other than retention, demonstration or display in the regular course of business is the rental of the property, while holding it for sale, the purchaser may elect to include in his gross receipts the amount of the rental charged rather than the cost of the property to him." (Italics added.) Retail Sales Act of 1933, Stats. 1933, p. 2599, as amended, § 17. Hence, the tax is payable by appellant if it made *any* use of the barrels other than merely *holding* them for resale. That provision embraces the same thought expressed in the definition of a sale at retail, namely, a sale "to *any* person for *any* purpose other than resale." Retail Sales Act of 1933, § 2(c). Certainly a *use* of the article by the purchaser is a purpose other than for resale.

Turning to the record in the instant case, and remembering that the trial court found that there was such use, it appears that appellant's witness testified that the barrels were used by appellant in selling and *packing* its product; that the product was placed in the containers; that the product could not be sold other than in containers; that "Q. It is necessary, in order *to have merchandise,* the Coca-Cola syrup, that you *have a container?* A. That is right. Q. And it is for *that purpose that you use these barrels* and cans and kegs? A. Yes, sir." Appellant maintains control over the containers inasmuch as the jobbers to whom it sells the product are *"required* to sell it in the original package."

The certificate of resale given by the jobbers to appellant, in describing the property sold to the jobber, mentions the syrup and other items but not the barrels or other containers. Although appellant's witness did testify that appellant did not reserve title to the barrels, there is no other evidence indicating that the barrels were not returnable to it. The *burden of proof rested upon the appellant.* The trial court could have disbelieved the testimony of the witness and the record before it would have been shorn of any evidence that the barrels were not returnable. If anything, the inference would be that they were returnable, inasmuch as they have considerable value, are primarily usable by appellant, being made for its purposes, and the jobbers could not alter them. It cannot be said therefore that, as a matter of law, the barrels were not used by appellant and were not returnable within the meaning of the statute. But that is precisely what the opinion prepared by Mr. Justice Edmonds holds. In American Distilling Co. v. State Bd. of Equalization, 55 Cal.App.2d 799, 131 P.2d 609, the court held that a rule of the board exempting certain transactions from the Retail Sales Tax Act of 1933 was void because no such exemption appeared in the exempting portions of the act.

However, even if we assume that the barrels were not returnable, still, under the authorities, they would be taxable to appellant for they were *used* by it. In People v. Puritan Ice Co., 24 Cal.2d 645, 151 P.2d 1, this court held the sale of ice to the packer of vegetables who in turn sold his packed product including the ice to buyers in the east was taxable to the seller of the ice to the packer although the buyer of the vegetables from the packer was separately billed for the ice. This court said: "'"They (the packers) *did not buy this ice for the purpose of selling ice, but they bought it for the purpose of preserving lettuce, in order that it might be sold in foreign markets at a profit.* * * * None of the ice involved in this proceeding was sold for the purpose of resale in the form of tangible personal property within the mean-

ing of that definition. * * * They do not sell ice any more than they sell lettuce crates."' * * * Whether we take the view of one of respondent's witnesses that the ice is used to make the vegetable more attractive and salable or that the ice is purchased solely for preserving the vegetables, the result is the same. The essence of the matter is that the purchasers of the ice are acquiring it for purposes other than resale. They are not engaged in the ice selling business. They are selling vegetables and the use of the ice or purported sale thereof to the purchasers of the vegetables is merely an incident of that activity. * * * Realistically, the purchasers of the vegetables are not concerned with acquiring ice as such." 24 Cal.2d 645, 649, 650, 151 P.2d 1, 3. Likewise, in the case at bar the appellant is not engaged in the business of selling barrels. On the contrary it is selling syrup and as an incident thereto and as a necessary part of its business it is *using* the barrels which it purchases. Manifestly, the meaning of use is not limited to or the same as consumption. In Kirk v. Johnson, 37 Cal.App.2d 224, 99 P.2d 279, 282, the sale was of dairy cows, which the buyer used as milk cows and then sold them for meat. It was held taxable, the court stating: "Under the circumstances of this case the dairy cattle were not bought 'for resale.' It is apparent that the chief purpose for which they were purchased was not for resale, but *they were to be used for the benefit of the owners in conducting their dairy businesses* as long as they were profitable for that purpose." (Italics added.) In the instant case appellant's own witness testified, as above quoted, that *it was necessary for appellant to have the barrels to conduct its business.* In Owens Illinois Pacific Coast Co. v. State Board of Equalization, the Superior Court for Sacramento County in holding the sale of bottles to a manufacturer and bottler of beer taxable, stated: "In the instant case the bottles were sold to the breweries for the purpose of serving as containers for the beer until the beer was sold and for the further purpose of enabling the breweries to market the beer. None of the breweries to which the bottles were sold by plaintiff are engaged in selling empty bottles. If it were not for the beer which they manufacture the bottles would be of no utility to them. The conclusion is proper that these bottles were purchased by the breweries to be put by them in their business to a substantial use. The fact that their purpose is to pass title to the containers when the beer is sold and to make a charge therefor does not under the reasoning of the California cases mentioned alter the nature of the original sale of the bottles." The case of People v. Monterey County Ice & Dev. Co., 29 Cal.App.2d 421, 84 P.2d 1069, involved the same factual situation as People v. Puritan Ice Co., supra. There can therefore be no escape from the proposition that the transaction here involved was undoubtedly taxable under the statute.

The first proposition heretofore stated, that is, that if the rule of the board exempts this transaction, it exceeded its powers, necessarily follows. Being clearly taxable under the statute it could not be exempted. When a rule of an administrative officer exempts a transaction from a taxing statute it should be closely scrutinized to ascertain whether it is within the scope of his power. *An exemption from a tax statute is strictly construed against the one asserting the exemption.* Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424; City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 112 P.2d 595; 51 Am.Jur., Taxation, §§ 524, 525. It follows that in determining the scope of power of the administrative official to make rules exempting property from a taxing statute the question of the validity of the rule must be answered by a strict construction against the one claiming the exemption. See 51 Am.Jur., Taxation, § 530.

On the second proposition I have pointed out that the evidence, if of any value on the subject, indicates that the *barrels were returnable.* Thus, under the rule of the board, by its very wording or without it, the transaction would be taxable. If the barrels are to be returned then no one can doubt that appellant is *using* them, and that it does not sell them at all. There is no resale of the barrels. They would be merely loaned to the jobber and retail seller of the Coca-Cola. But assuming the evidence indicates that the barrels were nonreturnable, the burden of proving that issue was upon appellant. See McDougald v. Boyd, 172 Cal. 753, 159 P. 168; 51 Am.Jur., Taxation, § 527. The trial court may have disbelieved appellant's witness who stated that appellant did not reserve title to the barrels. In any event the mere failure to reserve title does not exclude the probability that the barrels are returnable.

The third proposition that the 1943 amendment to the statute (Stats.1943, ch. 822) changed the law rather than merely clarified it, is clear. The amendment reads:

"There are *exempted* from the taxes imposed by this part, the gross receipts from sales of and the storage, use, or other consumption in this State of:

"(a) Nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container.

"(b) Containers when sold with the contents if the sales price of the contents is not required to be included in the measure of the taxes imposed by this part. (c) Returnable containers when sold with the contents in connection with a retail sale of the contents or when resold for refilling.

"As used herein the term 'returnable containers' means containers of a kind customarily returned by the buyer of the contents for reuse. All other containers are 'nonreturnable containers.'" (Italics added.) When the Legislature passed that amendment it clearly believed that such containers were not exempt under the existing law. It had more in mind than clarification. That statement is true for the following reasons: (1) The amendment refers to sales of the named items as being *exempted* from the tax. It was placed in the chapter and article of the Revenue & Taxation Code dealing with *exemptions*. Revenue and Taxation Code, § 6364. It was not an amendment of the provisions dealing with the definition of a sale at retail, or of that imposing a tax. If the transaction was not taxable under the act there would be nothing to exempt it from. Hence, the Legislature must have thought the sale was taxable and needed a specific exemption to enable it to escape. (2) Unlike the situation in Standard Oil Co. v. Johnson, 24 Cal.2d 40, 147 P.2d 577, and Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425, here there was no controversy or doubt about the meaning of the statute. It definitely included the sale of containers. The Legislature presumably was aware of Kirk v. Johnson, 37 Cal.App. 2d 224, 99 P.2d 279; and People v. Monterey County Ice & Dev. Co., 29 Cal.App.2d 421, 84 P.2d 1069, heretofore discussed, which, because of the reasoning and the existence of analogous facts pointed unerringly to the conclusion that the instant transaction was taxable. Rather than clarifying the statute the Legislature was seeking to nullify the effect of those decisions where containers were involved. This plainly indicates that the intent was not clarification as contemplated in Standard Oil Co. v. Johnson, 24 Cal.2d 40, 147 P.2d 577; Union League Club v. Johnson, 18 Cal. 2d 275, 115 P.2d 425, but was to *change* the law as stated in People v. Puritan Ice Co., 24 Cal.2d 645, at page 652, 151 P.2d 1, at page 5: "Finally, it is of some significance that in 1943, *after the decision in the Monterey case holding that ice sold to packers of vegetables is not a sale for retail,* the Legislature passed a bill amending the Retail Sales Tax Act, by adding section 6359.5 thereto reading: 'As incidental to the *exemption* provided for in Section 6359, there are *exempted* from the taxes imposed by this part, the gross receipts from the sale of and the storage, use, or other consumption in this State of containers, ice, packing materials and labels used or employed in packing, shipping or transporting food products.' Section 6359 * * * referred to, exempts food products from the sales tax. Although that bill was vetoed by the Governor, still *its passage by the Legislature indicates an impression on its part that it was necessary to specifically exempt ice sold for such purpose. Otherwise, it would be subject to the tax.* It is quite natural that the Legislature would have that thought in view of the decision in the Monterey case. True, there may have been a dispute with respect to whether the food products exemption embraced ice for preservation of the food, a factor not considered in the Monterey case, and hence, there might be some reason for applying the rule that the legislation was intended for clarification and not to change the law (see Standard Oil Co. v. Johnson, 24 Cal.2d 40, 147 P.2d 577; Union League Club v. Johnson, 18 Cal.2d 275, 115 P.2d 425), but here the basic issue of whether such sales were taxable had at least partially settled any dispute." (Italics added.) (3) It is asserted in the opinion prepared by Mr. Justice Edmonds that the Legislature failed to amend the statute after the rule was adopted by the Board of Equalization and that therefore a legislative approval of the rule is indicated. That is completely refuted by the amendment in 1943. If the Legislature thought the rule satisfactory and that it exempted the transaction here involved, why did it amend the law in 1943? If the rule already accomplished the result achieved

by that amendment the latter would be an idle gesture. It is not to be supposed that the Legislature indulges in that practice.

In my opinion the judgment should be affirmed.

Rehearing denied; CARTER and SPENCE, JJ., dissenting.



25 Cal.2d 880

PEOPLE v. THOMAS.

Cr. 4551.

Supreme Court of California.

Feb. 7, 1945.

1. Homicide ⇐282

Evidence was not wholly insufficient as matter of law to support adjudication of first-degree murder, and was ample to sustain finding of manslaughter or second-degree murder, so that determination of degree of offense was for jury.

2. Homicide ⇐307(2)

The jury should be adequately and accurately informed as to elements of each of the degrees of murder as well as those pertaining to manslaughter, and as to burden of proof in relation to them, to make determination of degree of homicide.

3. Criminal law ⇐731

The jury does not have discretion, other than in resolving factual issues, in determining degree or class of offense, but standard for classification is prescribed by law.

4. Criminal law ⇐731

The jury's function is to consider evidence, find all material facts, and, upon those facts, to apply the law as written in light of a full knowledge of all elements essential to proper discrimination among the several offenses or degrees of offenses which are included in the charge and which can be deduced from the evidence.

5. Homicide ⇐22(2), 23(2)

Homicile in anger would be first-degree murder if, before returning home before killing, defendant had considered and formed intent to kill mistress if he caught her "running around" again, but would be at most second-degree murder if intent to kill was entirely unformed and unconsidered prior to that evening, and was a product purely of hot anger of the moment, executed without reflection and without revolving the thought beforehand.

6. Homicide ⇐282

In prosecution for murder of mistress because of jealousy, defendant's statement that he had "laid in wait to catch her", apparently referring to other occasions when he had caught her going out surreptitiously, did not as a matter of law constitute an admission of lying in wait to commit murder, in view of statute requiring oral admissions to be viewed with caution. Code Civ.Proc. § 2061, subd. 4.

7. Homicide ⇐152

Where commission of homicide is proved, burden of proving circumstances to mitigate the offense from first-degree to second-degree murder does not devolve upon defendant.

8. Homicide ⇐253(1)

The prosecution has burden of producing evidence which satisfies jurors beyond all reasonable doubt not only that unlawful homicide with malice aforethought was committed, but also that such homicide was of a type specifically enumerated in statute as first-degree murder or of equal cruelty and aggravation with those enumerated, and was accompanied with deliberate and premeditated intent to take life. Pen.Code, § 189.

9. Homicide ⇐146, 254

When killing is proved to have been committed by defendant and nothing further is shown, presumption of law is that it was malicious and an act of murder, but verdict should be second-degree and not first-degree murder.

10. Criminal law ⇐808½

An instruction in language of statute is proper only if jury would have no difficulty in understanding the statute without guidance from court, and is improper if reasonable men might differ as to construction of the statute, for it would delegate judicial function to jury.

11. Criminal law ⇐808½

An instruction in language of Code that on trial for murder, commission of homicide by defendant being proved, defendant has burden of proving circum-

stances to mitigate, justify, or excuse it unless prosecution's proof tends to show that crime only amounted to manslaughter or that defendant was justifiable or excusable, was improper as failing to define extent of duty as to degree of proof and not advising jury that test is inapplicable in determining degree of murder. Pen.Code, § 1105.

12. Criminal law ⇐778(4), 789(4), 823(1)

A general instruction on presumption in favor of innocence and jury's duty to acquit if it should ascertain reasonable doubt upon any fact or element necessary to constitute the crime was proper on general issue of guilt, but inapplicable to question of degree or class of homicide, especially when not expressly made applicable to evidence of mitigating circumstances, and hence did not cure error in misleading instruction in statutory language on mitigating circumstances. Pen.Code, § 1105.

13. Criminal law ⇐789(4), 823(1)

An instruction to give defendant benefit of doubt and find him guilty only of lowest offense as to which jury may find him guilty beyond a reasonable doubt, although a correct statement of law, did not eradicate confusion naturally arising from prior instruction in statutory language on defendant's burden of proving mitigating circumstances. Pen.Code, § 1105.

14. Criminal law ⇐808½

The responsibility of statutory construction should not be left to jury, but interpretation of statute and its applicability to given set of facts are exclusively province of court.

15. Criminal law ⇐778(2)

If court gave instruction in statutory language on defendant's burden of proving mitigating circumstances when defendant's commission of homicide is shown, court should definitely inform jury that such instruction had no application to determining degree of murder if offense was found to be murder, or to fixing punishment if offense was murder of first degree. Pen. Code, § 1105.

16. Homicide ⇐297, 309(1)

If court gave instruction in statutory language on defendant's burden of proving mitigating circumstances if defendant's commission of homicide is proved, court should instruct that the rule could be considered only in determining whether homicide amounted to murder or manslaughter or was justifiable or excusable, and that on such question defendant was required only to adduce evidence of circumstances sufficient to raise reasonable doubt on the particular issue, if prosecution evidence did not in itself leave such doubt, and that all pertinent evidence, whether produced by defendant or by the state, should be considered; defendant being entitled to benefit of prosecution evidence. Pen.Code, § 1105.

17. Homicide ⇐308(1)

An instruction that, if killing is done without provocation and passion which reduces the offense to manslaughter, or in other circumstances, it is second-degree murder unless evidence proves specific intent to take life, in which event the offense would be first-degree murder, was erroneous as indicating that jury must find homicide to be first-degree murder if it was murder at all.

18. Homicide ⇐22(2)

"Specific intent" is not synonymous with "deliberate" so as to make first-degree murder of what would otherwise be second-degree murder. Pen.Code, § 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate" and "Specific Intent".

19. Homicide ⇐308(1)

The rule as to sufficiency of pleading murder, whereby words "malice aforethought" are deemed equivalent to averment of deliberation and premeditation, cannot be allowed to emasculate statutory difference between degrees of murder or obviate necessity for correct instructions on elements which must be proved. Pen.Code, § 190.

20. Statutes ⇐194

In construing criminal statutes, the ejusdem generis rule is applied with stringency.

21. Homicide ⇐23(2)

The general words "or any other kind of willful, deliberate and premeditated killing," following specifically enumerated instances of killing which are expressly declared by statute to constitute first degree murder, must be construed in light of specifically listed types and be held to include only killings of the same general kind or character as those specifically mentioned. Pen. Code, § 190.

22. Homicide ⇐22(2)

By conjoining the words "willful, deliberate, and premeditated" in definition and limitation of first-degree murder, Legislature emphasized intention to require substantially more reflection than involved in mere formation of specific intent to kill. Pen.Code, § 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful, Deliberate, and Premeditated".

23. Homicide ⇐22(2)

A murder is of the first degree, no matter how quickly the act of killing follows ultimate formation of intention, if that intention has been reached with deliberation and premeditation. Pen.Code, § 190.

24. Homicide ⇐22(3)

Under statute requiring first-degree murder to be "deliberate and premeditated", neither the statute nor the court measures in units of time the length of period during which thought must be pondered, and true test is not duration of time so much as extent of reflection. Pen.Code, § 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate and Premeditated".

25. Homicide ⇐22(3)

Under statute requiring first-degree murder to be "deliberate and premeditated", the word "deliberate" is an antonym of hasty, impetuous, rash, impulsive, and no act or intent can be "premeditated" unless it has been the subject of actual deliberation or forethought. Pen.Code, § 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Deliberate" and "Premeditated".

26. Homicide ⇐22(2)

The phrases "malicious intent" and "malice aforethought" are not synonymous with "willful, deliberate, and premeditated" intent required as elements of first-degree murder. Pen.Code, § 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice Aforethought" and "Malicious Intent".

27. Criminal law ⇐1186(4)

Error in instruction that offense would be first-degree murder if specific intent to take life existed at time of unlawful killing was prejudicial. Const. art. 6, § 4½.

28. Criminal law ⇐823(17)

An instruction that jury could not convict of first-degree murder if it entertained reasonable doubt whether killing was willful, deliberate, and premeditated did not cure error in preceding instruction that offense would be first-degree murder if specific intent to take life existed, where meaning of "willful, deliberate, and premeditated" was not explained.

29. Homicide ⇐23(2)

Provocation insufficient to fully negative or raise a reasonable doubt as to both premeditation and malice, thereby reducing offense to manslaughter, may nevertheless negative or raise a reasonable doubt as to premeditation or deliberation, leaving the homicide as murder of second degree. Pen.Code, §§ 187, 189, 190.

30. Homicide ⇐23(1)

"Second-degree murder" is the unlawful killing of a human being with malice aforethought, which is not perpetrated by poison, lying in wait, or torture, is not willful, deliberate and premeditated, and is not committed in perpetration of, or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. Pen.Code, §§ 187, 189.

31. Homicide ⇐271, 295(1)

Existence of provocation and its extent and effect upon defendant's mind in relation to premeditation and deliberation in forming specific intent to kill, as well as to existence of malice, are fact questions for jury, and they should be so advised. Pen.Code, §§ 187–189.

32. Criminal law ⇐1189

Where conviction of first-degree murder must be reversed because of error in instruction, but reviewing court was satisfied that original trier of facts was in a better position to pass upon weight of evidence, and evidence was not clearly inadequate to support verdict of first degree murder, court would not reduce the judgment but would remand the case. Pen. Code, § 1181, subd. 6.

33. Criminal law ⇐993, 1183

On application to reduce the degree or class of an offense, trial judge may review weight of evidence but an appellate court could consider only its sufficiency as matter of law. Pen.Code, 1181, subd. 6.

EDMONDS and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

C. T. Thomas was convicted of murder, and appeal was automatically taken under Pen.Code, § 1239, from the judgment and from an order denying a new trial.

Reversed.

H. E. Manning and George Olshausen, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

This is an appeal from a judgment imposing the death penalty for murder in the first degree and from an order denying defendant's motion for a new trial. It is contended, among other things, that the evidence is insufficient to establish the homicide as murder of the first degree, that it shows at most murder of the second degree or manslaughter, and that the trial court erred to the prejudice of defendant in instructing the jury relative to the elements of the two degrees of murder and the burden of proof.

[1-4] Upon an examination of the record it appears to us that the evidence, while not wholly insufficient as a matter of law to support the adjudication of first degree murder, is ample to sustain a finding that the homicide was manslaughter or murder of the second degree. It was, therefore, incumbent upon the jury to resolve the material conflicts in the evidence, including the divergent inferences, and thereupon to determine the class or degree of the offense. In order to make such determination it was essential that the jury be adequately and accurately informed as to the elements of each of the degrees of murder as well as those pertaining to manslaughter, and as to the burden of proof in relation to them. While it is said that the jury makes the determination of the degree or class of the offense, it is not implied that the jury has any discretion, other than in resolving factual issues, in so classifying the offense. The standard for classification is prescribed by law. The function of the jury is to consider the evidence, find all the material facts, and upon those facts, in the light of a full knowledge of all the elements essential to proper discrimination among the several offenses or degrees of offenses which are included in the charge and which can be deduced from the evidence, to apply the law as written. (People v. Holt (1944), 25 Cal.2d 59, 153 P.2d 21.) Unless the distinguishing elements of the several degrees and classes of offense which might be found from the evidence are adequately and accurately declared by the court the jury would either be misled or given the prerogative of fixing the standard as well as finding the facts. Neither alternative could be sustained. As hereinafter set forth more fully it appears that the court erred in four material instances: (1) It failed to adequately define murder of the second degree with respect to differentiating it from murder of the first degree; (2) it instructed the jury, in effect, that a homicide embodying merely the elements of second degree murder could be found to be murder of the first degree; (3) it gave an instruction readily susceptible of the interpretation that upon a homicide being shown the burden was upon the defendant to prove circumstances mitigating it from first degree to second degree murder; (4) it impliedly excluded from consideration by the jury (pertinent to the *degree of the murder)* any extent of provocation insufficient to reduce the homicide to *manslaughter.*

In declaring the errors above enumerated it is but fair to the trial judge to mention that over a period of years the decisions of this court and of the District Courts of Appeal have shown substantial inconsistencies and obfuscation of concept as to the elements of the two degrees of murder, as was recently pointed out in our opinion in People v. Holt (1944), supra, 25 Cal.2d 59, 153 P.2d 21. As is also shown in that opinion, however, the intent of the Legislature to recognize differing degrees of human culpability and frailness is also manifest and it is our duty to require that such intent be given effect.

In order to make readily apparent the probable prejudicial effect of the above mentioned errors in instructions it is proper to summarize the facts of the case. At the time of the homicide the defendant C. T. Thomas and Bernice Owsley had been living together as man and wife for approximately four years without benefit of ceremonial marriage. They had one child about fifteen months old. Bernice's mother, Effie Banks, lived with the family. Both the defendant and Bernice were employed in war industry. Bernice worked from eight in the morning to four in the after-

noon; the defendant worked from midnight to eight in the morning. Mrs. Banks cared for the child during absence of the parents. As they resided a substantial distance from defendant's place of employment it was necessary for defendant to leave the house shortly after 10 p. m. in order to meet his shift at the shipyard.

On October 23, 1943, the entire family spent the evening at home. Defendant and Bernice appeared to be friendly; they had been in bed together; after they left the bedroom they "played" together in the kitchen. As stated by Mrs. Banks, "They were playing when he left the house" and she did not "hear or see anything that occurred that night that would indicate there was any trouble brewing between them." At the time defendant left, about 10:30 p. m., Bernice, who had already been in bed, "wasn't dressed, she had a princess slip on." Shortly thereafter she dressed (in a sweater and skirt) to go out. About 11 p. m. or a little later defendant returned, unexpected by Bernice and her mother, and remained outside the house for a few moments overhearing an asserted conversation. He had either missed the bus or, being doubtful of Bernice's fidelity, had deliberately come back to test his doubt. He testified that he "missed the bus" but he told police officers and the district attorney shortly after the shooting that Bernice had been "running around" and "cheating on him" and that "I pretend to go to work. I left her in bed and act like I was going to work, but I came back and she had her clothes on. Her mother stays there with her and she said, 'You'd better be careful or C. T. is going to catch you. You shouldn't do things like that. He takes good care of you and you shouldn't treat him that way.' And she says, 'Oh, damn C. T. * * * He'll soon be in the Army now.'"

Mrs. Banks, as a prosecution witness, denied the substance of the above related conversation but she admitted on cross-examination that there had been some talk about going "down to the Knotty Pine," an establishment which, it appears provided for its patrons the transient use of private rooms. The transcript shows the following: "Q. * * * [D]id you say that she [Bernice] was playing the radio and with the music playing that Bernice said to you, 'Let's go down to the Knotty Pine?' * * * Did you say that to the district attorney in describing what your daughter said to you while she was playing the radio after Thomas had left for work? A. I did say that to him, and I explained to him while the music was playing Bernice was explaining to me, and she was explaining to me, 'Let's go down to the Knotty Pine.' And Bernice knew I didn't go to places like that, and Thomas knew I didn't go to places like that."

After the conversation with Bernice, whatever it was, Mrs. Banks entered the bathroom to draw water for a bath. She soon heard Bernice call, "Mama, come quick and don't let C. T. kill me." She responded to the call. Defendant had entered the house. She saw him "with his arm around Bernice's elbows. She was drawn very tight in his arms." Mrs. Banks said she "asked him not to hurt Bernice" and that "He told me to get back, I was ring-leader, or he would give me the same. * * * *He looked to be very angry to me.* [Italics added.] * * * When he asked me to back off he had his hand in his pocket and he pointed and told me to get back." Defendant, Mrs. Banks, and Bernice struggled through the house; defendant pushed Bernice out the front door; the struggle continued; and eventually defendant threw Bernice off the porch. During the altercation on the porch one Walter Bell, a neighbor, passing by across the street, was called to for help. He started to cross toward the melee but heard Mrs. Banks say, "He has a gun," whereupon the witness, in his own language, "turned around * * * and I went on about my business." After defendant had thrown Bernice from the porch "He stood on the stairs [porch steps] until she got up." Bernice ran and defendant pursued her down the street or court (south) a substantial distance and then back in a northerly direction. The witness Bell said that "I could hear her pleading, 'Please don't kill me, I haven't done anything.' * * * They were talking but I didn't understand, but I could hear that because she talked so loud. I started moving along a little bit and walked slow and looked back all the time and pretty soon I heard a shot and a flash in my direction, and I took off fast, quick, and I went to this house and I heard three shots * * * then I stood there a few minutes and started to go ahead, and then I heard two more shots, but * * * I went on to the bus."

From other evidence it appears that five shots from an automatic .32 caliber pistol

were fired by defendant, four of them taking effect in the body of decedent. At least two of the wounds, in the opinion of the autopsy surgeon, were in vital areas. The defendant went to his home, took the baby to a neighbor whom he requested to care for the child, and returned to the body of Bernice where he awaited arrival of police. When the officers arrived he raised his arms above his head and said: "I did it. I won't try to run away." He indicated the position of the pistol which was removed from his person by the arresting officer. From blood on defendant's clothing and from a statement made by him it appears that he caught Bernice once after wounding her (apparently after the first shot), that she broke away, that he pursued her again and fired more shots into her body, the last (inferentially) passing through her brain.

About fifteen minutes after the officers arrived (they had arrived at the scene about twenty minutes after the shooting) one of them (Deputy Sheriff Olson) had further conversation with the defendant and concerning it testified: "[H]e said, 'a person like that,' or words similar to those words, deserved to be shot. * * * I asked him why he shot her and he said because she was running around. And I asked him if she had done this often and he said yes, she had. * * * He said she had been doing it for some time. He said this night he stayed home and caught her at it. * * * We stated some more but I really don't recall. * * * [H]e seemed very cool, very cool, calm and collected."

Deputy Sheriff DeVarney testified that: "I asked Mr. Thomas if he was sorry that he had shot this woman and he stated that he wasn't, that he had been—that she had been cheating on him for some time and he had planned to do this before but all he was worrying about now was the fact that he wanted his mother to have the baby; there seemed to be a baby involved, he just stated. I asked him if, if—Oh, he stated then that the fellow involved was across the street, a fellow named Big."

The defendant himself, in a statement made to the district attorney about two or three o'clock in the morning of October 24, a few hours after the shooting, which statement was taken down in shorthand, said that he had been living with Bernice for four years, that before coming to California in February of 1942, while they were residing in St. Louis, Missouri, "she gave me some trouble running around there, I caught her several times there with fellows. She promised me she wouldn't do it any more. I wasn't satisfied then so I'd rather leave town than not be satisfied. So I came out here to go to work. * * *" Bernice came out in March or April of 1943, bringing the baby, and she and defendant resumed cohabitation. In response to the direct question "When did your last quarrel take place?" the defendant replied: "It was just tonight. I kept telling her about it. See, I works graveyard shift and I go to work and leaves her in bed. She gets up and goes out." He was then asked, "You figure that she has been going out after you left?" and he answered, "I don't figure—I know. You know I ain't no fool—*I laid in wait to catch her.*" (Italics added.) He then detailed his pretense of going to work, his return, his overhearing the asserted conversation above mentioned, and said, "I just got mad and I grabbed my pistol. * * * She broke and run on out and I ran after her and shot her."

[5] In determining the degree or class of the homicide the most crucial question before the jury was whether the defendant in forming and carrying out the intent to kill Bernice acted with deliberation and premeditation or in the heat of passion upon substantial provocation. The question was at best a difficult one for the jury to solve because, upon the record here, it involved not only a problem of conflicting evidence and inferences but also probably a determination of the relative extents in which the mental processes of defendant were characterized by deliberation on the one hand and passionate impulse on the other. If, previous to his return home on the night of October 23, the defendant had considered and formed the intent to kill Bernice if he caught her "running around" again then unquestionably the homicide would be murder of the first degree and the mere fact that he was angry at the time would not mitigate the degree. On the other hand if the intent to kill was entirely unformed and unconsidered prior to that evening and if it was a product purely of hot anger of the moment and was executed without reflection, without revolving the thought beforehand, then such homicide could be no higher offense than murder of the second degree.

The evidence on the point under discussion cannot be said to point unerringly to one conclusion. Aside from oral admissions of the defendant it tends strongly to show some degree of provocation and hot anger; it admits of conflicting inferences as to whether there were deliberation and premeditation. The defendant said that Bernice had been unfaithful to him before and it is apparent that his belief in that regard had a strong effect upon his conduct, but that is not tantamount to saying that he had previously determined to kill her if he again caught her transgressing the standard he invoked. He apparently had been feeling very friendly toward Bernice just before and at the time he left the house. Mrs. Banks said that he "looked to be very angry" when she first saw him after his return. He did not shoot Bernice then; neither did he shoot her as she lay on the ground almost beneath him after he had ejected her from the house and thrown her from the porch. The jury could have inferred that he did not then shoot because he had not then formed the intent to kill. Perhaps the jury on the other hand could have inferred that he already had determined to kill her but was temporarily frustrated in his intent by the struggle with Bernice and Mrs. Banks. But the question is a close one and the defendant was entitled to have it determined upon proper instructions as to the law.

[6] As to the admissions of defendant it is code law that evidence of the oral admissions of a party is to be viewed with caution. (Code Civ.Proc., § 2061(4).) His statement that he had "laid in wait to catch her" apparently refers to other occasions when assertedly he had caught her going out surreptitiously. But regardless of whether it refers to other occasions or to this occasion, as a matter of law it does not on its face and in its context justify the claim on behalf of the state that it constitutes an admission of lying in wait to commit murder. Not only is the admission in itself inadequate to support such a theory but all the evidence in the case touching on the subject tends to show a homicide of a character other than a lying-in-wait or ambush murder.

The asserted admission related by Deputy Sheriff DeVarney—"that she had been cheating on him for some time and *he had planned to do this before*" (italics added)—if those were the exact words used by defendant and if they mean what the state contends, was the most direct and important evidence in the trial on the question of degree of the offense. But, however conscientious an officer may be, it is possible for him to misapprehend words or suffer a fault of memory. In addition to the statutory admonition to view evidence of oral admissions with caution there were other incidents of this admission which the jury were bound to consider. On this highly important point the officer made no inquiry as to what the defendant meant by the words "do *this* before" or what the preconceived plan contemplated, whether it was a plan merely to catch Bernice "running around," a plan to pretend to start to work and then return to watch her, or a plan to kill her. And the officer "forgot about it completely" and reported it to no one until, more than three months later, he testified on the witness stand. The transcript shows the following:

"Q. Did you ask what he meant by he had planned to do this before? A. No, sir, he told me it was because she was cheating.

"Q. Did you make any notes of what he told you on this occasion? A. No. sir.

"Q. Have you ever made any written notes? A. No, sir, no written notes. * * *

"Q. Did you ever make a report about what you have stated on the witness stand to anyone? A. No, never made any report.

"Q. When was the first time you told an officer or otherwise what your testimony would be here today? A. I couldn't recall that.

"Q. Was it within the past few days? A. No, I forgot about it completely.

"Q. You forgot about it completely? A. Yes.

"Q. What caused you to remember? A. Well, I was there, I should remember."

The above related evidence fairly depicts the difficult case which was submitted to the jury. The need for adequate and correct instructions covering the elements of second degree murder as well as those pertaining to murder of the first degree and manslaughter is obvious. The instructions which were given are in material part as follows:

"Murder is the unlawful killing of a human being with malice aforethought. * * * [Malice defined.]

"All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary or mayhem, is murder of the first degree, and all other kinds of murder are of the second degree. * * * [Manslaughter defined; specifically enumerated types of first degree murder stated.]

"But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class the Legislature leaves the jury to determine from all the evidence before them, the degree of the crime, but prescribes for the government of their deliberations the same test which has been used by itself in determining the degree of the other two classes, to-wit: The deliberate and preconceived intent to kill. It is only in the latter class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of the second degree, and this difficulty is more apparent than real. The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection and not upon a sudden heat of passion sufficient to preclude the idea of deliberation.

"There need be, however, no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by and the result of a concurrence of will, deliberation and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

"If the unlawful killing is done without the provocation and sudden passion which reduces the offense to *manslaughter*, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, *unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree.*

"Manslaughter, as you have already been instructed, is the unlawful killing of a human being without malice.

"If under the evidence herein you are convinced to a moral certainty and beyond a reasonable doubt that the defendant is guilty of the crime of murder, that is to say, that he unlawfully killed said Bernice Thomas, also known as Bernice Ousley, with malice aforethought, but still if you entertain a reasonable doubt whether the said killing was wilful, deliberate and premeditated, then in such case you cannot find the Defendant guilty of murder in the first degree.

"I instruct you that before you may find the defendant guilty of murder of the second degree, you must find that he unlawfully took the life of deceased with malice aforethought.

"Manslaughter is principally distinguishable from murder in this: That though the act which occasions the death be unlawful or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionately lenient.

"You are instructed that the defendant can be convicted of no greater crime than voluntary manslaughter if the jury believe from all the facts and circumstances as may be shown by the evidence in the trial of this case that the defendant did not act with malice aforethought.

"You are instructed that to reduce a felonious homicide from the grade of murder to that of *manslaughter* upon the ground of sudden quarrel or heat of passion, the provocation must be of such a character as would be naturally calculated to excite and arouse the passions and it must appear that the party acted upon the smart of sudden passion and resentment.

"The sufficiency of provocation to reduce a homicide from murder to *manslaughter*

and whether defendant did in fact act under such provocation are questions of fact for the jury. * * *

"Provocation, as the term is used in law, means that treatment of one person by another which arouses passion and anger. In cases of homicide it negatives the idea of malice and premeditation because the hot blood engendered by provocation produces a temporary suspension of the reflective faculties, and the passion aroused excludes the idea of deliberation. *Therefore,* evidence tending to establish provocation may be considered by you and if, after due consideration of such evidence, you should entertain a reasonable doubt as to whether there existed at the time of the homicide in the mind of the defendant the malice, deliberation and premeditation essential to constitute the crime of *murder,* it would be your duty to *acquit* the defendant of the charge of murder. * * *

"I instruct you that if you find from the evidence that the defendant inflicted the wounds which caused death in a sudden transport of passion excited by what the deceased said, or did, or disturbed by preceding events, which for the time disturbed his reasoning faculties and deprived him of the capacity to reflect, or while under the influence of some sudden quarrel or heat of passion, *the imputation that he acted with malice aforethought is rebutted and the act is not murder.* * * *

"Upon a trial for *murder,* the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to *manslaughter or that the defendant was justifiable or excusable* [sic]." (Italics added.)

[7-9] Considering first the last paragraph of the above quoted instructions (all of which were given of the court's own motion) in connection with the other instructions, it is apparent that there is at least an implication that upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances to mitigate the offense from murder of the first degree to that of the second devolves upon the defendant. That is not the law. In order to establish murder of the first degree the burden is upon the prosecution to produce evidence which satisfies the minds of the jurors beyond all reasonable doubt not only that an unlawful homicide with malice aforethought was committed by the defendant but also that such homicide was of a type specifically enumerated in the statute as being murder of the first degree or was of equal cruelty and aggravation with those enumerated and was accompanied with a deliberate and premeditated intent to take life. "When the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is that it was malicious and an act of murder; but in such a case the verdict should be murder of the second degree, and not murder of the first degree." (People v. Howard (1930), 211 Cal. 322, 329, 295 P. 333, 336, 71 A.L.R. 1385; see, also, People v. Knapp (1886), 71 Cal. 1, 6, 11 P. 793; People v. Ford (1927), 85 Cal.App. 258, 263, 258 P. 1111.)

[10, 11] The instruction was in the language of the code (Pen.Code, § 1105), but, as declared by Mr. Justice Traynor in his concurring opinion in People v. Albertson (1944), 23 Cal.2d 550, 587, 145 P.2d 7, 26, "An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court. [Citations.] It is not proper if reasonable men might differ as to the construction of the statute, for it would delegate to the jury the function of statutory interpretation that belongs to the court. [Citations.]" Not only is the instruction under the facts of this case subject to the precise criticism levelled at it by Justice Traynor in the Albertson case (failure to define the extent of the duty insofar as degree of proof was concerned, the effect of which failure standing alone we do not now consider) but also, here, such instruction is erroneous in that the jury were not advised that it has no application whatsoever in determining the degree of murder, if the homicide is found to constitute murder, but is pertinent (if it ever should be given as an instruction even with proper explanation) only in relation to determining whether the homicide constitutes murder or manslaughter or is justifiable or excusable. Although the giving of instructions embodying the substance of that section has been countenanced or approved in a number of cases, with a variety of comments and limitations (see concurring opinion of Justice Traynor

in the Albertson case, at pages 586, 587 of 23 Cal.2d, at pages 25, 26 of 145 P.2d for listing of such cases), logic suggests that since such section in reality merely declares a rule of procedure and does not relieve the state of the burden of proving each and every essential element of guilt beyond a reasonable doubt the propriety of reading it to the jury, even with a proper explanation, is doubtful.

[12] It is true that the court here also instructed the jury that "the law raises no presumption whatever against the defendant, but on the contrary, every presumption of the law is in favor of his innocence and * * * every material fact necessary to constitute such crime must be proved beyond a reasonable doubt and, if you entertain a reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and *acquit him.*" (Italics added.) Such instruction is eminently proper on the general issue of guilt or innocence but as it concludes with a direction to *acquit* if the doubt is entertained it obviously is not applicable to the question of degree or class of homicide. Furthermore, it was not, by its terms, expressly made applicable to the evidence of mitigating circumstances. (See comment of Justice Traynor in People v. Albertson (1944), supra, 23 Cal.2d at page 588, 145 P.2d at page 26.)

[13] Likewise the instruction that if the jury "have a doubt as to the degree of the offense of which the defendant is guilty * * * the jury will give the defendant the benefit of such doubt and find him guilty only of the lowest offense as to which they may find him guilty beyond a reasonable doubt," although it is a correct statement of the law, does not necessarily to the lay mind eradicate the confusion naturally arising from the prior seemingly inconsistent instruction that "Upon a trial for *murder,* the commission of the homicide by the defendant being proved, the *burden of proving* circumstances of mitigation * * * devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to *manslaughter.* * * *" (Italics added.) (For discussion as to the effect of error in instructions in a criminal case where the verdict is based on substantially conflicting evidence, see People v. Dail (1943), 22 Cal.2d 642, 650, 140 P.2d 828; People v. Silver (1940), 16 Cal.2d 714, 723, 108 P.2d 4.) Here the defendant was on trial for murder, the homicide was proved and admitted and the proof on the part of the prosecution evidently was regarded by the jury *not* as showing that "the crime committed only amounts to manslaughter." Thus there was left for the jury no apparent application of the instruction unless it was to be regarded as placing on the defendant the burden of proving circumstances of mitigation to reduce the offense from murder of the first degree to that of the second. And as to whether such burden required the defendant to adduce evidence which proved those circumstances by a preponderance of the evidence or beyond a reasonable doubt or sufficient merely to raise a reasonable doubt, the jury were wholly uninstructed unless by a process of lawyerlike science they could deduce some inference from the general instructions.

[14-16] As heretofore suggested the responsibility of statutory construction should not be left to the jury. The interpretation of a statute and the question of its applicability to any given set of facts are exclusively the province of the court. It was the duty of the court, if it gave the instruction at all, to definitely inform the jury that such instruction had no application whatsoever to a determination of the degree of the murder if the offense was found to be murder (see People v. Howard (1930), supra, 211 Cal. 322, 329, 295 P. 333, 71 A.L.R. 1385) or to fixing the punishment if the offense was found to be murder of the first degree (see Pen.Code, § 190; People v. Bollinger (1925), 196 Cal. 191, 207-209, 237 P. 25); furthermore, that the rule could be considered only in connection with the question as to whether the homicide amounted to murder or manslaughter or was justifiable or excusable, that on such question no more was required of the defendant than that he adduce evidence of circumstances sufficient to raise a reasonable doubt on the particular issue, if the prosecution evidence did not in itself leave such a doubt, and that in determining such issues all of the pertinent evidence in the case, whether produced by the defendant or by the state, was to be considered, the defendant being entitled to the benefit of prosecution evidence, if it tended to benefit him, as well as to that adduced by himself. (See People v. Wells (1938), 10 Cal. 2d 610, 621-623, 76 P.2d 493.)

[17] A still more serious error appears in the instruction that "If the unlawful killing is done without the provocation and sudden passion *which reduces the offense to manslaughter,* or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, *unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree.*" (Italics added.) Such instruction is egregiously erroneous. If the jury followed it they were bound to find, upon the facts of this case, that the homicide was murder of the *first* degree if it was murder at all.

[18] The attorney general contends that "the presence of specific intent distinguishes murder in the first degree from murder in the second degree. If the proof shows specific intent, it is murder in the first degree, and not murder in the second degree. Specific intent is deliberate intent" and that "'Malice aforethought' is synonymous with 'deliberation and premeditation,'" citing People v. Watts (1926), 198 Cal. 776, 800, 801, 247 P. 884, 893. Such contention cannot be sustained. (See People v. Holt (1944), supra, 25 Cal.2d 59, 153 P.2d 21.) To support it would belie any difference in the plain import of the words "specific" and "deliberate" and would emasculate the statutory difference between first and second degree murder. The word "specific" (adjective) means "Precisely formulated or restricted; * * * definite, * * * explicit; of an exact or particular nature" (Webster's New Int. Dict., 2d Ed.) while "deliberate" (as an adjective) means "formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; * * * Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; * * * Slow in action; unhurried; * * * Characterized by reflection; dispassionate; not rash." (Id.) The verb "deliberate" means "to weigh in the mind; to consider the reasons for and against; to consider maturely; reflect upon; ponder; as to *deliberate* a question * * * to weigh the arguments for and against a proposed course of action." (Id.) It has been judicially declared that "Deliberation means careful consideration and examination of the reasons for and against a choice or measure." (People v. Richards (1905), 1 Cal.App. 566, 571, 82 P. 691, 693.)

It is to be noted that the discussion by the attorney general omits any mention of the word "premeditated," which word is also used in the statute (Pen.Code, § 189), conjoined with "deliberate," to denote an essential element of murder of the first degree of the type here involved. The verb "premeditate" means "To think on, and revolve in the mind, beforehand; to contrive and design previously." (Webster's New Int. Dict. (2d ed.).)

[19] It is true that in the case of People v. Watts (1926), supra, 198 Cal. 776, 800, 801, 247 P. 884, 893, this court, in discussing an averment in an information, said that "The words 'malice aforethought' are equivalent to an averment that the killing was committed with deliberation and premeditation"; also, in the case of People v. Fowler (1918), 178 Cal. 657, 661, 174 P. 892, 893, it was said that "The statement in the information that the defendant did 'of his malice aforethought' kill and murder Duree is equivalent to an averment that the act was committed with deliberation and premeditation." Whatever is, or may have been, the rule as to sufficiency of pleading murder, it cannot be allowed to emasculate the statutory difference between the two degrees of murder or obviate the necessity for correctly and adequately instructing the jury as to the elements which must be proved.

[20-22] Section 189 of the Penal Code defines the degrees of murder as follows: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree." In construing criminal statutes the ejusdem generis rule of construction is applied with stringency. (Matter of La Société Francaise, etc., (1899), 123 Cal. 525, 531, 56 P. 458, 787; People

v. McKean (1925), 76 Cal.App. 114, 121, 243 P. 898.) Hence, the more general words "or any other kind of willful, deliberate, and premeditated killing," following the specifically enumerated instances of killing which are expressly declared to constitute murder of the first degree, must be construed in the light of such specifically listed types and be held to include only killings of the same general kind or character as those specifically mentioned. By conjoining the words "willful, deliberate, and premeditated" in its definition and limitation of the character of killings falling within murder of the first degree the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill.

[23, 24] Since the decision in People v. Sanchez (1864), 24 Cal. 17, 20, it has been repeatedly declared that "There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind," but this is not the equivalent of saying that the *intention to kill* can be formed without being preceded by deliberation and premeditation. It is only a declaration that the act of killing may instantaneously follow the intention once the latter is finally formulated. It does not imply that mature reflection (deliberation and premeditation) need not precede the ultimate formation of the evil intention. By its very language it has reference only to the "space of time between the intention to kill and the act of killing." In other words, a murder is of the first degree no matter how quickly the act of killing follows the ultimate formation of the intention if that intention has been reached with deliberation and premeditation. This view of the law is manifest in the Sanchez case by the statement (at page 30 of 24 Cal.) that "The intent to kill must be the result of deliberate premeditation; it must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation." Neither the statute nor the court undertakes to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent which is truly deliberate and premeditated. The time would vary with different individuals and under differing circumstances. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes from murder of the first degree those homicides (not specifically enumerated in the statute) which are the result of mere unconsidered or rash impulse hastily executed.

[25-27] The word "deliberate" is an antonym of "Hasty, impetuous, rash, impulsive" (Webster's New Int. Dict. (2d ed.)) and no act or intent can truly be said to be "premeditated" unless it has been the subject of actual deliberation or forethought (id.). It is obvious that the phrases "malicious intent" and "malice aforethought" are not synonymous with "willful, deliberate, and premeditated" intent. (See People v. Holt (1944), supra, 25 Cal.2d 59, 153 P.2d 21.) Implications to the contrary in People v. Watts (1926), supra, 198 Cal. 776, 800, 801, 247 P. 884, and People v. Fowler (1918), supra, 178 Cal. 657, 661, 174 P. 892, are disapproved. The instruction given was erroneous and under the circumstances of this case we cannot conclude that it was not prejudicial. (See People v. Dail (1943), supra, 22 Cal.2d 642, 650, 40 P.2d 828.)

[28] It is contended on behalf of the state that the admonition that "If * * * you are convinced * * * that the defendant is guilty of the crime of murder * * * but still if you entertain a reasonable doubt whether the said killing was wilful, deliberate and premeditated, then in such case you cannot find the Defendant guilty of murder in the first degree" operates to cure the error in the preceding instruction that "If such specific intent [to take life] exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree." But such contention has no merit. Since the effect of the last quoted instruction is to tell the jury that "wilful, deliberate and premeditated" intent means simply a specific intent to kill (as is contended by the attorney general to be the law) the jury, if consistent, would interpret the related doubt instruction as meaning merely that, as a basis for finding murder of the first degree, they must believe beyond a reasonable doubt that the killing was perpetrated with a *specific intent to kill.* If "specific

intent" and "wilful, deliberate and premeditated intent" were synonymous, and if the jury had been instructed fully as to the meaning of "wilful, deliberate and premeditated," then the state's contention could be sustained, but since such expressions are not synonymous and inasmuch as the jury were not informed as to the meaning of "wilful, deliberate and premeditated," the error and the failure to cure it are obvious.

On behalf of the state great emphasis has been placed on certain language appearing in People v. Leddy (1928), 95 Cal.App. 659, 670, 273 P. 110. An instruction similar to that which we are now considering had been given and on appeal it was assigned as one of many asserted errors. The District Court of Appeal in disposing of the point said (95 Cal.App. at page 671, 273 P. at page 115), "The court in its other instructions fully defines murder of the first and second degree, and manslaughter, *and the elements constituting those offenses.* Therefore, read in connection with the other instructions, the instruction complained of constituted a correct statement of the law. * * * [95 Cal.App. at page 680, 273 P. at page 119] We have gone over the entire record in the case, and have considered each one of the points raised by appellant, and we find no prejudicial error." (Italics added.) We disapprove the declaration that "read in connection with the other instructions, the instruction complained of constituted a correct statement of the law." Obviously, "the instruction complained of," whether read in connection with the other instructions or otherwise, did not constitute a correct statement of the law.

The real effect of the holding of the District Court of Appeal in the Leddy case was that under all the circumstances of that case the giving of the instruction did not amount to prejudicial error. Here, upon an examination of the entire record, we are unable to hold that it was not prejudicial. (Cal.Const., art. VI, § 4½; People v. Burness (1942), 53 Cal.App.2d 214, 222, 127 P.2d 623; People v. Dail (1943), supra, 22 Cal.2d 642, 659, 140 P.2d 828.) As previously pointed out, *upon the undisputed facts in this case,* if the jury found the offense to be murder at all, they were bound, *if they followed that instruction* to find that it was murder of the first degree. There is no question raised as to the specific intent of the defendant; both his conduct and his admissions establish it. But the evidence is in substantial conflict and presents a close question as to whether that specific intent was formed with deliberation and premeditation or rashly and impetuously in the heat of sudden anger. We belie the admonitions of reality and assume too much too lightly if we undertake to hold as a matter of law that the jury did not gain the understanding from the quoted instruction, regardless of the other inconsistent instructions, that they *could not lawfully find the defendant guilty of second degree murder* if "the evidence proves the existence in the mind of the slayer of the specific intent to take life." The court solemnly told them, "If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree." It should be obvious that the vice in this instruction which principally motivates our conclusion that it was prejudicially erroneous comes not from any failure of the trial court to have correctly defined first degree murder elsewhere but rather from the fact that under this instruction, whether read with the others or alone, the jury, *if they gave this instruction any effect whatsoever, were by it substantially precluded from finding the offense to be murder of the second degree.* Yet on the evidence this was the closest and most critical issue in the case. On such a record we cannot hold that the jury gave no effect to the instruction.

[29] It is also to be observed that the instructions given cover quite fully the distinction between murder and manslaughter and advise the jury as to the meaning of the term "provocation" and its materiality in relation to possibly reducing the offense from murder to manslaughter but the instructions are wholly silent in respect to the materiality of provocation as regards the degree of murder, if the homicide is found to be murder. Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i. e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation.

[30, 31] Murder of the second degree may be defined as the unlawful killing of

a human being with malice aforethought but which killing is not perpetrated by means of poison, or lying in wait, or torture, is not wilful, deliberate, *and* premeditated, and is not committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. (See Pen.Code, § 187, 189.) It is apparent from the facts previously recited that the homicide in this case, if it was murder at all, was murder of the second degree unless the killing was "wilful, deliberate and premeditated." The existence of provocation and its extent and effect, if any, upon the mind of defendant in relation to premeditation and deliberation in forming the specific intent to kill, as well as in regard to the existence of malice (Pen.Code, § 188), constitute questions of fact for the jury and they should have been so advised.

[32, 33] It will be observed that the errors hereinabove discussed all relate solely to the question of the degree of the murder (with the possible exception of one aspect of the reading of section 1105 of the Penal Code) and defendant has contended that we should reduce the judgment from murder of the first degree to that of the second. This latter contention, however, is based, necessarily, not upon the errors mentioned but upon the proposition that there is a doubt as to whether the evidence is sufficient to support the adjudication that the murder is of the first degree, citing People v. Howard (1930), supra, 211 Cal. 322, 330, 295 P. 333, 336, 71 A.L.R. 1385, wherein this court said, "We entertain a doubt as to its [the record] showing murder of the first degree" and reduced the judgment to murder of the second degree. Defendant urges that the rule is "that the judgment must be reduced *when there is a doubt* as to the sufficiency of the evidence to support the higher crime" and that "the doubt which justifies the reduction is the court's doubt and furthermore it is the doubt of *the particular court passing upon the question.*" (Italics added.) This view of the law would require courts of appellate jurisdiction in all cases involving crimes divided into degrees or including lower offenses, where the defendant was convicted of any other than the lowest possible class or degree, to examine and pass upon the *weight* of all the evidence in the record. We are satisfied that the trial court (with or without a jury), as the original trier of facts, having the witnesses before it and possessing facilities peculiarly appropriate and convenient to the ascertainment of facts, is in a better position than are we to pass upon the weight of evidence, and that the Legislature in amending subdivision 6 of section 1181 of the Penal Code to provide that "When the verdict is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed," did not intend to effect a general alteration of the rule as to the respective functions of trial and appellate courts. While the *power* granted to the appellate court is equal to that given the trial court the circumstances which will justify its exercise in a particular court are those which are appropriate to typical functioning of that court. In other words, upon an application to reduce the degree or class of an offense, a trial judge may review the *weight* of the evidence but an appellate court should consider only its *sufficiency as a matter of law.* This is in accord with the general rule stated in People v. Holt (1944), supra, 25 Cal.2d 59, 153 P.2d 21, 28: "The function of the jury was to appraise the weight of the evidence; ours is to appraise its legal adequacy" and (25 Cal.2d at page 90, 153 P. 2d at page 38) "While the jury is given the function of determining the facts upon the evidence it does not have the power of changing the standard [as to what constitutes murder of the first degree as distinguished from murder of the second degree]." Implications to the contrary in People v. Howard (1930), supra, 211 Cal. 322, 330, 295 P. 333, 71 A.L.R. 1385, are disapproved. Having examined the record in this case we do not feel constrained to hold that the evidence is legally inadequate to support a verdict of murder of the first degree. Hence, we are not authorized to reduce the judgment under our view of section 1181(6) of the Penal Code.

Other errors complained of arise from situations and events which need not occur on a new trial and therefore, in the light of the conclusion we have reached, need not be discussed.

For the reasons hereinabove stated the judgment and order appealed from are reversed.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concurred.

EDMONDS, J. As I read the record in this case it not only shows evidence which, as conceded by my associates, substantially supports the verdict of the jury finding Thomas guilty of murder of the first degree but also a charge to the jury which includes a complete and accurate statement of the law relating to the crimes of murder and manslaughter. I therefore cannot concur in the decision granting the appellant a new trial. And assuming that the abstruse and meticulous analysis of the instructions made by Justice Schauer justifies the conclusion that there was error in the charge to the jury, in my opinion, considering all of the facts of the case, the verdict should be upheld in accordance with the constitutional mandate requiring that a judgment shall not be reversed because of the jury's misdirection, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Cal. Const., art. VI, § 4½.

The evidence relating to the homicide, including the statements of Thomas concerning the circumstances surrounding its commission, provides ample basis for characterizing the crime as a planned and deliberate murder which the jury correctly determined to be of the first degree. For some time, Thomas had suspected that Bernice was engaged in clandestine relations with other men. Whether this mistrust was warranted or wholly unfounded, both at the time of his arrest, immediately following the shooting, and shortly thereafter he voluntarily stated that because of his suspicions he had "planned to do this before."

As he related the occurrences, on the night of the shooting he left Bernice in bed and pretended to go to work but instead "laid in wait to catch her." When he secretly returned to his home and found Bernice dressing to go out, he said "I just got mad and grabbed my pistol." Bernice then "broke and run on out and I ran after her and shot her." It appears that, in her efforts to escape Thomas, Bernice reached a point about 60 feet from the porch of their home and when he caught up to her there, she doubled back and ran in the opposite direction for a somewhat greater distance before he felled her with the fatal shots. Thomas admitted that he fired four times and his testimony was corroborated by the autopsy surgeon who found eight puncture wounds in the body of Bernice. These were the points of entrance and exit of the four bullets.

Later, on the witness stand, in an apparent attempt to minimize the legal consequences of his act, Thomas altered his story in several material particulars. He then said that he missed the bus for work on the night of the shooting and unexpectedly returned home to find Bernice preparing to go out with another man, that a dispute followed, and that in the resulting tussle the gun was accidentally discharged with fatal effect.

Unquestionably the jury was fully justified in rejecting the appellant's courtroom version of the shooting in the face of his earlier contradictory and impeaching statements. Moreover, it is inconceivable that the gun could have "accidentally" discharged four times into the body of Bernice. And in addition to the self-impeaching statements of Thomas, the testimony of other witnesses absolutely discredits the story related by him upon the witness stand.

According to Mrs. Banks, Bernice was dressing to visit her sister when Thomas entered the room. He was very angry and "grabbed" his loaded pistol from a dresser drawer. Bernice called out "Mama, come quick, and don't let C. T. kill me." As he held Bernice in one arm, Thomas told her mother to get back or he would give her "the same." He then shoved Bernice out of the door and down a flight of steps. She broke loose and ran down the street, Thomas pursuing her. He fired two shots at her and later three more. A neighbor, who was passing the house at the time of the "confusion," heard Bernice cry out, "Please don't kill me, I haven't done anything." Later, this witness said, Bernice ran down the street with Thomas in pursuit and as they entered a darkened area he heard her cry out several times, "Please don't kill me, C. T., I haven't done anything." He then heard several shots and a few seconds later he heard additional shots.

This evidence overwhelmingly supports the jury's verdict that the murder was premeditated and therefore of the first degree. The appraisal of the evidence and the resolving of conflicts therein including the weighing of the inconsistent and impeaching versions of the circumstances surrounding the homicide given by Thomas

were matters exclusively for the jury's determination. In explaining and minimizing the scope and effect of his statements indicative of premeditation, my associates have effectively usurped the function of the jury.

Concerning the instructions, the majority admit that they were correct in concept and adequate in expression of the distinction between murder and manslaughter. But, it is said, they did not adequately and accurately inform the jury in regard to the distinction between murder of the first degree and murder of the second degree. In reaching this conclusion, Mr. Justice Schauer declares that the brief of the attorney general misconceives the distinction between the degrees of murder and that it erroneously stresses the necessity for the presence, in a homicide of the type here involved, of only a specific intent to kill without mentioning the equally essential element of premeditation. It is somewhat unusual, to say the least, for a judicial conclusion to be based upon the assertedly incorrect statements of counsel in regard to the law. Considering the instructions as the basis of the charge that the jury was misdirected, I do not find any error in them; on the contrary they clearly define the crimes of murder of the first degree and murder of the second degree, accurately stating the difference between the two offenses.

"Murder," the court told the jury in the exact language of the Penal Code, "is the unlawful killing of a human being, with malice aforethought. [Pen.Code, § 187.] Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. [Pen.Code, § 188.] All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree." (Pen.Code, § 189.)

By these instructions the jury was told that to convict one of the crime of murder of the first degree, the evidence must show premeditation. But the court gave a much fuller explanation of the subject, saying: "In dividing murder into degrees the legislature intended to assign to the first as deserving of greater punishment, all murders of a cruel and aggravated character; and to the second all other kinds of murder which are murder at common law; and to establish a test by which the degree of every case of murder may be readily ascertained. That test may be thus stated: *Is the killing willful* (that is to say, intentional), *deliberate and premeditated? If it is, the case falls within the first degree and if not, within the second degree.* There are certain kinds of murder which carry with them conclusive evidence of premeditation; these the Legislature has enumerated in the code definition already given you and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder of the first degree. These cases are of two classes:

"First: Where the killing is perpetrated by means of poison, lying in wait, torture, etc. Here the means used is held to be conclusive evidence of premeditation.

Second: Where the killing is done in the perpetration, or attempt to perpetrate, some one of the felonies enumerated in the statute, such as arson, rape, robbery, burglary or mayhem, here the occasion is made conclusive evidence of premeditation. Where the case comes within either of these classes the test question: Is the killing willful, deliberate and premeditated? is answered by the statute itself, and the jury have no option but to find the prisoner guilty in the first degree. Hence so far as these two classes are concerned, all difficulty as to the question of degree is removed by the statute. But there is another and much larger class of cases included in the definition of murder in the first degree, which are of equal cruelty and aggravation with those enumerated, and which, owing to the different and countless forms which murder assumes, it is impossible to describe in the statute. In this class the legislature leaves the jury to determine from all the evidence before them, the degree of the crime, but prescribes for the government of their deliberations the same test which has been used by itself in determining the degree of the other two classes, to-wit: *The deliberate and preconceived intent to kill.* It is only in the latter class of cases that any difficulty is experienced in drawing the distinction between murder of the first and murder of

the second degree, and this difficulty is more apparent than real. The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. *The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection* and not upon a sudden heat of passion sufficient to preclude the idea of deliberation.

"There need be, however, no appreciable space of time between the intention to kill and the act of killing—they may be as instantaneous as successive thoughts of the mind. *It is only necessary that the act of killing be preceded by and the result of a concurrence of will, deliberation and meditation on the part of the slayer, and if such is the case the killing is murder in the first degree,* no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing." (Italics added.)

This instruction is taken directly from People v. Sanchez, 24 Cal. 17, 29, 30, which is relied upon by my associates in the present case and also characterized by them in People v. Holt, 25 Cal.2d 59, 153 P. 2d 21, as the first decision in this state to correctly point out the distinction between murder of the first and of the second degree. Certainly the instruction informed the jury no less than four times as to the necessity, under the legislative definition, for reflection or premeditation in order that a homicide may be classified as murder of the first degree.

My associates also place their conclusion that the judgment should be reversed upon the ground that another instruction destroyed the distinction between first and second degree murder, so painstakingly expressed by the trial court in its charge. The criticized instruction in this regard reads: "If the unlawful killing is done without the provocation and sudden passion which reduces the offense to manslaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in the description of murder in the first degree, or the circumstances of the killing show an abandoned heart, this is murder of the second degree, *unless the evidence proves the existence in the mind of the slayer of the specific intent to take life. If such specific intent exists at the time of such unlawful killing, the offense committed would of course be murder of the first degree.*" (Italics added.)

In determining that the italicized portion of the instruction is erroneous, my associates have not considered its context. Of particular importance are the emphasized words "existence" and "exists." As there used, and when read in light of the immediately preceding and immediately subsequent instructions, which clearly informed the jury as to the necessity for deliberation and premeditation in murder of the first degree, these two words necessarily connote or imply a preconceived or premeditated intent to take life. And, of course, when such preconceived and premeditated intent to take life "exists" in the mind of the slayer, the resulting homicide is murder of the first degree.

The immediately preceding instruction informed the jury, no less than four times, that premeditation was a necessary element of murder of the first degree. The instruction following re-emphasized the point by informing the jury, "If under the evidence herein you are convinced to a moral certainty and beyond a reasonable doubt that the defendant is guilty of the crime of murder, that is to say, that he unlawfully killed said Bernice Thomas, also known as Bernice Ousley, with malice aforethought, but still if you entertain a reasonable doubt whether the said killing was wilful, deliberate and premeditated, then in such case you cannot find the defendant guilty of murder in the first degree."

I am satisfied, therefore, that the instruction which my associates classify as prejudicially erroneous is not open to criticism when correctly construed and read in the light of the remainder of the charge to the jury. People v. Leddy, 95 Cal.App. 659, 670, 671, 273 P. 110, 115. The same instruction was challenged in the Leddy case upon the ground advanced by Thomas, but it was held (and this court denied a hearing) that when read in connection with the other instructions to the jury defining murder of the first and of the second degree and of manslaughter, it correctly stated the law. That conclusion was based upon the following reasoning: "It is claimed that this instruction is erroneous because it tells the jury that if there existed in the mind of appellant a specific intent to take life it constituted murder of the first degree, and that the instruction ignores the

necessary elements of premeditation and deliberation, which are necessary elements of murder of the first degree. It will be noted that the instruction states that if the unlawful killing is done without the provocation and sudden passion, which reduces the offense to manslaughter, or is done in the commission of an unlawful act, the natural consequences of which are dangerous to life, or is committed in the attempt to perpetrate a felony other than those mentioned in murder of the first degree, or the circumstances of the killing show an abandoned heart, that is murder of the second degree. The court in its other instructions fully defines murder of the first and second degree, and manslaughter, and the elements constituting those offenses. Therefore, read in connection with the other instructions, the instruction complained of constituted a correct statement of the law."

But, assuming that the criticized instruction is incomplete in its statement of the essentials of murder of the first degree, it is inconceivable that the jury could have been thereby confused or misled in its deliberations when, as shown, it had been told in many other instructions that "the unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a pre-existing reflection. * * *" Also, my associates give no effect to other instructions by which the jury repeatedly was told that premeditation is an essential element of the crime of murder of the first degree. Moreover, an instruction admonishing the jury to "consider these instructions as a whole [as required by settled law] and not any one instruction to the exclusion of another," is completely ignored. Under these circumstances and particularly considering the evidence consisting of Thomas' own statements and the physical facts which point convincingly to a murder of the first degree, the record presents a case calling for the application of the curative provisions of section 4½ of article VI of the Constitution.

The reversal is also grounded upon the asserted error in an instruction which is not challenged by the appellant. This instruction is phrased in the exact language of section 1105 of the Penal Code and many times has received judicial approval. People v. Boggs, 12 Cal.2d 27, 35, 82 P.2d 368; People v. Madison, 3 Cal.2d 668, 676, 677, 46 P.2d 159; People v. Grill, 151 Cal. 592, 595, 91 P. 515; People v. McClure, 148 Cal. 418, 421, 83 P. 437; People v. Leddy, 95 Cal.App. 659, 672, 273 P. 110; People v. Richards, 1 Cal.App. 566, 571, 82 P. 691. The criticism directed at that instruction in the concurring opinion of Mr. Justice Traynor in People v. Albertson, 23 Cal.2d 550, 586-588, 145 P.2d 7, is a statement of his views only. The cases of People v. Post, 208 Cal. 433, 281 P. 618; People v. Bushton, 80 Cal. 160, 22 P. 127, 549; and People v. Elliott, 80 Cal. 296, 22 P. 207, which were cited by him involved a different instruction which did not follow the language of Penal Code section 1105. Among other things, the instruction in those cases contained the following: "The killing being proved, the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. The burden of proof changes. It must be in some degree, no matter how small, stronger than the proof of the prosecution on the other side." In other words, the instruction there involved required proof of mitigating circumstances by a preponderance of the evidence. See criticism of this language in People v. Post, supra, 208 Cal. at page 437, 281 P. at page 619, and in People v. Madison, 3 Cal.2d 668, 676, 677, 46 P.2d 159.

The instruction in the present case is not open to this objection. Moreover, the jury which found Thomas guilty was clearly instructed that a defendant is presumed innocent "and, in order to convict him of the crime alleged * * * or of any lesser crime which may be included in it, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt and, if you entertain a reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit him." Additionally, the jury was charged that if it believed "from all the evidence in the case beyond a reasonable doubt that the defendant is guilty of homicide, but have a doubt as to the degree of the offense of which the defendant is guilty—whether it is murder in the first degree, murder in the second degree, or manslaughter, the jury will give the defendant the benefit of such doubt and find him guilty only of the lowest

offense as to which they may find him guilty beyond a reasonable doubt."

For these reasons, in my opinion, the judgment should be affirmed.

SHENK, J., concurred.



25 Cal.2d 913

PHILLIPS et al. v. TRUSHEIM.
L. A. 18812.

Supreme Court of California.

Feb. 9, 1945.

1. Appeal and error ⇐127
Judgment ⇐119

A trial court has jurisdiction to render default judgment over three years after service of summons on defendant, though such judgment is erroneous and subject to direct attack on appeal. Code Civ.Proc. § 581a.

2. Judgment ⇐137

A trial court, entering default judgment through inadvertence or improvidence, has power, independently of statute, to correct such mistake by amending or setting aside judgment, as such action presents no question of judicial review on merits.

3. Judgment ⇐355

Judicial error in rendition of orders or judgments because of exercise of judicial discretion may not be corrected except by statutory procedure.

4. Judgment ⇐141

A judge's order, granting motion to vacate default judgment, rendered by another judge of same court, and dismiss action solely on ground that judgment was not entered within three years after service of summons and complaint, as required by statute, was erroneous, in absence of showing of judicial inadvertence in rendering judgment and showing that judge granting motion had before him any matters not considered by other judge when he rendered judgment. Code Civ.Proc. §§ 473, 581a.

5. Judgment ⇐153(1)

A motion by defaulting defendant over six months after entry of default to set aside default judgment and dismiss action as against him came too late to entitle him to such relief on statutory ground of mistake, inadvertence, surprise, or excusable neglect, even if his counsel's statement in open court that he did not rely on such statute, but asked for ruling in defendant's favor because judgment was entered over three years after service of summons, did not preclude vacation of judgment on statutory ground. Code Civ.Proc. §§ 473, 581a.

6. Appeal and error ⇐882(3)

On appeal from order, granting motion to vacate default judgment and dismiss action against defaulting defendant because judgment was not entered within three years after service of summons and complaint on him, following his abandonment of statutory grounds for motion, his contention that he should be accorded trial on merits and granted relief on such grounds was without merit as inconsistent with his insistence that trial court properly dismissed action because of delay in entering judgment. Code Civ.Proc. §§ 473, 581a.

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by William E. Phillips and wife against Alvin A. Trusheim and others to quiet title to a tract of land. Judgment for plaintiffs, and from an order granting named defendant's motion to vacate the judgment and dismiss the action as to him, plaintiffs appeal.

Reversed.

Prior opinion, Cal.App., 149 P.2d 873.

Vincent Whelan, of San Diego, for appellants.

Lindley & Higgins, of San Diego, for respondent.

EDMONDS, Justice.

More than three years after the service of summons upon Alvin C. Trusheim, judgment was entered against him. Later he successfully moved to vacate the judgment upon the ground that there was no jurisdiction to render it, and the question for decision concerns the right of the court to make the order in his favor.

William E. Phillips and his wife, the appellants, sued to quiet title to 80 acres of land. They named as defendants Wofford T. Caldwell and Vera C. Caldwell, the owners of the property adjoining on the west, and Trusheim, the neighbor on the east. The purpose of the litigation is to determine boundary lines.

The complaint was filed in 1938 and the Caldwells promptly answered. The default of Trusheim was entered on January 6, 1939, and after a second service upon him, his default was again entered on March 30, 1939. Later Trusheim was adjudged an incompetent and the superior court appointed a guardian of his person and estate. In June 1940, more than six months after the entry of the default, the guardian gave notice of a motion to vacate it upon grounds specified in section 473 of the Code of Civil Procedure. The notice was accompanied by a proposed answer but the motion was never made and no permission to file the pleading was ever obtained.

Judgment in favor of the appellants was entered in September, 1942, more than "three years after service of summons." Code Civ.Proc. § 581a. The judgment is based upon a written stipulation between the appellants and the Caldwells, and upon the default of Trusheim. Within 60 days from the entry of judgment, Trusheim filed a notice of motion to vacate it and to dismiss the action as to him, but he did not appeal. No grounds for the motion were stated in the notice, but by amendment, counsel declared that the court would be asked to vacate the judgment because of Trusheim's "mistake, inadvertence, surprise and excusable neglect." Thereafter, by a second amendment to the notice, as an additional ground, it was stated that, because judgment was not entered within three years after the service of summons, it was void as to him. When the matter was heard, counsel for Trusheim stated in open court that he did not rely upon section 473 of the Code of Civil Procedure but based his motion upon the ground that the court was without jurisdiction to enter the judgment. The motion was granted and the court ordered the judgment vacated and the action dismissed as to Trusheim solely for the reason that the judgment was not entered within three years after the service of the summons and complaint upon him.

In attacking the order vacating the judgment in their favor, the appellants contend that a trial court has jurisdiction to enter judgment against a defaulting defendant more than three years after he was served with summons. Moreover, they assert, a court has no power, independent of statute, to correct judicial error by setting aside or amending its judgment. They say, in this connection, that the rendition of judgment against a nonanswering defendant more than three years after the service of summons is judicial error rather than mere inadvertence. And, in conclusion, the point is made that Trusheim did not attack the judgment in a manner authorized by statute, as by a motion under section 473.

In behalf of the respondent it is contended that the question is whether the action of the trial court can be upheld upon any theory of law and, although it is conceded that the appellants are "probably" correct in their contention that he was not entitled to relief under section 473 of the Code of Civil Procedure, Trusheim's counsel suggest that the trial court, "to prevent the miscarriage of justice," had the inherent power to grant the present motion. In any event, it is claimed, the judgment was entered against Trusheim through inadvertence and, accordingly, the trial court had the power to correct the mistake independent of statute.

[1-3] It is well settled that a trial court has jurisdiction to render a default judgment more than "three years after service of summons" (Code Civ.Proc. § 581a) although such a judgment is erroneous and subject to direct attack upon an appeal from it. Lynch v. Bencini, 17 Cal.2d 521, 110 P.2d 662; Pavlovich v. Watts, 46 Cal. App.2d 103, 115 P.2d 511; Merner Lumber Co. v. Silvey, 29 Cal.App.2d 426, 84 P.2d 1062. But if the judgment was entered against Trusheim through the inadvertence or improvidence of the trial court, it had the power independently of statute to correct the mistake by amending or setting aside the judgment (In re Estate of Burnett, 11 Cal.2d 259, 79 P.2d 89; Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147; Holtum v. Grief, 144 Cal. 521, 78 P. 11), as this presents no question of judicial review upon the merits. However, judicial error which occurs in the rendition of orders or judgments which are the fault of an exercise of judicial discretion may not be corrected except by statutory procedure. Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988, 990. As to what constitutes inadvertence, this court has said: "We are of

the opinion that the instant case presents an attempt to correct judicial error, even though the trial court recites that the first order was made by inadvertence. It appears that the inadvertence consisted of misinterpreting and misconstruing a waiver. * * * This is not a case where the order as entered by the clerk is not the order made by the court [citations]; where the court failed to express its intention by the order actually made [citations]; where there was an irregularity which made the order or judgment premature [citations]; nor where the court was ignorant of some fact material to the action taken by it [citation]. The situation here more closely approaches the cases of Egan v. Egan, supra [90 Cal. 15, 27 P. 22]; Coombs v. Hibbard, 43 Cal. 452, and Owen v. Crocker-Huffman L. & W. Co., 38 Cal.App. 649, 177 P. 299, in all of which it was held that, all of the matters before the court at the time of the making of the second order having been considered by it at the time of the making of the first order, it cannot, simply because upon a reexamination of the same matters it has reached a different conclusion, give effect to the second determination of the same issue by modifying or annulling the original order or judgment." Stevens v. Superior Court, supra; see, also, Vale v. Maryland Casualty Co., 101 Cal.App. 599, 281 P. 1058.

[4] In the present case, Judge Thompson, before whom the appellants' action was pending determined, it must be assumed, that he had the power to enter judgment against Trusheim and his decision was correct. Trusheim's motion was heard by Judge Turrentine of the same court, who ruled that there was no jurisdiction to enter the judgment and made the order now under review. His action was clearly an attempt to correct a determination which, in his opinion, was rendered by reason of judicial error. There is no showing whatever of judicial inadvertence but the ruling on the motion was made upon the ground that the judgment had been given in disregard of section 581a of the Code of Civil Procedure. Moreover, as in the Stevens case, supra, it is neither asserted nor does it appear that, in ruling upon Trusheim's motion, Judge Turrentine had before him any matters not considered by Judge Thompson when he rendered judgment for the appellants.

[5] The only appropriate statutory ground for attacking the erroneous judgment that finds any support in the record is a motion under section 473 of the Code of Civil Procedure. The notice of motion to vacate the judgment and to dismiss the action as to Trusheim stated that the application for relief would be made upon the ground that the judgment was void. This ground was emphasized upon the hearing of the motion when counsel for Trusheim stated in open court that he did not rely upon section 473 of the Code of Civil Procedure but asked for a ruling in his favor because the judgment was entered subsequent to three years after service of summons. But assuming that counsel's abandonment of reliance upon section 473 does not preclude Trusheim from an affirmance of the order upon that ground, the record shows no basis for such a determination for a motion under that section, to set aside a judgment entered against a defaulting defendant, must be made within six months after entry of the default. Macbeth v. Macbeth, 219 Cal. 47, 25 P.2d 11; Hunt, Mirk & Co., Inc., v. Hesperides Mining Co., 200 Cal. 382, 253 P. 317; Title Ins. & T. Co. v. King, etc., Co., 162 Cal. 44, 120 P. 1066. The present motion was not made until more than 43 months after entry of the respondent's default.

[6] Moreover, counsel for the respondent not only have taken an inconsistent position upon the present appeal, but rely upon grounds inconsistent with those presented to the court which granted his motion. It is not now asked that Trusheim be accorded a trial upon the merits, but that the order dismissing the action as to him be affirmed. He consistently took the position below that, under section 581a of the Code of Civil Procedure, the action should be dismissed, and, accordingly, his motion to vacate the judgment did not include a request that his default be set aside and that he be allowed to answer. Trusheim's abandonment of reliance upon section 473 of the Code of Civil Procedure in the court below, as a ground for his motion, is undoubtedly explained by the fact that he does not desire a trial upon the merits, but wishes to have the action dismissed. On this appeal, in an abortive attempt to justify the present order upon statutory authority, he claims that the record shows him entitled to relief under section 473 and, at the same time, he insists that, according to the provisions of section 581a, the trial court properly dismissed the action by the order from which the present appeal was taken.

The order granting the motion to vacate the judgment against Alvin A. Trusheim and to dismiss the action against him is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



68 Cal.App.2d 189

BURKE et al. v. CITY OF LOS ANGELES et al.

Civ. 14618.

District Court of Appeal, Second District, Division 1, California.

Feb. 26, 1945.

1. Constitutional law ⇐92

Where lot was vacant for a time after zoning ordinance restricting area to residential uses went into effect, and owners thereafter were granted a variance for one year to use building moved thereon as real estate office, owners had no vested right to use building for such purpose, notwithstanding they had continued such use for several years and had used previous building on lot for same purpose.

2. Constitutional law ⇐92

User for commercial purposes in districts zoned for residential purposes, if subsequent to enactment of zoning ordinance, confers no vested right for continuance thereof.

3. Municipal corporations ⇐625

If there is reasonable basis for belief that establishment of a strictly residential district has substantial relation to public health, safety, morals, or general welfare, a zoning ordinance to establish such purpose will be upheld against contention of being arbitrary and unreasonable.

4. Municipal corporations ⇐625

Where 75 per cent of zoning area was occupied by single-family residences, it was neither arbitrary nor unreasonable for city by ordinance to forbid user of a building therein for a real estate office.

5. Municipal corporations ⇐63(2)

Where action of city by ordinance, under its police power, forbidding business use of property in residential zoning district, was fairly debatable as to reasonableness, such action could not be disturbed by court.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by J. Pay Burke and another against the City of Los Angeles, a municipal corporation, and others for a declaratory relief enjoining the city from interfering with plaintiffs' use of a building as a real estate office. From an adverse judgment, plaintiffs appeal.

Affirmed.

Robert J. Sullivan, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Roger Arnebergh, Deputy City Atty., all of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

The plaintiffs in this case are owner and lessee, respectively, of a lot in the City of Los Angeles, located in a subdivision known as Brentwood Park. Upon this lot there is a small building used by plaintiff-lessee as a real estate office. For several years prior to 1924, a real estate office was maintained upon the property in a building which was removed during that year. There was nothing on the lot for a month or two, when the building now there was moved to and placed upon it. With the exception of about a year this latter building has since been used as a real estate office.

In December, 1924, after the latter building was placed upon the lot, the then owner, in accordance with provisions of the Los Angeles zoning ordinance, applied for and received a variance notwithstanding Brentwood Park was zoned for residential use only. This variance permitted the use of the building as a real estate office for one year. No request has since been made for extension and no extension of this period of one year has been granted by the City.

The City zoning ordinance became effective as to this property in September, 1923, and Brentwood Park was zoned exclusively for single residence buildings.

Alleging that the City of Los Angeles threatened to force them to desist using the premises for a real estate office, the plaintiffs filed complaint in the Superior Court against the City and its Planning Commissioners, praying for declaratory relief and a judgment enjoining the City from interfering with this use. The trial court found that Brentwood Park was zoned for residential use only, and that the plaintiffs had no right to use the property in question for any other purpose.

From this judgment plaintiffs appeal, and urge the following grounds for reversal: 1. That the zoning ordinance is not applicable, because the lot was used for a real estate office before and after the adoption of the ordinance. 2. That in this case the application of the zoning ordinance is arbitrary and unreasonable.

[1, 2] The first ground of contention is answered when it is admitted that the first building was removed and the property stood vacant for a time after the zoning ordinance went into effect, the second building having been thereafter moved upon the lot. Moreover, the then owner, conforming to the ordinance, asked for and was granted a variance for one year to maintain a real estate office upon the premises—a variance which was never extended. User for commercial purposes in districts zoned for residential purposes, if subsequent to enactment of the zoning ordinance, confers no vested right for continuance thereof. Acker v. Baldwin, 18 Cal.2d 341, 115 P.2d 455.

[3, 4] The second ground of contention is even more readily answered by Acker v. Baldwin, supra, in which it is held that if there is a reasonable basis for the belief that the establishment of a strictly residential district has substantial relation to the public health, safety, morals or general welfare, a zoning ordinance to establish that purpose will be upheld. The record shows that seventy-five per cent of Brentwood Park is occupied by single-family residences. It is neither arbitrary nor unreasonable for a city to forbid commercial user of lots in such an area. Should a real estate office be permitted upon the premises involved in this case, then further exceptions may well be contended for and granted to the extent that the value of the area for residential purposes may eventually be destroyed.

[5] The action of the City, under its police power, forbidding business use of the property in question being fairly debatable, the court will not substitute its judgment for that of the legislative and executive body charged with the duty and responsibility of determining the question. Acker v. Baldwin, supra; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; Otis v. City of Los Angeles, 52 Cal.App.2d 605, 126 P.2d 954; Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 33 P.2d 672; Marblehead Land Co. v. City of Los Angeles, 9 Cir., 47 F.2d 528; Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.



68 Cal.App.2d 104

TWINING v. THOMPSON et al.

2 Civ. 14560.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1945.

1. Limitation of actions ⇐28(1)

Where plaintiff and defendants agreed to execute community lease for oil development of their three lots and divide royalties in proportion to acreage, and thereafter such community lease was abandoned and plaintiff made a new oil lease on his lot providing for same division of royalties and defendants accepted their share of such royalties, the contractual relation still existed between plaintiff and defendants, though parties had not signed same document, hence two-year limitation statute did not apply to plaintiff's action to recover his share of royalties from defendants' lots. Code Civ.Proc. § 339, subd. 1.

2. Contracts ⇐40

Limitation of actions ⇐28(1)

Where oral agreement has been executed or a number of writings dovetail so as to show meeting of minds, contract is

as well established as though it had been signed on one writing by all parties and executed with conventional formality, and two-year statute of limitations is not applicable thereto. Code Civ.Proc. § 339, subd. 1.

3. Limitation of actions ⇐192(3), 197(2)

An allegation that during six years defendants received and retained royalties from oil lease knowing that they belonged to plaintiff, and proof in support thereof, was sufficient pleading and proof of fraud, as respects tolling of statute of limitations. Code Civ.Proc. § 338, subd. 4.

4. Mines and minerals ⇐99(2)

Where plaintiff and defendants agreed to execute community oil lease and to divide royalties according to acreage, defendants, as partners of plaintiff, were obligated to disclose to plaintiff the payment to defendants of plaintiff's share of royalties from defendants' lots, and suppression of such fact was a fraud on plaintiff. Civ.Code, § 1572.

5. Limitation of actions ⇐100(11)

An action based on fraud or mistake is not deemed to have accrued within three-year limitation period until, with reasonable diligence, aggrieved party might have discovered facts constituting the fraud or mistake. Code Civ.Proc. § 338, subd. 4.

6. Limitation of actions ⇐100(11)

Where there is no legal duty on plaintiff to investigate and no circumstance is present which would put reasonably prudent man on inquiry, mere fact that means of acquiring knowledge of alleged fraud is available and plaintiff has not made use of such means does not debar him from recovering when he makes the discovery after expiration of limitation period. Code Civ. Proc. § 338, subd. 4.

7. Limitation of actions ⇐100(11)

Where, at time of trial of action to recover share of royalties from oil lease on defendants' lots under agreement to divide royalties in proportion to acreage, plaintiff was over 80 years of age and had been seriously ill for several years, and nothing had occurred to direct plaintiff's attention to fact that oil was being produced from defendants' lots until he visited property, and within a few weeks thereafter he sued for his share, action brought within three years following defendants' retention of plaintiff's share was not barred by limitations respecting fraud. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 1572.

8. Limitation of actions ⇐192(3)

A pleading, to excuse failure to file a fraud action within statutory period, must set forth when fraud or mistake was discovered, why it was not discovered sooner, and circumstances under which it was discovered. Code Civ.Proc. § 338, subd. 4.

9. Limitation of actions ⇐100(11)

The courts do not lightly seize on small circumstances in order to deny an award to an innocent victim of fraud on ground that he did not discover fraud sooner. Code Civ.Proc. § 338, subd. 4.

10. Limitation of actions ⇐100(11)

To warrant denial of recovery to defrauded person, circumstances must be such that inquiry became a positive duty, and failure to make inquiry was an omission of duty. Code Civ.Proc. § 338, subd. 4.

11. Limitation of actions ⇐104(1)

The fraudulent concealment of a fact on existence of which cause of action accrues is a good answer to plea of statute of limitations. Code Civ.Proc. § 338, subd. 4.

12. Limitation of actions ⇐1

The statute of limitations was intended as a shield against stale claims, but a wrongdoer may not use it to perpetrate fraud upon otherwise diligent suitors. Code Civ.Proc. § 338, subd. 4.

13. Limitation of actions ⇐99(1)

Technical rules as to when a cause of action accrues with respect to statute of limitations apply only when case is free from fraud of defendant. Code Civ.Proc. § 338, subd. 4.

14. Mines and minerals ⇐99(2)

Where defendants for six years, with conscious knowledge, received and retained royalties from oil leases belonging to plaintiff under contract to lease lots and divide royalties in proportion to acreage owned, and plaintiff was excusably ignorant of fact that during such period defendants' lots had been developed for oil, demand on defendants by plaintiff for his share of royalties was not necessary as prerequisite to action therefor. Civ.Code, § 1572.

15. Money received ⇐6(5)

Where defendants knowingly received and retained plaintiff's share of royalties from oil lease under contract for division

of royalties in proportion to acreage owned by them, law implied defendants' promise to pay such moneys to plaintiff, and common count for moneys had and received would lie to recover such moneys obtained by fraud or mistake. Civ.Code, § 1572.

16. Money received ⇐11

When demand is made on defendant or when defendant learns of facts informing him of mistake under which he has received money belonging to plaintiff, law imposes obligation of restitution on defendant.

17. Limitation of actions ⇐95(2)

Defendants' cross-action for reformation of contract for division of royalties received under contract to divide royalties in proportion to acreage owned was barred by three-year statute, where no excuse for failing to discover alleged mistake in acreage on which respective proportions were computed was pleaded, and no demand for revision was alleged. Code Civ.Proc. § 338, subd. 4.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by H. Laverne Twining against W. V. Thompson and others to recover plaintiff's share of the royalties paid out of proceeds from sales of petroleum products recovered from lots of certain defendants, wherein such defendants filed cross-complaint for revision of the contract involved. Judgment for plaintiff, and named defendant and certain other defendants appeal.

Affirmed.

Houser & Houser and Bruce Mason, all of Long Beach, for appellants.

H. B. Pool, of Los Angeles, for respondent.

MOORE, Presiding Justice.

On June 27, 1941, plaintiff filed this action to recover his share of the royalties which had been paid out of the proceeds from the sales of the petroleum products recovered from the two lots of appellants during the preceding six years. The natural codefendants of appellants had acquired from the latter participating interests in such production, and by reason thereof had collected various percentages of the royalties. The defendant Western Trust & Savings Bank was designated as the depositary of appellants for the purpose of distributing amongst all of the interested participants the royalties to be paid upon the production from appellants' lots.

Having pleaded the two and three-year statutes of limitation, appellants now urge (1) that there was no proof of an express contract and (2) that therefore recovery is barred by the two-year statute. Subd. 1, sec. 339, Code Civ.Proc. Although they denied (3) that their transactions were tainted with fraud, they now contend (4) that prior to suit no demand was made for the royalties withheld, and (5) that if the action is not barred by the three-year statute no sufficient excuse for failure to file suit within the statutory period was proved. Subd. 4, sec. 338, Code Civ.Proc. The bare substance of the findings, which are abundantly supported, will serve largely to confute these contentions.

On June 8, 1920, plaintiff was the owner of lot 22, Block C of Garfield Street Addition to the City of Huntington Beach.[1] At the same time Mrs. Arnett and Mr. Thompson and his wife owned respectively lots 29 and 30 of block B, same tract. Plaintiff and defendants agreed at that time to execute a community lease for the development of oil and petroleum products on the three lots and to divide the royalties among themselves in proportion to the acreage leased by them. Pursuant to such agreement on the same day they executed a community lease to the Columbia Leasing & Development Co., hereinafter referred to as Columbia, by the terms of which they were to receive and share one-sixth of the proceeds to be received by the lessee from the sale of all petroleum products recovered from the three parcels, to be divided as follows: 50.1758 per cent to the owners of lot 22; 29.8242 per cent to the owners of lots 29 and 30. This lease was abandoned some eight years later and the several titles were restored to the lessors. But on March 15, 1929, plaintiff made a new oil lease on lot 22 and provided thereby for the payment of one-sixth of the production as royalty, to be divided among himself and appellants as provided in their original agreement and in the community lease. Following the month of September, 1931, oil, gas and gasoline were produced from lot 22 and the royalties were actually divided as stipulated in the

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[1] Inasmuch as Mrs. Twining deceased prior to the filing of this action, mention of her in the statement of each fact that occurred during her lifetime and in which she participated will add nothing of value to the discussion.

lease. Each of the parties thereafter at all times received his share of the royalties paid from the production of lot 22.

Prior to March 15, 1935, the defendants Bryce and associates acquired interests in lot 30. On that day they joined the Thompsons in executing an oil and gas lease to Lee Doran and others on the east portion of lot 30 which by a subsequent amendment was increased to the east one half. Since the east half only is involved, hereafter all reference to lot 30 will refer to the east half unless the west half is specified. In making such lease Thompson observed his original agreement with plaintiff with respect to the division of the royalties from lot 30 by requiring 50.1759 per cent thereof to be paid to plaintiff as owner of lot 22; 18.6339 per cent to the owner of the west half of lot 30; 14.9171 per cent to W. V. Thompson as owner of the east half of lot 30; and 16.2732 per cent to Mary Arnett. By the terms of the lease on lot 30 as amended the lessee agreed to pay a royalty of one sixth of the value of all petroleum substances recovered from the property. It was also provided that the shares due the owner of the west half of lot 30 and plaintiff should be deposited with defendant Western Bank, but that the shares going to Thompson and to Mrs. Arnett were to be mailed directly to them by the lessee. The west half of lot 30 was never leased for the development of oil and no well was ever drilled thereon. On the 1st of October, 1935, the Thompsons conveyed about seventeen per cent of the production of lot 30 to defendants Bryce et al., each of whom thereafter received his share.

April 15, 1935, Mrs. Arnett executed an oil and gas lease on lot 29 to Duke-Gates Petroleum Co. for one-sixth royalty. By her lease Mrs. Arnett directed the division and payment of the royalty in the exact language employed by Thompson in his lease to Doran, appellants to receive their shares directly from the lessee.

Since October, 1935, and March, 1936, respectively, while production had been continuous from lots 29 and 30, the total royalty was deposited with Western Bank. During the period of such deposits appellants had full and complete knowledge of plaintiff's right to receive 50.1758 per cent thereof. Between October, 1935, and March, 1941, out of the entire royalty from the production of lots 29 and 30 received by the Western Bank it paid the entire amount thereof to defendants, including plaintiff's share in the amount of $12,655.80. This money was paid by the bank through mistake in the belief that plaintiff's share had been deducted prior to the deposit of the royalties with the bank and that the money which it received was to be distributed to the defendants only.

The court awarded judgment in favor of plaintiff and against the several defendants for the recovery from each of the portions of plaintiff's royalty deposited by the lessees with the bank, that institution having paid such portions to the defendants. Appeal was taken only by Mr. and Mrs. Thompson and Mrs. Arnett.

Contractual Relations between the Parties

[1] Appellants contend that no contractual relation existed between plaintiff and appellants because of the abandonment of the properties by Columbia and its quitclaim of the leases on the three lots. In this appellants misconceive the significance of the transactions of the parties prior to the execution of the existing leases on lots 29 and 30. Thompson testified that plaintiff set up a specified way according to which appellants were to receive their royalties and that he copied such provision into his own lease; that the idea in starting a community lease with Columbia in June, 1920, was so "one person could not fall out" and get all the royalty; that thereby appellants were to extend the community lease. Plaintiff testified that the provision in his lease to McKeon providing for the division of royalties from lot 22 with the owners of lots 29 and 30 is exactly in accordance with the agreements between himself and appellants; that he had assumed that if Thompson received royalties from lot 22 plaintiff should receive royalties from 29 and 30. Such assumption by both parties and all of their transactions including appellants' acceptance of royalties from lot 22 together with their original contract and the Columbia lease constituted a definite agreement for the division among them of royalties from the production of lots 29 and 30. This understanding was confirmed by two other incidents of which the proof is in writing, viz., (1) a written notice served upon appellants in September, 1928, in which plaintiff advised appellants of his cancellation of the lease executed June 8, 1920, to Columbia, in which notice plaintiff advised them that in the event of his executing a new lease they should receive the same percentages of royalty as they

were entitled to under the Columbia lease; (2) after production had been developed on lot 22, under plaintiff's new lease he made provision for all owners of lots 29 and 30 to share in the royalty from his lot according to their respective percentages of interest in those lots. Such royalty was accepted by appellants.

[2] The fact that the plaintiff and appellants did not sign the same document does not spell the nonexistence of the contract which grew up between them. When an oral agreement has been executed or when a number of writings dovetail so as to show a meeting of the minds for the accomplishment of the same object, the contract is as well established as though it had been signed on one writing by all parties and executed with conventional formalities. Cameron v. Burnham, 146 Cal. 580, 80 P. 929; Gilliam v. Brown, 126 Cal. 160, 58 P. 466; Elbert v. Los Angeles Gas Co., 97 Cal. 244, 32 P. 9; Patterson v. Donner, 48 Cal. 369. A written contract fully executed having been thus established, it readily appears that the two-year statute of limitation is not applicable.

Fraud of Appellants

[3, 4] Assignment is made that there was neither pleading nor proof of fraud on the part of appellants. The allegation that during six years appellants received and retained the royalties of plaintiff knowing that they belonged to him and the proof in support thereof declares all that is essential to a compliance with the rule as to pleading and proof of fraud. Plaintiff had no knowledge of appellants' leases, the drilling of the wells, or the production or the payment of the royalties until April, 1941, within sixty days prior to the commencement of this action. Such allegation comprehends not only a fraudulent intent but the consummation of a fraud. As a partner of plaintiff appellants were obligated to disclose to plaintiff the payment of the moneys to them. The suppression of such fact was a fraud upon plaintiff, Civil Code, § 1572, and the allegation thereof is sufficient.

Tolling the Running of the Statute

[5] An action based upon fraud or mistake is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake or until with reasonable diligence he might have made the discovery. Code Civil Proc. § 338, subd. 4; Lightner Min. Co. v. Lane, 161 Cal. 689, 697, 120 P. 771, Ann. Cas.1913C, 1093. In contending that there is neither sufficient pleading nor proof to toll the running of the statute appellants do not correctly evaluate the proof of the reasonableness of plaintiff's insistence that he could not by the exercise of ordinary care have learned of defendants' possession of his money. Such facts were pleaded and proved.

[6, 7] Plaintiff had been a teacher in California schools from 1888 till 1935. At the time of the trial he was past eighty years of age; had been seriously ill since 1933. During the seven years from 1928 to 1935 lots 29 and 30 were not leased. During those years there was neither an oil well nor other improvement upon either lot. Thereafter there was no improvement on either lot except the oil wells. The place of plaintiff's residence and business was about 50 miles from the properties. Nothing occurred between 1935 and April, 1941, to direct plaintiff's attention to the fact of petroleum production from either lot. Besides the aforementioned infirmities of plaintiff it is established that during the six years preceding April, 1941, he was not able to journey over sixty or seventy miles. He had not driven an automobile after 1936. He had not visited his property after 1930. His first knowledge of the existence of the wells on lots 29 and 30 was occasioned by a visit to his property in April, 1941. Prior to that time he had received no information of the leases made by appellants covering their two lots. Having discovered on that April day the operation of appellants' producing wells he reported the fact to an income tax expert then in his employ. The investigation made by the expert disclosed all of the facts of the leases, of the drilling of the wells, and of the payment of the royalties to the bank from the commencement of the production until plaintiff's discovery. While it is true that he regularly received royalty checks from production on his own lot, yet nothing in connection therewith was reasonably calculated to arouse a suspicion that his share from appellants' production was being paid to defendants or that the wells had been drilled. Where there is no legal duty of a plaintiff to investigate and no such circumstance is present as would put a reasonably prudent man upon inquiry, the mere fact that a means of acquiring knowledge is available to plaintiff and he has not made use of such means does not debar plaintiff from recovering

after he makes the discovery. Tarke v. Bingham, 123 Cal. 163, 166, 55 P. 759. Innocent parties do not carry the burden of inquiry. Hart v. Walton, 9 Cal.App. 502, 509, 99 P. 719.

Appellants urge as proof of plaintiff's knowledge of their leases the testimony of the witness Porter that in 1935 he had told plaintiff of the oil situation at Huntington Beach. But such conversation was denied by plaintiff. Moreover, Thompson himself testified that he had never informed plaintiff of the production from lots 29 and 30. During the entire period from the commencement of the drilling on those lots plaintiff was subject to sickness and unfit for physical exertion. With both impaired vision and hearing, with diabetes, kidney ailment and toxemia, his exertions were confined practically to banking his money and paying his bills. He owned no automobile after 1937 and was thenceforth incapacitated for driving one. While he financed a metallurgical laboratory he employed another to do the work because of his infirmities.

[8] The evidence as well as the findings supply ample justification for deciding that plaintiff was excusable for his failure to institute his action within three years following the retention of his moneys by appellants. There is no fact or circumstance in connection with the execution of the leases, the drilling of the wells and the deposit of the money that would constitute the equivalent of a knowledge of the existence of such facts. It is not to be denied, as announced in the authorities cited by appellants, that a pleading to excuse the failure to file a fraud action within the statutory period must set forth (1) when the fraud or mistake was discovered, (2) why it was not discovered sooner, and (3) the circumstances under which it was discovered. Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809; Phelps v. Grady, 168 Cal. 73, 141 P. 926; Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Myers v. Metropolitan Trust Co., 22 Cal.App.2d 284, 70 P.2d 992; Johnson v. Ehrgott, 1 Cal. 2d 136, 34 P.2d 144; Watson v. Santa Carmelita, etc., Co., 58 Cal.App.2d 709, 137 P.2d 757. However, the complaint here complied with those requirements. The cited decisions are not pertinent. In most of them the complaint omitted to declare the three essentials to excuse delay in commencement of the action. In Phelps v. Grady the fraud alleged was the statement of an opinion as to the value in inducing the purchase of real property which lay open to inspection for seven years after its acquisition.

[9-13] The courts do not lightly seize upon small circumstances in order to deny an award to an innocent victim of a fraud upon the ground that he did not discover the fraud sooner. Simmons v. Briggs, 69 Cal.App. 447, 231 P. 604; Victory Oil Co. v. Drum, 184 Cal. 226, 193 P. 243. In order to warrant a denial of recovery to one who has been defrauded, the circumstances must be such that inquiry became a positive duty and failure to make the inquiry was an omission of a duty. Nichols v. Moore, 181 Cal. 131, 183 P. 531. In the Nichols case the complaint was sufficient although it merely alleged discovery of the fraud through an investigation made by plaintiff's brother. In an early case for the sale of goods consigned to the defendant he neglected to report the sale. Knowledge thereof by the plaintiffs was not acquired until shortly before suit and subsequent to the expiration of the statutory period. To have held that the statute ran against the plaintiffs under such circumstances would have been to permit defendant "to take advantage of his own wrong; and to sustain a defence which, in conscience, he ought not to be permitted to avail himself of." Kane v. Cook, 8 Cal. 449, 458. In all cases a fraudulent concealment of a fact "upon the existence of which the cause of action accrues" is a good answer to the plea of the statute of limitations. The statute of limitations was intended as a shield against stale claims, but a wrongdoer may not use it to perpetrate a fraud upon otherwise diligent suitors. Pashley v. Pacific Electric Co., 25 Cal.2d 226, 153 P.2d 325. Technical rules as to the time when an action accrues apply only when a case is free from fraud on the part of defendant. Ibid.

Demand Not Necessary

[14, 15] Appellants contend that no cause of action was alleged or proved by reason of the failure of plaintiff to make demand upon appellants for his share of the royalties which they collected and retained. Under the circumstances no demand was necessary. Appellants knew they had wrongfully kept the moneys of plaintiff. The court was not obliged to believe Thompson's testimony that he was ignorant of receiving more than his share. He had

provided in both his own and the Arnett leases for their shares of the royalties "to be mailed by the purchaser of the oil" directly to them, while the payment of plaintiff's share should be deposited in the bank. Despite such provision he and Mrs. Arnett knowingly received more than twice the amounts they would have received had plaintiff's share been paid to him. They could not have continued in a state of innocence for six years, receiving every month their checks with a "statement" of the total production of each lot, the price and the amount payable for the one sixth. Thompson testified that he understood the facts contained in such monthly statements. Because of their conscious knowledge of having received, and of holding, the funds of plaintiff, demand upon them was unnecessary. The law implied their promises to pay them. Firpo v. Pacific Mutual Life Insurance Co., 80 Cal.App. 122, 123, 251 P. 657; Pike v. Zadig, 171 Cal. 273, 152 P. 923. The Firpo case further holds that the common count for moneys had and received will lie to recover money obtained by fraud or by mistake of fact.

[16] The cases cited by appellants (Dunham v. McDonald, 34 Cal.App. 744, 168 P. 1063; Bledsoe v. Stuckey, 47 Cal. App. 95, 190 P. 217; Mitchell v. California-Pacific Title Insurance Co., 79 Cal.App. 45, 248 P. 1035) arose out of transactions wherein the party charged with possession of plaintiff's money had no knowledge of his wrongful detention thereof; for that reason demands were necessary. In the article quoted by appellants from the 15th California Law Review, p. 64, it is said: "When demand is made upon defendant, or when he learns of facts which inform him of the mistake * * * the law imposes the obligation of restitution." In both the Mitchell and Bledsoe cases the moneys had been paid by mutual mistake, rendering demand in each case a prerequisite to the maintenance of the action. In the instant case there is no showing of innocence on the part of appellants. Thompson was the son-in-law of the aged Mrs. Arnett and at all times acted as her general agent in all matters relating to her lot from the time of the first contract.

Appellants Not Entitled to Revision of the Contract

[17] Finally, appellants contend that the contract for the division of the royalties should be reformed. They contend that by mutual mistake the areas of lots 22, 29 and 30 were miscalculated, as a result of which plaintiff's stipulated percentage of the royalties to be earned was 50.1758 per cent instead of 45.0559 per cent, which by a correct computation was the extent of participation to which plaintiff was entitled. In their cross-complaint appellants allege that the "figures were in error in that one half of the adjoining streets was excluded in computing the area of each lot." There are two answers to this assignment: (1) By their contract they provided that each party was to share in the royalties according to the acreage leased. Thompson's lease included only one half of lot 30. This made the combined area leased by appellants more than 8,000 square feet less than the area of lot 22. (2) The lease on lot 22 had been executed in 1929. Plaintiff had collected his share of the royalties from his own lot since September, 1931. Hence, an action to revise the contract was barred by the three-year statute and no excuse for failing to discover the mistake within the statutory period was pleaded, nor was demand for revision alleged.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.



68 Cal.App.2d 131

BABER v. COMPTON–DELEVAN IRR. DIST. (LAMBERT, Intervenor).

Civ. 7093.

District Court of Appeal, Third District, California.

Feb. 19, 1945.

Hearing Denied April 19, 1945.

1. States ⇐89
Waters and water courses ⇐231

Evidence supported finding that contract provision, giving purchaser of irrigation district's lands taken over for payment of assessments the district's share of rice crop in consideration of purchaser's payment of water charges, was not a gratuitous transfer of public property in violation of the Constitution, but that it was a part of the entire contract and supported by consideration. Const.art. 4, § 31.

2. Appeal and error ⇐931(1)

A reviewing court must resolve all conflicts in favor of the trial court's judgment, and accept as true, and in the most favorable light toward the successful party, all the evidence tending to establish the correctness of the finding in support thereof.

3. Waters and water courses ⇐231

A provision in contract for sale of land taken over for nonpayment of assessments by irrigation district, giving purchaser right to acquire district's share of rice crop upon paying water charges, was not rendered invalid on ground that it forced the sale of the property for less than market value, since ultimate selling price of rice crop was no criterion as to value of property at time contract was made.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by W. H. Baber against Compton-Delevan Irrigation District for money had and received and to enforce contract for the sale of land, wherein Charles F. Lambert, fiscal agent of the district, intervened. Judgment for plaintiff, and intervenor appeals.

Affirmed.

Neal Chalmers, of Woodland, for appellant.

Duard F. Geis, of Willows, and Ware & Ware and Phil Ware, all of Chico, for respondent.

George R. Freeman, of Willows, and Jerome D. Peters, of Chico, for defendant.

PEEK, Justice.

The present controversy arose out of a sale of certain lands to plaintiff by defendant Compton-Delevan Irrigation District. From the judgment of the trial court in favor of plaintiff, the intervenor-appellant Lambert alone has appealed.

At the time of the sale in question the District was bankrupt. For several years it had been unable to meet either its principal or interest obligations. Its former landowners likewise had failed to meet their assessments, and as a consequence the District was compelled to take over all of the acreage within its boundaries. In order to get the land back on the tax rolls the intervenor-appellant was engaged as fiscal agent of the District to reorganize and to refinance its obligations. A commitment was obtained from the Reconstruction Finance Corporation, but before any monies so committed by that agency could be used it was necessary for the District to dispose of all of the land it then held to private owners. Appellant handled the negotiations for all sales except that of plaintiff, which was arranged solely by his father, W. C. Baber, president of the Board of Directors of the District. According to the testimony of appellant, prior to a meeting of the Board on August 5, 1941, arrangements or contracts had been made for the sale of all of the lands then held by the District, and at said meeting a resolution was regularly adopted authorizing the issuance of a contract of purchase to plaintiff. The contract so authorized consisted of two typewritten pages, and in effect provided that the District desired to refinance and reorganize its affairs, eliminate outstanding liens, and return the lands to private ownership; that plaintiff, a bondholder of the District, desired to purchase some of the land and agreed to deposit in escrow certain bonds of the District and to buy certain described real property "* * * at such prices, in no event to exceed $10.00 per acre, and under such terms and conditions as may be hereafter fixed by the Board of Directors, free and clear of all delinquent State and County taxes * * *" According to the secretary of the Board, in order to conclude all sales of the District held lands, the last meeting was adjourned until August 7, 1941, and during the interim the contract above mentioned was drafted and given to W. C. Baber for the purpose of obtaining the signature of plaintiff. The minutes of the August 7th meeting disclose that "after due consideration and deliberation, * * * it was resolved and ordered that the following be added to the contracts heretofore authorized to be executed and delivered by the District to W. H. Baber [and all other purchasers] * * * that second party [plaintiff] shall be entitled to first party's [defendant's] share of the 1941 rice crop growing on said premises upon the payment by second party to first party of the charges for furnishing water to said lands during the crop season of 1941." The additional provision was set forth on a separate page and attached to plaintiff's contract. The completed instrument, consisting of the three pages which were stapled together, was introduced in evidence and bears the signatures of both parties in two places—once on the second page immediately fol-

lowing the portion authorized by the August 5th meeting, and once on the third page immediately following the additional portion authorized by the August 7th meeting. After harvesting, the rice was warehoused in the name of the defendant District, and during the month of January, 1942, pursuant to plaintiff's instructions, his father, W. C. Baber, as chairman of the Board, sold the crop. The check received from the sale thereof was delivered by plaintiff to the secretary of the District. The minutes of the Board further disclose that several months thereafter, on June 20, 1942, the Board met, and pursuant to the August 5th resolution established the grades and prices for lands held by the District. Grade A was to be sold at $10 per acre, Grade B at $6, and Grade C at $2.50. The acreage being purchased by plaintiff was classified as Grade A. Soon after this meeting defendant informed plaintiff that the deed to the property was in escrow and the sale ready to be concluded. In response to said letter plaintiff called upon appellant, who informed him that the District could not credit him with the balance of the proceeds received from the sale of the rice crop over and above the water charges assessed against the land, and that he would have to pay the maximum price per acre as set forth in the contract. Plaintiff thereupon deposited in escrow the total sales price of the land at $10 per acre together with a letter informing the District that by so doing it was not to be considered as a waiver by him of any of the rights he might have to the balance of the proceeds of said rice crop. Shortly thereafter he filed his complaint in two counts, the first, a common count for money had and received, and the second upon the written agreement previously mentioned. Defendant by its answer alleged that the additional matter added to the contract pursuant to the August 7th resolution of the Board was an option which had been granted voluntarily, without the knowledge of plaintiff and without consideration, and that the granting thereof constituted a gratuitous transfer of public property in contravention of Article IV, section 31 of the Constitution.

At the conclusion of the trial of the issues so raised, the court found that the contract was not issued to plaintiff in two parts as contended by defendant but was submitted to him in its entirety as one contract; that said contract had not been executed by plaintiff until after the District had executed the same in its entirety; that the socalled optional portion thereof was not a separate agreement but was a part of the contract as a whole and was an inducement to plaintiff to execute the agreement which he would not have done had it not been added as an original part thereof; that the optional part of the contract was not granted voluntarily by the District or without the knowledge of plaintiff; that the consideration expressed for the purchase of the land by plaintiff constituted and was consideration for the granting of the right to take the rice crop upon the payment of the water charges; that plaintiff fully exercised his option rights which had not been revoked or rescinded prior thereto by the District. By reason of the foregoing findings the court concluded that the optional portion of the contract was not a gratuitous transfer by the defendant of its property in contravention of the Constitution, and gave judgment accordingly.

The appeal in effect is predicated upon three contentions: (1) That the ultimate result of the judgment of the trial court is to compel a gift of public funds, and therefore is void under Article IV, section 31 of the Constitution of this state; (2) that the socalled option agreement is void for lack of consideration and mutuality; and (3) that the judgment would force a sale of trust property for less than its market value.

[1] It is readily apparent that if the record discloses sufficient evidence to sustain the findings of the trial court that the first portion of the contract relating to the sale of the land and the portion relating to the 1941 rice crop were but parts of one indivisible contract, then appellant's contentions must fail. In other words, appellant's argument could be valid only if the alleged option had been determined by the trial court to be a separate instrument. Our examination of the record in this regard discloses testimony by plaintiff that he had no intention of buying the land until he was asked if the inclusion of the rice crop, which was being added to all of the other contracts of sale, would be of interest to him; that until such information was conveyed to him at the time the Board passed the resolution of August 7th, he had made no commitment relative to the purchase of the land to any person connected with the

District; that he understood by the provision in question that he was thereby obligated to pay the water charges; that when he did finally sign the contract there were no separate portions thereof, but that all of the pages were attached together as one contract and that he signed pages 2 and 3 on the same date and at the same time after the August 7th meeting of the Board.

The testimony of Mr. Laine, secretary of the District at the time the contract was under consideration, related to circumstances surrounding the actual signing of the contract and discussions of the Board and appellant concerning the question of prices. The first portion of his testimony discloses that he did not see plaintiff sign the contract; that when he signed there were no other signatures on the contract; that it was then delivered to plaintiff's father for the purpose of securing plaintiff's signature; and that he saw no signatures on the contract other than his own until sometime after August 7th. The pertinency of the remaining portion of his testimony related to the third issue raised by appellant.

The only other witness who testified concerning the manner of plaintiff's signing and the date thereof was appellant, who stated that the contract had been executed between August 5th and 7th; that he did not see plaintiff actually sign the contract but that he did see plaintiff's signature prior to the addition of the socalled option set forth on page 3 thereof (the portion added by the August 7th resolution).

[2] This testimony of appellant, although contrary to that of plaintiff and defendant's secretary, did nothing more than present to the trial court a conflict in the evidence only in regard to the time and manner of plaintiff's execution of the contract. From the judgment of the court it is obvious that it chose to accept the testimony in support of plaintiff's case, and found both portions of the agreement to be but one contract and indivisible. If the evidence introduced was sufficient to support said findings, and we conclude that it was, the trial court thereby eliminated from our consideration any question relating to the optional portion as a separate instrument. It is elementary to add that under such circumstances a reviewing court must resolve all such conflicts in favor of the judgment of the trial court, and accept as true, and in the most favorable light toward the plaintiff, all evidence tending to establish the correctness of the findings in support thereof. 2 Cal.Jur. § 515.

[3] An examination of the entire record in relation to the final contention of appellant discloses that such question was not placed in issue by the pleadings of either defendant or appellant nor was any direct evidence regarding the same introduced during the course of the trial. However, even if it be considered that said question was directly at issue, substantial support for the conclusion of the trial court is found in the testimony of appellant himself who, in response to a question relating to the reason for "changing the contract with reference to the 1941 rice crop", stated that because the Board had previously provided for the sale of that year's crop to another purchaser for the price of the water, which price the Board had established at $6 per acre (the price under plaintiff's alleged contract was $7.84 per acre), appellant suggested that all purchasers be allowed the same opportunity; that rice was then selling for "around $1.50 a hundred and the August prospect was not too good, and the Board felt if they could get the return of their water that they would be perfectly satisfied. I agreed with that for the reason in setting up the financing program I was directly concerned in that question because I was taking into consideration the District's assets as well as land sales in connection with all the money that was needed, which was of considerable moment."

In addition to this there is the further testimony of Mr. Laine, who also referred to the time element and the necessity of completing the sales before the escrow agreement expired, and his further testimony concerning a statement of appellant at the August 5th meeting of the Board that by allowing land purchasers to take the rice crop upon payment of water charges the District would not lose even if the crop were a failure.

Finally it may be said that the ultimate selling price of the rice, $3.375 per hundred, cannot be considered as any criterion of the reasonable value of the land or crops at the time the contract was executed. In addition it is quite evident, in view of the previously expressed attitude of both the Board and the fiscal agent of defendant District in relation to prices, that the possibility of a war five months thereafter and

its skyrocket effect upon the market was in no way contemplated.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



68 Cal.App.2d 30

HOUSING AUTHORITY OF CITY OF LOS ANGELES v. PIRRONE et al.

Civ. 14402.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1945.

Eminent domain ⇐265(4)

The rule that owner of property sought to be condemned cannot be required to pay any portion of his reasonable costs incident to trial is inapplicable to parties having no interest in subject matter of litigation, so that party prosecuting unsuccessful appeal from judgment determining that she is not owner of property condemned cannot recover costs on appeal.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action in eminent domain by the Housing Authority of the City of Los Angeles against Theodore Pirrone, as executor of the estate of Rosa Pirrone, deceased, Fanny R. Cunningham, Florence M. Enright, as special administratrix of the estate of Antonio M. Nieto, deceased, and others. A judgment determining that defendant Cunningham had no interest in the property sought to be condemned was affirmed by the District Court of Appeal, 151 P.2d 22, on defendant Cunningham's appeal, and she moves to recall the remittitur and strike therefrom the clerk's order that respondents recover costs on appeal.

Motion denied.

Faries & McDowell, of Los Angeles, for plaintiff and respondent Housing Authority.

John F. Poole, of Los Angeles, for defendant and appellant Fannie Cunningham.

W. M. Greathouse, of Los Angeles, for respondent Florence M. Enright, special administrator.

Leo Goodman, of Los Angeles, for defendant and respondent Record Searching Title Co.

J. H. O'Connor, Co. Counsel, and L. K. Vobayda, Deputy Co. Counsel, both of Los Angeles, for defendant and respondent Los Angeles County.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for defendant and respondent State of California.

W. J. WOOD, Justice.

In this action in eminent domain the court in its judgment made no order concerning costs but the clerk inserted in the remittitur which was issued on October 27, 1944, the words "respondents to recover costs on appeal." We have now before us a motion presented by appellant to recall the remittitur and to strike therefrom the order concerning recovery of costs.

Appellant was made a party defendant in the action commenced by respondent Housing Authority and she filed an answer claiming title in herself to property sought to be condemned. The trial court adjudged that another party defendant was the owner of the property and that appellant had no right, title or interest therein. On appeal we affirmed this judgment. Appellant relies upon the rule that in condemnation proceedings the owner whose property is sought to be taken cannot be required to pay any portion of his reasonable costs incidental to the trial because such requirement would reduce the just compensation to which he is entitled. City & County of San Francisco v. Collins, 98 Cal. 259, 33 P. 56. In City of Oakland v. Pacific Coast Lumber, etc., Co., 172 Cal. 332, 156 P. 468, the appellant was dissatisfied with the amount of damages which had been awarded and prosecuted an appeal from the judgment. The appeal was entirely unsuccessful and the court held that the condemning party was entitled to its costs on appeal. In the matter now before us the party presenting the motion prosecuted an unsuccessful appeal in which it was held that she was not even an owner of the property being condemned. The rule relied upon by appellant has no application to parties who

have no interest in the subject matter of the litigation.

The respondents who contested appellant's claim of ownership are clearly entitled to costs on appeal.

The motion is denied.

MOORE, P. J., and McCOMB, J., concur.



BROWN v. REPUBLIC PRODUCTIONS, Inc., et al.*

Civ. 14693.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1945.

Rehearing Denied March 2, 1945.

Hearing Granted April 19, 1945.

1. Literary property ⇐4, 7

Coauthors of musical and lyrical composition "Puddin Head", being owners in common of the property therein, were severally entitled to use the composition and to license others to use it without first consulting coauthor with reference to such use or license, being obligated only to account to coauthors for royalties and profits.

2. Tenancy in common ⇐37, 49, 50

One tenant in common may, by lease or license, confer upon a stranger the right to occupy and use the property of cotenants to the same extent that licensor himself might have used it, being obligated only to account to cotenants.

3. Literary property ⇐4, 7

Manipulation of musical composition by the coauthors so as to impair later utility and profitable sale thereof is an incident of a tenancy in common wherein any cotenant may use or license others to use the property of the cotenancy.

4. Literary property ⇐4

Modification of musical composition and lyrics by one of three coauthors and publication thereof and adaptation to motion picture under license from him and another coauthor did not constitute destruction of third coauthor's property in composition, so as to render publisher or motion picture company liable to him, even though as a result, public interest therein waned and sale value of original composition was reduced.

5. Literary property ⇐7

License from two of three coauthors of musical composition and lyrics protected licensees from liability to third coauthor, though modification of composition and publication thereof and adaptation to motion picture by licensees reduced sale value of original composition.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by George R. Brown against Republic Productions, Inc., Mills Music, Inc., and others for plagiarism, infringement, conversion or destruction of a certain musical composition, its lyrics and title. From that part of judgment denying relief against named defendants, plaintiff appeals.

Judgment affirmed.

See also —— Cal.App.2d ——, 156 P.2d 42.

Ray Sandler, of Los Angeles, and Max Fink, of Hollywood, for appellant.

Loeb & Loeb, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The sole question for decision is whether the licensee of musical and lyrical compositions under license by two of the three tenants in common is liable to the third cotenant for profits and royalties.

Appellant brought his action for the plagiarism, infringement, conversion, or destruction of a certain musical composition, its lyrics and its title, to-wit, "Puddin Head." It was found that he was a joint author thereof with defendants Styne and Meyer in June, 1940. Before the compositions had ever been published, defendant Styne, in 1941, without plaintiff's consent, within the scope of his employment by Republic Productions, Inc., hereinafter referred to as Republic, used all of the Puddin Head musical composition and lyrics by incorporating them in a similar production also entitled Puddin Head. By such rewriting and alteration of the lyrics and music of the original Puddin Head, Styne and

* Subsequent opinion 161 P.2d 796.

Republic altered the original lyrics of plaintiff and his coauthors with knowledge of plaintiff's rights and without compensating appellant for his interest in the production. Thereafter Republic caused reprints of the motion picture to be distributed and exhibited for profit and will cause additional prints to be made and displayed for profit. Also, Mills Music, Inc., hereinafter referred to as Mills, published and distributed, for profit, copies of the Puddin Head musical compositions as rewritten, without plaintiff's knowledge and without compensating plaintiff, and will cause additional copies to be printed and distributed for profit. As a result of the appropriation of such composition, Republic, Mills, Styne and Meyer have realized profits and royalties from and by virtue of the rewritten Puddin Head. However, the modification of the original Puddin Head composition and its use by Republic and Mills were done and made pursuant to an express written agreement of Styne and Meyer authorizing and licensing the use of such modified composition by Republic and Mills.

Upon the determination of such facts the court awarded judgment in favor of appellant against his former collaborators Styne and Meyer for an accounting to him of one-third of all profits received or to be received by such defendants in connection with or from the use or sale of such modified musical composition entitled Puddin Head and retained jurisdiction for further accountings, but denied judgment against both Republic and Mills. From that part of the judgment denying relief against respondents, plaintiff brings this appeal.

[1, 2] Inasmuch as appellant and defendants Styne and Meyer were owners in common of the property of the musical and lyrical compositions, the latter were severally entitled to use the compositions and to license others to use them without first consulting appellant with reference to such use or license. Klein v. Beach, D.C., 232 F. 240; 2 Cir., 239 F. 108; Lee Chuck v. Quan Wo Chong & Co., 91 Cal. 593, 598, 28 P. 45; Dinsmore v. Renfroe, 66 Cal.App. 207, 225 P. 886; Herbert v. Fields, 152 N.Y.S. 487. By lease or license one tenant in common may confer upon a stranger the right to occupy and use the property of the cotenants to the same extent that the licensor himself might have used it. Lee Chuck v. Quan Wo Chong & Co., supra. Such licensor's sole obligation is to account to his cotenants. Neither can exercise a superior authority. Herbert v. Fields, supra.

[3] Appellant contends that he is entitled to judgment against Republic on the ground that the modification of the original composition and its adaptation to the motion picture of the same title deprives him of further enjoyment of his property and that such deprivation constitutes a destruction of his property in such creations. There is no finding that appellant was deprived of the lyrics or of the music by use of the modified compositions in a motion picture or by the sale and distribution of the rewritten music. All of the music and "a portion of the lyrics" were used, from which it may be inferred that substantially the entire original musical composition and words were contained in the ultimate composition as used by Republic and as published by Mills. If the compositions were so manipulated by appellant's cotenants as to impair the later utility and profitable sale thereof, such is an incident of a tenancy in common wherein any cotenant may use or license others to use the property of the cotenancy. While such use or license of an intellectual creation results in the gradual depletion of public interest therein, yet so long as interest is alive and public demand exists for the product all owners in common are entitled to share in its fortunes.

[4, 5] But however wide a range its sale, use and publication may extend as a result of the license of its use by one of the tenants, the waning of public interest therein cannot be termed either a legal or a factual "destruction" of the composition. Only corporeal things may be destroyed. While it may be that the modification and publication of the composition and lyrics involved herein reduced the sale value of the original composition, the acts of Styne and Meyer in licensing the use of the music and lyrics to Republic and in permitting the publication and sale thereof by Mills defeats any award against those corporations in favor of appellant. Such is the logical result of the appropriation and use of any musical or literary composition but it is not to be confused with the destruction of corporeal property by one of its co-owners in collaboration with a stranger. Herbert v. Fields, 152 N.Y.S. 487. A musical production is an incorporeal entity and cannot be destroyed in the sense intended by those authorities wherein the doctrine is treated. Italiani v. Metro-Gold-

wyn-Mayer Corporation, 45 Cal.App.2d 464, 114 P.2d 370.

Appellant's authorities are distinguished by their facts. In Osburn v. Schenck, 83 N.Y. 201, the property in which the plaintiff asserted interest as a tenant in common was a planing machine and it was actually destroyed. In Estergren v. Sager, 39 Cal.App.2d 401, 103 P.2d 177, the property owned by the parties was a tractor alleged to have been converted by defendant. The case of Scarborough v. Woodill, 7 Cal. App. 39, 93 P. 383, involved the destruction of cypress trees growing on the boundary line of orange orchards of the litigants. The case of Fuller v. Montafi, 55 Cal.App. 314, 203 P. 406, was brought by one cotenant against the other and his vendees for the cutting and removal of timber from the tenancy in common. Being an incorporeal entity, a musical production has no physical existence; hence it cannot be destroyed as a machine or trees.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.



BROWN v. REPUBLIC PRODUCTIONS, Inc., et al.*

Civ. 14694.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1945.

Rehearing Denied March 2, 1945.

Hearing Granted April 19, 1945.

Literary property ⚖4, 7

Where two of three coauthors of certain musical compositions and lyrics without knowledge or consent of third incorporated portions thereof in compositions under different titles and permitted publication and use of new compositions in motion pictures, third coauthor, though entitled to judgment against coauthors and accounting for all profits and royalties, was entitled to no relief against publisher or motion picture producer.

* Subsequent opinion 161 P.2d 798.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by George R. Brown against Republic Productions, Inc., Mills Music, Inc. and others for plagiarism, infringement, conversion or destruction of certain musical compositions. From that portion of judgment denying relief against named defendants, plaintiff appeals.

Judgment affirmed.

Ray Sandler, of Los Angeles, and Max Fink, of Hollywood, for appellant.

Loeb & Loeb, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The issues of this case are identical with those of its companion action, 14693, this day decided. — Cal.App. —, 156 P.2d 40. Pursuant to appropriate pleadings the court found that in 1940 appellant with defendants Styne and Meyer in collaboration created and composed the music and the lyrics of five songs, to-wit: "All This and Heaven Too," "Peek-A-Boo," "I Could Love You Any Time At All," "Hunky-Dunky-Dory," and "Bonita Lolita", which songs and music were not leased, published, or sold jointly anywhere by the authors. Thereafter, within the scope of his employment by Republic Productions, Inc., hereinafter referred to as Republic, Styne used certain portions of the musical compositions of "All This And Heaven Too" and incorporated them into a composition entitled "Who Am I," with which he used different lyrics. Subsequently, Styne and Meyer within the scope of their employment by Republic, without the consent of plaintiff, used 24 bars of the melody "Peek-A-Boo" by incorporating them in a composition entitled "Look At Me, Look At You," but used different lyrics for the melody as modified. Thereafter Styne and Meyer in the scope of their employment by Republic used eight bars of "Peek-A-Boo" by incorporating them in a similar composition entitled "Melody Ranch," with which they used different lyrics. Also, the same defendants within the scope of their same employment used 16 bars of the melody of the song "I Could Love You Any Time At All" with slight variation by incorporating them in a musical composition entitled "Cracker Barrel County," but used different lyrics. Subsequently, the same defendants within the scope of

their same employment used the entire 32 bar of the melody with a slight variation as well as the lyrics of the song "Bonita Lolita" by incorporating them in a composition entitled "Tumble Down Shack in Havana." Such use of the music and lyrics of which appellant is a tenant in common with defendants Styne and Meyer, by incorporating them in the new compositions and in using the original melodies with new lyrics, was without the knowledge or consent of appellant.

Thereafter, Republic produced the following pictures for profit, to-wit: "Hit Parade of 1941," "Sis Hopkins," "Melody Ranch," "Riding On A Rainbow," and "The Singing Hill." In such pictures Republic made use of the modified lyrics and musical compositions. The songs are sung and their accompanying music is played with musical instruments throughout the respective pictures in which they severally appear. Of each of the original musical and lyrical productions appellant was a tenant in common with Styne and Meyer. Not a song or a musical composition appearing in the named motion pictures is an original composition but each of them was created by Styne, Meyer and Republic by copying into the re-written productions the original musical compositions theretofore created by appellant, Styne, and Meyer in 1940. Republic caused prints of such motion pictures to be made, distributed and exhibited for profit and Mills printed, published and distributed for profit copies of the modified musical compositions. Such acts of Republic and Mills in using the original music and lyrics in the publication and sale of such motion pictures and musical compositions were done pursuant to a written agreement whereby Mills and Republic were permitted to make use of the modified songs and the new titles created and composed by Styne and Meyer while in the employ of Republic.

Upon the finding of the foregoing facts the court awarded appropriate judgment in favor of appellant against his cotenants in common of the music and songs originally created by the trio, and required of such defendants Styne and Meyer to account for all sums received or to be received by them as royalties or otherwise by reason of the use of the musical compositions and lyrics theretofore created by them, but denied any relief against the corporate respondents. From the portion of the judgment denying such relief comes this appeal.

By reason of the identity of issues with that of its companion action, 14693, our conclusions are the same as there derived and for the reasons therein defined.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.



MacISAAC et al. v. POZZO et al.*

Civ. 14507.

District Court of Appeal, Second District, Division 1, California.

Feb. 23, 1945.

Rehearing Denied March 19, 1945.

Hearing Granted April 23, 1945.

1. Joint adventures ⇐5(2)

Where plaintiffs alleged joint adventure agreement with defendants whereby plaintiffs were to receive 85 per cent. and defendants 15 per cent. of profits, defendants' answer and cross-complaint, which alleged that contract was induced by fraud, but which, instead of seeking damages for such fraud, sought to have contract ignored and defendants awarded what they would have received under a contract dividing profits on a 50—50 basis, were insufficient.

2. Pleading ⇐354(1)

A plaintiff may test sufficiency of answer by a motion for judgment on pleadings and may thereby recover judgment without introduction of any evidence, if complaint states facts sufficient to constitute a cause of action and the answer, as interposed by defendant, neither raises any material issue nor states a defense.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Donald MacIsaac and another, copartners, doing business as MacIsaac & Menke Company, and MacIsaac & Menke Company, a partnership, against Emile A. Pozzo and another, copartners, doing busi-

* Subsequent opinion 161 P.2d 449.

ness as Pozzo & Pozzo, and Pozzo & Pozzo, a copartnership, for declaratory relief, wherein the defendants filed a cross-complaint. From a judgment for plaintiffs on the pleadings, defendants appeal.

Affirmed.

H. G. Redwine and Gwyn S. Redwine, both of Hollywood, for appellants.

A. L. Abrahams, of Los Angeles (Henry B. Ely, of Los Angeles, of counsel), for respondents.

YORK, Presiding Justice.

This is an appeal by defendants from a judgment on the pleadings in an action for declaratory relief. The complaint alleges that on August 18, 1942, plaintiffs and defendants entered into a joint venture agreement (Exhibit A) for the construction of civilian housing at Ogden Air Depot, Ogden, Utah, all profits and losses arising thereunder to be divided or borne equally among the parties, share and share alike; that the work contemplated by said agreement was completed and accepted by the United States government; that for the purpose of facilitating the performance of such work, the parties established in Salt Lake City a general office and management staff; that on September 22, 1942, the plaintiffs learned that another housing project was to be erected by the Utah Fuel Company at Sunnydale, near Sunnyside, Carbon County, Utah, and began negotiations to secure the contract for such construction; that plaintiffs informed defendants regarding this latter project and proposed that should their negotiations be successful that the office and organization set up for the handling of the Ogden Air Depot project be used, instead of setting up a new office to handle the Sunnydale job; that said plaintiffs and defendants agreed that this be done and also if plaintiffs were successful in securing the contract it would be secured as a joint venture on the basis of 85% to plaintiffs and 15% to defendants; that on September 30, 1942, a written agreement (Exhibit B) incorporating such terms was executed by said parties; that thereafter plaintiffs and defendants entered into a contract (Exhibit C) with the Utah Fuel Company for the "management, superintendence and supervision of the construction" of the Sunnydale housing project; that such construction was "carried on and completed" and during the progress thereof partial payments were made by Utah Fuel Company on account, which payments were divided between plaintiffs and defendants in the proportion 85% and 15% respectively; that there remains unpaid on account of said project from Utah Fuel Company the sum of $10,000 and plaintiffs allege upon information and belief that defendants have prevented said Fuel Company from settling the amount of the balance owing to said parties and said Fuel Company has refused to negotiate with plaintiffs or to settle or pay any balance without defendants' participation in such negotiations; that defendants have refused to so participate until the respective rights of the parties hereto have been determined, adjusted and settled; that plaintiffs are entitled to receive 85% and defendants are entitled to receive 15% of the money heretofore collected and which may hereafter be collected and received from the Utah Fuel Company under said contract. It is further alleged that it is necessary that a declaration of the rights of plaintiffs and defendants in respect to such matters be made by the court and that in addition thereto the court determine the validity of said contract (Exhibit B).

Defendants by their answer and cross-complaint admitted the execution of the questioned contract (Exhibit B) as well as the contract for the Ogden Air Depot project (Exhibit A), but allege that immediately after these contracts were entered into, they learned that certain representations of plaintiffs, in connection with negotiations on the contracts were untrue, were made for the purpose of misleading and deceiving defendants and to induce them to agree to enter into said venture on a 15% basis instead of a 50% basis. Such representations are alleged in the cross-complaint to have been made under the following circumstances: "That after said understanding and agreement with the Utah Fuel Company had been arrived at as aforesaid, plaintiffs represented and stated to defendants that plaintiffs had obtained an agreement to supervise said construction work of said housing project for themselves by reason of the recommendation of the Kaiser Company who were interested therein and for whom said plaintiffs had done construction work at Fontana, California, and that plaintiffs could either take said contract for their own account or they could take said contract as a joint venture contract with defendants, and that if defendants would join them in a joint venture contract to supervise said construc-

tion work and utilize the Salt Lake office facilities and personnel set up for the purpose of performing the Ogden, Utah, housing project under the joint venture then existing between plaintiffs and defendants, that plaintiffs would give defendants 15% of the profits which would be derived from said contract, and defendants, believing said representation that plaintiffs had obtained said contract for their own account by reason of the recommendation of the Kaiser Company, and not knowing that said contract had been negotiated by the employees and agents of themselves and plaintiffs as joint venturers, did agree to join with plaintiffs as joint venturers in the supervision of said housing project at Sunnydale and to receive 15% of the net proceeds therefrom. * * * but for such belief in the truthfulness of said representation and because of their lack of knowledge of the true circumstances surrounding the obtaining of said agreement as aforesaid, they would not have entered into Exhibit B attached to plaintiffs' complaint, but on the contrary would have demanded that they receive 50% of the net proceeds derived from said agreement with said Utah Fuel Company. * * * Defendants are informed and believe and therefore allege that the Kaiser Company did not recommend plaintiffs for the work as contractors in connection with the construction of the housing project at Sunnydale, and that the plaintiffs then and there well knew that the Kaiser Company had not recommended them for the same, and that said representation was made for the purpose of concealing the fact that said contract had been negotiated and obtained by agents and employees of and at the expense of plaintiffs and defendants as joint venturers and for the purpose of fraudulently inducing defendants to enter into an agreement to receive 15% of the net proceeds derived from said agreement with the Utah Fuel Company instead of 50% thereof which defendants would have been entitled to and have demanded had they known all of the facts and circumstances surrounding the negotiations for and the obtaining of said agreement with the Utah Fuel Company. That, acting and relying upon the fraudulent representations of plaintiffs as aforesaid, defendants executed Exhibit B, the joint venture agreement attached to plaintiffs' complaint, and Exhibit C and D (supervision agreement with Utah Fuel Company) attached to plaintiffs' complaint. * * * That shortly after execution of said Exhibits B and C attached to plaintiffs' complaint, and on or about October 10, 1942, defendants learned for the first time of the true facts and circumstances surrounding the negotiations for and the obtaining of said agreement with the Utah Fuel Company and then and there informed and advised plaintiffs that, by reason thereof, they were entitled to receive 50% of the net proceeds derived from the performance of said contract with Utah Fuel Company, Exhibit C * * * and that they expected an adjustment of the contract on a 50% basis upon the completion of said contract with Utah Fuel Company * * *."

It is further alleged by defendants in their cross-complaint that progress payments in the amount of $48,195 have been made by the Utah Fuel Company to plaintiff and defendants under their contract, Exhibit C, with said company and that there is an additional sum due thereunder, the exact amount of which cannot be determined because of adjustments yet to be made between the said parties and the Fuel Company; that of said $48,195 plaintiffs have received the sum of $40,965.75 and defendants have received $7,229.25 and there is now due from plaintiffs to defendants the sum of $16,868.25 "constituting the difference between the amount of money heretofore paid by Utah Fuel Company * * * to defendants and the amount they are entitled to by reason of the facts and circumstances hereinabove alleged."

The court granted plaintiffs' motions for judgment on the pleadings which were based upon the complaint and answer "including the admissions of the defendants in their answer," and upon the cross-complaint of defendants and the answer of plaintiffs thereto, and entered judgment decreeing that the joint venture agreement (Exhibit B) was a valid and subsisting contract, and that plaintiffs and defendants were entitled to demand, receive and accept all monies heretofore paid or due and payable from the Utah Fuel Company pursuant to the terms of the said agreement in the proportion of 85% and 15% respectively.

In support of the judgment on the pleadings, respondents urge that a contract induced by fraud is not void, but is a valid and enforceable agreement unless rescinded promptly upon discovery of the fraud; that appellants discovered the alleged fraud at the very inception of the contract but instead of rescinding the same they elected

to carry out its terms and therefore the court was without authority to cancel said contract and substitute therefor an implied contract to divide the profits on a 50/50 basis.

Appellants on the other hand argue that it was not "until *after* the execution of the Utah Fuel Company agreement that the appellants discovered the fraud practiced upon them, and after the execution of the Utah Fuel Company agreement the appellants were placed in a position where they were compelled to go forward with the performance of that agreement. * * * A court of equity or a court of law will not compel a person to give up a valuable property right in order to relieve himself from the fraud of a dishonest joint venturer, which would be the situation were the appellants required before they were entitled to relief to have refused to have proceeded further with the joint venture agreement to perform the Utah Fuel Company contract, and in effect to have refused to have performed the Utah Fuel Company contract."

[1] Both the complaint and the answer thereto seek a declaration of the rights of the parties under the so-called 85/15 contract as well as a construction of its terms. By their cross-complaint, appellants attempt to raise the question of fraud, but instead of seeking damages by reason of such fraud, they ask the court to ignore the contract and award them what they would have received had another and a different contract been entered into. In an action for declaratory relief, appellants' pleadings are insufficient as a defense.

[2] "A plaintiff may test the sufficiency of an answer by a motion for judgment on the pleadings, and may thereby recover judgment without the introduction of any evidence, if his complaint states facts sufficient to constitute a cause of action, and the answer, as interposed by the defendant * * * neither raises any material issue nor states a defense, i. e., where the answer expressly or substantially admits or does not sufficiently deny all the material allegations of the complaint and sets up no new matter which is sufficient to bar or defeat the action." 21 Cal.Jur. 235, sec. 164, and authorities there cited.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

OSTERBERG v. OSTERBERG.

Civ. 7062; Sac. 5652.

District Court of Appeal, Third District, California.

Feb. 28, 1945.

As Modified on Denial of Rehearing March 27, 1945.

Hearing Denied April 26, 1945.

1. Deeds ⇐17(4)

Where father agreed to convey farm to son in consideration of son's assistance in maintaining home and in helping to educate his brothers and sisters and the son faithfully performed his agreement, the deed was supported by adequate consideration.

2. Deeds ⇐196(2, 3)

The mere proof of existence of a confidential relationship between a grantor and a grantee of land does not raise a presumption of fraud or undue influence.

3. Deeds ⇐196(2, 3)

A conveyance is not deemed to be void merely because of a confidential relationship between grantor and grantee.

4. Deeds ⇐196(2, 3)

Grantee has burden of showing that deed was not obtained by fraud or undue influence only when it appears that grantee exercised activity in procuring deed, or deed was executed without consideration.

5. Deeds ⇐211(3, 4)

Where father agreed to convey farm to son in consideration of son's assistance in maintaining home and in helping to educate his brothers and sisters and son gave up the completion of his education and assisted his father, evidence supported findings that deed was made and title to land conveyed, subject to reservation of life estate in grantor, for adequate consideration, free from fraud or undue influence or activity to procure deed, on part of son.

6. Deeds ⇐17(4)

Where father's agreement to convey farm to son in consideration of son's assistance in maintaining home and in helping to educate his brothers and sisters was made during son's minority but deed was not executed until long after the son became of age and the greater proportion of services performed and funds supplied by son was contributed after son became of age, the deed was not without consideration

on theory that father was entitled to earnings of son during his minority. Civ.Code, § 197.

7. Deeds ⇐181

The alteration of a deed, at grantor's request, by inserting therein, after it had been signed and acknowledged by grantor but before it had been recorded or delivered, a clause reserving to grantor a life estate, did not invalidate the deed as it was originally executed.

8. Acknowledgment ⇐4

The acknowledgment of a deed is not essential to its validity but is merely evidentiary in character and is required only to entitle it to be recorded so as to render it competent evidence of the conveyance without further proof.

9. Deeds ⇐208(4)

The recording of deed at request of grantor was prima facie proof of delivery with the intention on part of grantor to presently convey title to the property subject to his life estate reserved in the deed.

10. Cancellation of Instruments ⇐34(1)

Where plaintiff had full knowledge of deed before she married grantor and did not institute action to cancel deed for nearly five years after deed, with alteration by insertion of clause reserving a life estate to grantor, had been recorded, the plaintiff could not complain of the alteration. Civ.Code, § 1207.

11. Deeds ⇐31

A deed which does not contain name of grantee or identify party to whom property is to be conveyed is void. Civ.Code, § 1092.

12. Alteration of Instruments ⇐13

Where grantor authorized alteration of deed by insertion of clause reserving in him a life estate and with full knowledge of the alteration grantor directed the recording of the deed and subsequently procured it to be delivered to grantee in grantor's presence, there was sufficient ratification of alteration to render deed valid as against anyone except a purchaser in good faith.

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by Johanna Olson Osterberg against William Osterberg to cancel a deed, to quiet title to an interest in land, and for an accounting, wherein the defendant filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Affirmed.

Edward R. Solinsky and Philip C. Boardman, both of San Francisco, for appellant.

Cleary & Zeff, Leslie A. Cleary, and Sherrill Halbert, all of Modesto, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment rendered in a suit against the son of her deceased husband, to cancel a deed executed by the father prior to his marriage with plaintiff on the grounds of lack of consideration and undue influence. Plaintiff also asked the court to quiet title in her to a one-third interest in the ranch, and also asked for an accounting of the proceeds therefrom.

The defendant is the oldest son of John Osterberg by a former wife who died in 1908. There were six children as issue of John's first marriage. The father bought a 17 acre ranch near Modesto upon which his family resided. The farm was mortgaged, and the father maintained his family with great difficulty. The defendant was 17 years of age when his mother died. He never married. When the mother died, the father told the defendant that if he would "stay with him" and help maintain and educate his younger brothers and sisters he would convey the home ranch to him. Pursuant to that agreement the defendant left school and worked for five years for wages on adjoining ranches, turning all of his wages over to his father for the maintenance of the family. He also assisted his father in the performance of farm work and spent his evenings with him. In 1913 the father acquired a well-drilling outfit and the defendant assisted him for five years in carrying on that enterprise. In 1918 the defendant joined the Army, serving for four months during the first World War, until the Armistice. He then returned to his home and continued to assist in the farm work and contributed to the maintenance of his father and the family until the death of his father in March, 1942.

In 1920 their house was destroyed by fire. The defendant procured an old barn which he moved to the home property and he improved it for the use of the family as a temporary home. He later borrowed

$2,500 which he added to a similar loan obtained by his father, with which they constructed a new home. The defendant paid his said loan in regular installments. That debt was not fully satisfied until 1932. The defendant paid the taxes on the ranch. The father and son engaged in an oil exploring enterprise on the property at a loss of over $6,000. In 1920 the defendant purchased and planted five acres of peaches on the ranch at his own expense. Later he planted several other acres of fruit trees on the property, at his own cost. After 1919 the son practically assumed the entire charge of the ranch. There is evidence that in the ten years following the last mentioned date William contributed to the maintenance of the family. He purchased machinery and operated the ranch, expending therefor several thousand dollars which he either paid or for which he assumed the obligation.

In 1919, after William returned from the war, his father told him he was "then ready to turn the place over" to him. William told him "there was no hurry about that; just to leave it the way it was." He said that he did not ask him for the deed. The first time William learned that his father had executed the deed was in June, 1932, when his father returned from town and told him "Bill, the place is now yours." His sister Elsie, who was then employed in a real estate office in Modesto, testified that she drew the deed at the request of her father. Bill was not present when the deed was executed. The children knew that was in accordance with their father's agreement and purpose. A clause reserving the life estate in the grantor was later inserted at his request. Elsie placed the deed in a safe deposit box and later left it with the Modesto Title Company, at the request of her father. In July, 1937, Elsie's father asked her to have the deed recorded. She instructed the title company to do so, and it was recorded at the request of the company July 20, 1937. The deed was manually delivered to William by Elsie at the direction of the father and in his presence in July, 1937.

The plaintiff was related to defendant's mother. She had been previously married and had children by her first husband. He died. She was left without resources or a home. The plaintiff became engaged to marry John Osterberg. Before their marriage, which occurred March 22, 1933, Mrs. Esther Smith, a daughter of the grantor, told the plaintiff in the presence of plaintiff's daughter, Mrs. Sears, about the conveyance of the property to her brother William. Esther testified that the plaintiff told her regarding that deed that she had been working hard in San Francisco, and "she couldn't do it any more and she had to give it up, and she was glad to come out there and live with my Dad." In reply to the question propounded, "And that she didn't want anything after [his death]?" the plaintiff replied "Absolutely." "Q. Just so she had a living? A. Just so she had a home there. * * * Q. Just a home for the time that your father was alive? A. Yes." The plaintiff admitted that John Osterberg told her he was unable to care for the ranch and that he had "turned it over to Bill," subject to the reservation of a life estate in himself. Regarding the transfer of title to the son, the following colloquy occurred during the examination of the plaintiff:

"The Court: He couldn't manage it so he turned it over and took a life estate? A. Yes.

"The Court: And not for the purpose of cheating you? A. No. He said I was going to be protected. * * * He also told me when he was in the hospital *that there was money left for me, that I was supposed to have.* * * * He said, 'You don't need to worry about it, there is money there for you. He [the defendant] has money for you, and there is some money.'"

The plaintiff never at any time asked her husband to have the deed changed or cancelled. She evidently expected he would leave her some money and not an interest in the ranch. July 20, 1937, four years and eight months before the death of her husband, the plaintiff abandoned his home and went to live with her married daughter in San Francisco. She testified in that regard: "I couldn't be there any longer, I couldn't do the work and he knew all about it; it was too much for me to do." The spouses did thereafter associate together, but she never returned to his home at Modesto.

Within two and a half months after the death of John Osterberg this suit was commenced. The defendant answered the complaint, denying the material allegations

thereof, and filed a cross-complaint alleging that the ranch was conveyed to him by his father for a good and sufficient consideration, free from fraud or undue influence, and that he was the owner thereof, praying that title thereto be quieted in him. The court adopted findings favorable to the defendant and cross-complainant in every essential respect. A judgment was accordingly rendered to the effect that plaintiff was entitled to nothing by her complaint, and title to the ranch was quieted in the defendant. From that judgment this appeal was perfected.

The appellant seeks to reverse the judgment on the grounds that it is not supported by the evidence, and that the deed to the home property was procured by the defendant without consideration and by means of coercion, fraud and undue influence.

[1] While there is some conflict of evidence, and we have not attempted to recite the testimony favorable to the appellant, we are of the opinion there is adequate proof to support the findings and the judgment. The little 17 acre Modesto ranch was bought by the defendant's father for $45 per acre. When the dwelling house was destroyed by fire in 1920 it was rebuilt at a cost of $5,000, at least one-half of which sum was contributed by the defendant. It was a modest, inexpensive home. The property was worth less than $10,000. In 1908, after the death of defendant's mother, and 25 years before plaintiff came to live in the family, his father agreed to convey the property to him in consideration of his aid and assistance in maintaining the home and farm and in helping to educate his brothers and sisters. He faithfully did so until the time of the death of his father in March, 1942. He worked for adjacent farmers for wages, all of which he turned over to his father. He worked on the farm and planted and cared for some ten acres of fruit trees at his own expense. He purchased machinery and helped to rebuild the dwelling house. He contributed to his father's oil drilling enterprise at a cost in excess of $6,000. He furnished his father with funds during that entire period of time amounting to several thousand dollars. He gave up the completion of his education to thus assist his father. It may not be said there was not adequate consideration for the deed.

[2-4] The mere proof of the existence of a confidential relationship between a grantor and a grantee of land does not raise the presumption of fraud or undue influence. Best v. Paul, 101 Cal.App. 497, 281 P. 1089. Nor is a conveyance deemed to be void merely because such confidential relationship existed. Jorgensen v. Dahlstrom, 53 Cal.App.2d 322, 333, 127 P.2d 551. It is only when it also appears that the grantee exercised activity in procuring the deed, or that it was conveyed without consideration, that the burden is placed on the grantee to show that the deed was not obtained by fraud, or undue influence. Best v. Paul, supra; Jorgensen v. Dahlstrom, supra; Hatch v. Penzner, 44 Cal.App.2d 874, 879; 39 Am.Jur. p. 744, sec. 99, and p. 745, sec. 100.

[5] In the present case there is sufficient evidence to support the findings of the court that the deed was made and the title to the land conveyed, subject to a reservation of a life estate in the grantor, for a valuable and adequate consideration, free from fraud or undue influence or even activity to procure the deed, on the part of the grantee. There is no evidence that the son importuned or coerced or even asked his father at any time to convey the property to him. On the contrary, there is evidence that when William returned from the war in 1919, and his father told him he was then ready to deed him the ranch, William replied that there was no necessity to hurry about that. He requested his father to "leave it the way it was." William testified that he never asked his father to make that deed; that the first time he learned of the execution of the deed was when his father told him in June, 1932, that he had executed the deed. William had nothing to do with procuring the execution of the deed. He was not present when it was made or when it was placed in the custody of the Modesto Title Company. There is ample evidence that the grantee was not active in procuring the deed.

[6] There is no merit in the contention that the deed was made without consideration since the agreement to convey the title was made during William's minority and that his father was entitled to his earnings, under Section 197 of the Civil Code, until he reached the age of his majority. The circumstances of this case indicate that the father waived his legal right to his

son's wages during his minority. Moreover, the deed was not executed until long after William became of age. The original voluntary agreement of the grantor was made in consideration of *continuing services* and of contributions of funds by his son. The greatest proportion of services performed and funds supplied by the son was contributed during a period of thirty years after he became of age. Those contributions continued for ten years after the deed was executed in June, 1932, to the time of the grantor's death, with full knowledge of that conveyance on the part of the plaintiff. There was adequate consideration for the deed, independently of the wages contributed before William reached the age of his majority.

The appellant contends that the concealing by the grantee and his brothers and sisters of the fact of the execution of the deed to the defendant furnishes evidence of fraud. The deed was acknowledged June 28, 1932. The children had knowledge of that fact. They also knew their father intended to marry the plaintiff. The marriage did not occur until March 22, 1933. Regarding plaintiff's previous knowledge of that deed, there is a conflict of evidence. But there is positive testimony on the part of Mrs. Esther Smith, a sister of the defendant, that the children had talked of the expected marriage and thought it would be fair to tell the plaintiff about the previous conveyance of the property. Mrs. Smith said that two or three months before the wedding she told the plaintiff about her father's conveyance of the home to William, and his reasons therefor, saying to her "I want you to know that before you marry." At the request of the plaintiff, Mrs. Smith told Mrs. Sears, the daughter of plaintiff, about the conveyance, saying, "I felt it only fair that she should know." In response to that information, the plaintiff replied that she didn't care about the conveyance of the property; that she had been working in an apartment house in San Francisco too hard; that she couldn't stand such hard work, and "she would be glad to live there with that understanding." Mrs. Smith testified that plaintiff said: "I am not asking for anything but just to stay here. * * * To come out there and live with my Dad." That evidence refutes the theory of fraud or deceit on the part of the children.

[7, 8] The deed was not rendered invalid by the addition of the clause inserted at the request of the grantor reserving a life interest in the property, after he had signed the deed and before it was delivered or recorded. The deed was prepared by Elsie Carroll, the daughter of the grantor, at his request. It was dated June 10, 1932, and signed by him. It was duly acknowledged by him June 28, 1932, and was left in the custody of Elsie. It was not recorded or delivered to the grantee until July 20, 1937. In the meantime, the clause reserving the life estate in the grantor was inserted in the deed at his request. In California the acknowledgment of a deed is not essential to its validity. The acknowledgment of a deed is merely evidentiary in character and is required only to entitle it to be recorded so as to render it competent evidence of the conveyance without further proof. Williston v. City of Yuba City, 1 Cal.App. 2d 166, 171, 36 P.2d 445; Kimbro v. Kimbro, 199 Cal. 344, 249 P. 180; Dutton v. Locke-Paddon, 37 Cal.App. 693, 174 P. 674; 9 Cal.Jur. 113, sec. 18.

The alteration of the deed by inserting therein before it was recorded or delivered the clause reserving to the grantor a life estate, at his request, did not invalidate the instrument as it was originally executed. 2 Am.Jur. 613, sec. 23; 3 C.J.S., Alteration of Instruments, § 56, pp. 972, 974, sec. 58; 67 A.L.R. 364, note; Dutton v. Locke-Paddon, supra. In 2 American Jurisprudence at page 613 it is said in that regard:

"The rule seems to be generally established that, in the absence of a statute making acknowledgment or attestation of an instrument, such as a deed or mortgage, a prerequisite to the validity thereof, an alteration made in such an instrument, by consent of the parties, after execution and acknowledgment or attestation, and either before or after delivery, or even after recording, does not, as between the parties thereto, render invalid the instrument as originally executed."

In 3 C.J.S., § 58, at page 974, supra, it is likewise said:

"The parties to an instrument under seal may by consent make a change in it before complete execution, and, since a complete execution of a deed is consummated only by final delivery, the mere signing and

sealing of an instrument does not preclude changes by consent before delivery."

[9] In the present case there is no doubt the alteration of the deed was made at the request of the grantor, after which he directed it to be recorded and delivered. It was delivered to the grantee in the presence of the grantor, as altered and recorded. It was therefore not invalid on account of the alteration or otherwise. It was accepted by the grantee, subject to the life estate retained by his father. In addition to the positive evidence that the deed was manually delivered to William at the request and in the presence of his father, the recording of the instrument at the request of the grantor was prima facie proof of delivery with the intention on the part of the grantor to presently convey title to the property subject to his reserved life estate. Hitch v. Hitch, 24 Cal.App.2d 291, 293, 74 P.2d 1098; 26 C.J.S., Deeds, § 44, p. 245, and 26 C.J.S., Deeds, § 187, p. 598. In the authority last cited it is said at page 600:

"The delivery of a deed for record, by one who has executed and acknowledged it, with unqualified instructions to record it, will raise the presumption in the absence of any rebutting circumstance that the grantor intends to part with his title. * * *

"The presumption of delivery arising from recording is rebuttable, especially where the deed is recorded by or under the direction of the grantor; *and the burden of overcoming the presumption rests on the person who denies delivery.*" (Italics added.)

For the rule regarding the burden of proof, see also the case of Azvedo v. Azvedo, 1 Cal.App.2d 504, 507, 36 P.2d 1078.

[10] The plaintiff may not complain of the alteration of the deed. It was favorable to the grantor. She was not an innocent purchaser for a valuable consideration. She had full knowledge of the deed and conveyance before she married the grantor. Moreover this suit was not filed for nearly five years after the deed with its alteration was duly recorded. After one year had elapsed from the time of the recording of the deed, the plaintiff was charged with notice of the contents and of any defect, omission or informality which the deed may have contained. Section 1207 of the Civil Code provides in part:

"Any instrument affecting the title to real property, one year after the same has been copied into the proper book of record, kept in the office of any county recorder, imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; * * *."

We find nothing in the authorities cited by the appellant in conflict with what we have previously said regarding the validity of the deed, its alteration, the adequate consideration therefor, or its delivery to and acceptance by the grantee.

[11] The case of Trout v. Taylor, 220 Cal. 652, 32 P.2d 968, 970, relied upon by the appellant, is not in point. In that case, the plaintiff, an elderly lady without education or business experience, was induced to agree to exchange her real property for shares of stock in Running Springs Park, Inc. She signed, acknowledged and delivered to the agent her deed without naming any grantee therein. No authority was given by the grantor for anyone to enter the name of a grantee in the blank space left in the deed which she had executed and delivered. The court said in that regard: "The record shows no agency, and no authority, express or implied given by plaintiff to defendant R. H. Taylor." The court properly held in that case that the deed was void for the reason that it contained the name of no grantee, and the grantor did not authorize the insertion therein of the name of a grantee. The authorities are uniform to the effect that a deed which contains no name of the grantee and no sufficient identification of the party to whom the property is to be conveyed, is a nullity and void. Tumansky v. Woodruff, 14 Cal.App.2d 279, 283, 57 P.2d 1372; 9 Cal.Jur. 125, sec. 28; 32 A.L.R. 737, note. The form of a grant deed, prescribed by Section 1092 of the Civil Code, requires that instrument to designate the grantee by name.

[12] In the present case the deed contained no such omission or infirmity, and it was not void on that account. In this

case there was definite authority from the grantor to insert the clause reserving in him the life estate. If it was not actually done in his presence, he requested it to be done and he ratified that change when, with full knowledge thereof, he directed the recording of the deed and subsequently procured it to be delivered to the grantee in his presence.

The case of Videau v. Griffin, 21 Cal. 389, upon which the appellant also relies, is not in point. In that case the court properly held that a deed which purported to have been signed and executed by a person other than the owner of the land was not entitled to be admitted in evidence as the deed of the grantor, because of the lack of written authorization or power of attorney for an agent to sign and execute the deed. The land belonged to Henry Sparks. The deed was signed and acknowledged by John A. Clark, "as the attorney" or agent of the grantor. No power of attorney or written authority for Clark to sign or execute the deed was shown. The court properly held that it was not competent evidence of the conveyance of title to the real property. The instrument was held to be a nullity and void. Section 1091 of the Civil Code provides that:

"An estate in real property, other than an estate at will or for a term not exceeding one year, *can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.*" (Italics added.)

In the present case the agent of the grantor did not sign or acknowledge or execute the deed. The grantor himself signed and acknowledged it. He instructed his daughter to insert the clause reserving the life estate. If that was not actually done in the presence of the grantor, it was the duty of the plaintiff to prove that fact. The deed was valid on its face. The plaintiff failed to furnish evidence of the absence of the grantor. He instructed his daughter to record the deed after the change had been made, and he was present when it was actually delivered to the grantee. Certainly that was sufficient ratification and approval of the change in the deed which was made at his special instance and request, to render it valid as against anyone except a purchaser in good faith for a valuable consideration. We are of the opinion the deed was not void, under the circumstances of this case, on that account, or at all.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



68 Cal.App.2d 180

CALDWELL et al. v. DALARAY MINES, Inc.

Civ. 7098.

District Court of Appeal, Third District, California.

Feb. 23, 1945.

Hearing Denied April 23, 1945.

1. Mines and minerals ⇨53

A writing giving plaintiffs the option of purchasing mining property for a fixed amount upon making a down payment and certain monthly payments was not binding upon either party until the down payment had been made.

2. Specific performance ⇨37

To maintain action for specific performance it must be proved that there has been an acceptance of defendant's offer to sell the property, which acceptance, to be effective, must be unequivocal and positive and must comply with the terms of the offer.

Appeal from Superior Court, Calaveras County; J. T. B. Warne, Judge.

Action by Harry Caldwell and Ben L. Schultz against Dalaray Mines, Inc., for specific performance of a contract for the sale of certain mining property. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Chas. L. Gilmore, of Sacramento, for appellants.

Homer Lingenfelter, of Marysville, for respondent.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment in favor of defendant.

Defendant corporation was the owner of certain mining property known as the Gospel Quartz Mine located in Calaveras County, California. On October 20, 1941, D. C. Smith and Ray Hageman, president and vice-president, respectively, of said corporation, granted to plaintiffs the following option:

"San Andreas, October 20-1941.

"We the undersigned hereby give and grant unto Dr. Harry Caldwell and Ben L. Schultz of San Francisco Calif. an exclusive Option for a period from the date hereof until Nov. 1st 1941 on the Dalaray Mines Inc.
Dalaray Mining Co. Property a California Corp. on the following conditions to wit:

"The undersigned agree to give an exclusive title to all the holdings of Dalaray Mines Inc. for a Total Price of One Hundred thousand Dollars ($100,000.00) payments to be made viz: $2000.00 Cash down and a minimum of $300.00 cash per Month, and, or, 10% ten per cent on the Gross Production of all metals all to be applied on the purchase Price of $100,000.00 Net to the undersigned.

"We the undersigned further agree to permit Dr. Harry Caldwell and Ben L. Schultz to get their profit over and above our Net Price. Should Caldwell and Schultz fail to interest parties within the time herein stated or renewals thereof we are to consider this Contract as Null and void and of no effect. Title to be free and clear of any and all incumbrances.

"Accepted	Dalaray Mines Inc.
"Ben L. Schultz	Dalaray Mining Co.
"Harry Caldwell.	And as Individuals and as directors of
"Phone	Dalaray Mines Inc.
"(Hageman Mine)	Dalaray Mining Co.
"72 Y 3	Ray Hageman
"Meridian 28	D. C. Smith."

Thereafter follows the acknowledgment by plaintiffs on March 14, 1942.

By a writing dated October 29, 1941, and signed by Ray Hageman only, plaintiffs were granted an extension from November 1st to November 24th. Hageman again granted a similar extension on November 22nd to January 10, 1942. Said extension recited that he acknowledged "receipt of the payment of Two hundred Dollars which is to be applied on aforesaid Contract-Agreement as a part payment, on the purchase price. * * *" On January 9, 1942, plaintiffs again were granted a like extension by Hageman until January 24th, wherein he acknowledged "receipt of the payment of Two hundred and fifty dollars (250.00) which is to be applied on within Option-Agreement as an additional payment on the purchase price. * * *"

On January 20, 1942, prior to the expiration date of the last extension, plaintiffs addressed a letter to defendant, stating in part: "We are now ready and we are prepared to make the final payment * * * and to make the Royalty Payments. Upon showing your Titles to be free and clear of any and all encumbrances * * * and granting us possession of all holdings of aforesaid Corporation as per our agreement and upon which we have paid you $450.00, we will pay the balance due."

Plaintiffs' second socalled demand letter, dated March 1, 1942, in part, was as follows:

"Please take notice that the undersigned citizens and holders of a certain Option Agreement given to us by you * * * are ready to carry out our part of the agreement, and request of you, for the second time, to get your title in a merchantable shape, as per your agreement in writing to us. * * *

We are at this time making demand upon you to grant us possession, and feel that you have had sufficient time to clear your title. * * *"

No answer to either letter was made by defendant, and shortly thereafter it sold the property to a third party. On May 19, 1943, plaintiffs filed their complaint predicated upon the previously mentioned option and alleged that on various dates after January 20, 1942, tender had been made to defendant of the balance of the $2,000 provided for in the option; that defendant refused to accept the tender or to carry out any of the terms of the contract, and prayed for specific performance of the contract or damages for failure of performance. Defendant's answer was in the nature of a general denial of such allegations.

At the conclusion of the trial the court found that the payments of $200 and $250 were made as partial payments on the sum of $2,000 to be paid by plaintiffs to defendant upon exercise of the option; that such payments were so received by defendant and that plaintiffs did not exercise their option nor did they at any time tender the sum of $1,550, being the balance due on the speci-

fied sum of $2,000, payable upon the exercise of said option.

[1] There can be no disagreement with plaintiffs' first argument which is that a contract, unilateral at its inception, may, through the acts of the parties, ripen into a bilateral contract enforceable in an action for specific performance. It is the acts of the parties, however, which necessarily must determine the applicability of such rule. The writing was plainly an option without consideration by which the defendant offered to sell its mine to plaintiffs upon certain terms and conditions and under which plaintiffs had a right, if exercised within a specified time, to purchase the mine upon compliance with said terms and conditions, one of which was the necessary payment of $2,000. Admittedly only $450 of said sum was paid, which the trial court, as previously mentioned, found to be merely a part payment on account of the $2,000, and that the balance thereof, $1,550, was never paid or tendered by plaintiffs to defendant. Plaintiffs, however, urge that even though the $2,000 was not paid in full, the sum of $450 did pass from them to defendant, and that under such circumstances equity will enforce the contract.

The issue herein does not involve a question of part performance of a contract. Plaintiffs merely were given the privilege, for a limited time, of purchasing the mine upon the performance of certain conditions as set forth in the option, and until there was a compliance therewith, to-wit: the payment of $2,000 within the time specified, plaintiffs assumed no obligation under the contract to either buy or pay, and the agreement was not binding upon either party. Thomas v. Birch, 1918, 178 Cal. 483, 489, 173 P. 1102.

[2] It long has been the law in this state that in order for a plaintiff to maintain an action for specific performance it must be proved that there has been an acceptance of defendant's offer, which acceptance, to be effective, "must be unequivocal and positive and must comply with the terms of the offer." Ajax Holding Co., etc., v. Heinsbergen, 1944, 64 Cal.App.2d 665, 669, 149 P.2d 189, 192; Briles v. Poulson, 1915, 170 Cal. 408, 410, 149 P. 804. The rule also has been stated thus: "The acceptance must in every respect correspond with the offer, neither falling with nor going beyond the terms proposed, but exactly meeting them at all points, and closing with them just as they are stated." 6 Cal.Jur. p. 61. See 17 C.J.S., Contracts, § 42, p. 378; 12 Am.Jur. 532.

By virtue of the findings of the trial court that plaintiffs failed to exercise their option, the final contention that defendant is estopped to deny the authority of its officers to execute the contract becomes immaterial if there was sufficient evidence, and we conclude there was, to support the finding of the trial court that plaintiffs failed to perform the option in accordance with the conditions therein set forth.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



68 Cal.App.2d 192

CITY OF LOS ANGELES v. WHITE.

Civ. 14677.

District Court of Appeal, Second District, Division 3, California.

Feb. 26, 1945.

Hearing Denied April 26, 1945.

1. Dedication ⇐16(1), 20(2)

Landowners' intent to dedicate land to public use may be inferred from their long acquiescence in such use, but ultimate determination as to whether there was dedication must be drawn from all circumstances of particular case.

2. Dedication ⇐20(4)

The fact that public has been in habit of going on uninclosed and uncultivated land will ordinarily be attributed to license from owner thereof, rather than his intent to dedicate land to public use.

3. Dedication ⇐41

In city's action to quiet title to easement for street purposes over strip of defendant's land, burden was on plaintiff to prove affirmative allegations as to defendant's implied dedication of strip for such purposes by reason of long use thereof by public as highway.

4. Dedication ⇐44

A landowner's intention to dedicate land or roadway over it to public must be proved clearly and unequivocally, and,

when dedication rests on acts and conduct, such intent must clearly appear.

5. Dedication ⇨44

In city's action to quiet title to easement for street purposes over strip of defendant's land, finding of dedication was not sustained.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by the City of Los Angeles against Florence E. White to quiet title to an easement for street purposes over a strip of defendant's land. Judgment for defendant, and plaintiff appeals.

Affirmed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Roger Arnebergh, Deputy City Atty., all of Los Angeles, for appellant.

James V. Brewer, of Los Angeles, for respondent.

FOX, Justice pro tem.

This is a quiet title action in which the city of Los Angeles sought to obtain a judgment determining the existence of an easement for street purposes over a strip of land which for many years has been used as a highway by the public. From a judgment in favor of the defendant the city has appealed.

The defendant's property, consisting of 2¼ acres, was located in the city of Venice prior to that city's annexation to the city of Los Angeles in November, 1925. It was formerly a part of the Machado ranch. The vicinity is sparsely settled, open country territory. It was for the most part subdivided in the early and middle 1920's, though some of it was subdivided earlier. Up until about 1925 or 1926, the road over the property in question was just an ordinary winding country dirt road, without fixed boundaries. It was used principally by the people who lived on the adjacent ranches.

On August 7, 1924, the city of Venice filed an action to condemn a right of way for street purposes over this strip of land. Mrs. McDevitt, the then owner, filed her answer December 29, 1924. The referee's report was filed August 18, 1925, fixing the owner's award at $3,419.52. This award, however, was never paid and the action was dismissed on August 15, 1933, upon motion of another party. Notice of said motion does not appear to have been served on Mrs. McDevitt.

In about 1926, some gravel and oil was applied to this strip and it was rolled. The strip thus improved was somewhat wider than that previously traveled. More recently, this road became a part of a regular bus route in that community. In August, 1936, Mrs. McDevitt by grant deed conveyed the tract of land of which this strip is a part to George E. White. He died in March, 1941, and defendant thereupon inherited the property. There was no reservation or exception of any portion of this strip or roadway in the deed from Mrs. McDevitt to Mr. White. In June, 1942, a written request was made to the Board of Public Works on behalf of the defendant for permission to barricade said roadway and close same to traffic. This request was denied. The taxes on the said parcel of land including the strip used for a road have always been paid by the record owner of the property.

The trial court found that the said strip of land "has been continuously traveled and used as a public street or highway by the public since 1898." It also found, however, that "neither said Florence E. White nor her predecessors ever dedicated an easement over said property for street purposes or otherwise to the plaintiff, the City of Los Angeles, or to its predecessors in interest." The court further found that "the defendant Florence E. White is the owner in fee simple of the said land * * * and * * * that the plaintiff has no title, right, easement or other claim thereto."

The sole issue is whether or not plaintiff has an easement for street purposes over said property. Plaintiff contends that by reason of the long use thereof by the public there has been an implied dedication of the strip of land in question for street purposes.

We need not pause to consider whether the evidence herein recited would have sustained a finding that there was a dedicated easement for street purposes over said property. We need only to determine the question of whether the evidence compelled such a finding and conclusion. In our opinion it did not.

[1] The most that can be said is that the evidence of the use made of this strip of land was proper to be considered with other evidence on the question of whether

the owners intended to dedicate it to public use. Dunn v. County of Santa Cruz, 1944, 67 Cal.App.2d 400, 154 P.2d 440; Manhattan Beach v. Cortelyou, 1938, 10 Cal.2d 653, 668, 76 P.2d 483; Lyons v. Schwartz, 1940, 40 Cal.App.2d 60, 64, 104 P.2d 383; Lantz v. City of Los Angeles, 1921, 185 Cal. 262, 268, 196 P. 481; Huffman v. Hall, 1894, 102 Cal. 26, 36 P. 417. "It is true that this intent may be inferred from long acquiescence in a use by the public", Manhattan Beach v. Cortelyou, supra [10 Cal.2d 653, 76 P.2d 490], but the ultimate determination as to whether there is a dedication must "be drawn from all the circumstances of each particular case." Quinn v. Anderson, 1886, 70 Cal. 454, 11 P. 746, 747.

[2] First, the period up to 1925 should be considered. Up to that time the land in that vicinity appears to have been unenclosed and uncultivated for the most part. Under such circumstances, "the fact that the public has been in the habit of going upon the land will ordinarily be attributed to a license on the part of the owner, rather than to his intent to dedicate." Manhattan Beach v. Cortelyou, supra, 10 Cal.2d at page 668, 76 P.2d at page 490. Furthermore, the filing of the condemnation action and the answer of Mrs. McDevitt, who then owned the property, support an inference against any intended dedication to public use up to that time.

The improvement of the road with gravel and oil and the use thereafter by the public during the time that Mrs. McDevitt continued to own the property loses much of its significance because of the pendency of the condemnation action and the referee's award to her of $3,419.52 for the value of the land taken and damages for severance. The trial court was justified in inferring that she could have reasonably expected that the city would go through with the condemnation proceeding and that in due time she would be paid the amount of the award. Under such circumstances it would be difficult to infer an intention on her part to dedicate the strip to a public use from the fact that it was thus improved. On the contrary, the trial court could have reasonably inferred that she permitted the improvements without objection (if such was the fact) because she expected to be paid for the property. In this connection it should be borne in mind that the condemnation action was not dismissed until August, 1933, and then without notice to Mrs. McDevitt. Furthermore, the fact that she did not exclude the road from the description of the property in her deed of August 11, 1936, to Mr. White, tends to support the inference that she had not dedicated it to a public use.

From the fact that the defendant filed a request in writing in June, 1942, with the Board of Public Works, seeking permission to barricade this road and close it to traffic shows that she did not then have any intention of dedicating this strip of land to a public use. From this the court could reasonably infer that she had not previously intended to so dedicate the property. (In fact, the said request to the Board of Public Works, indicates that the use of this road by the public had been orally protested by defendant nearly a year earlier.) Also, the payment of taxes on the property by the defendant and other record owners shows "conduct consistent with the ownership of the property." Manhattan Beach v. Cortelyou, supra, 10 Cal.2d at page 670, 76 P.2d at page 491.

[3, 4] Finally, the burden was upon the plaintiff to prove the affirmative allegations of its complaint, and we are satisfied that the trial court was entirely justified in concluding that the plaintiff had failed to sustain the burden of proving that there had been a dedication. See Dunn v. County of Santa Cruz, 67 Cal.App.2d 400, 154 P.2d 440, supra; Lyons v. Schwartz, supra, 40 Cal.App.2d 60, 104 P.2d 383; Niles v. City of Los Angeles, 1899, 125 Cal. 572, 58 P. 190; DeMartini v. San Francisco, 1895, 107 Cal. 402, 40 P. 496. As was said in Lyons v. Schwartz, supra, 40 Cal.App.2d at page 65, 104 P.2d at page 386: "The courts have consistently held that the intention to dedicate to the public land or a roadway must be proven clearly and unequivocally. When the dedication rests upon acts and conduct, the intent must clearly appear. Burk v. City of Santa Cruz, 163 Cal. 807, 127 P. 154."

[5] As we view the evidence it is ample to support the trial court's finding that "neither said Florence E. White nor her predecessors ever dedicate an easement over said property for street purposes or otherwise to the plaintiff, the City of Los Angeles, or to its predecessors in interest." This finding supports the judgment for the defendant.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

68 Cal.App.2d 163

In re KISLING'S ESTATE.

LOOMIS v. HANNEY et al.

Civ. 14691.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1945.

1. Wills ⇐304

Testimony of handwriting expert, supported by photographs of questioned handwriting and of admittedly authentic handwriting of decedent together with an examination by the court of the questioned document and photographs, was substantial evidence to sustain finding that body of alleged holographic will was not in the handwriting of decedent, notwithstanding testimony of decedent's attending physician and another witness that they were present when alleged holographic will was prepared and that it was written in its entirety by decedent in the presence of both witnesses without assistance from anyone.

2. Wills ⇐295

Where authenticity of purported holographic will was questioned, it was competent for court to examine questioned document, photographs purporting to show variations between writing in question and admittedly authentic writings, and other writings admittedly those of decedent.

3. Wills ⇐439

In construing a will, court must primarily endeavor to ascertain intent of testator, and once that intent is ascertained it will prevail unless it violates some positive rule of law.

4. Wills ⇐72

Before a document will be admitted to probate as decedent's will, it must satisfactorily appear that maker of document intended by the very paper itself to make a disposition of his property in favor of party or parties claiming thereunder.

5. Wills ⇐488

In determining whether decedent intended by instrument offered for probate that such instrument constitute decedent's will, where on its face instrument is free from ambiguity, it may not be shown that decedent intended it to operate differently than manner indicated by language used.

6. Wills ⇐400

District Court of Appeal in reviewing decree denying purported holographic will admission to probate cannot determine credibility of witnesses.

7. Wills ⇐72, 206

Letter to decedent's attorney requesting him to visit her to make out a new will, and advising him of intended disposal of her property, authorized conclusion that decedent did not intend letter to be her last will, and thereby authorized decree denying letter probate as an holographic will.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceedings in the matter of the estate of Mrs. L. W. Kisling, also known as Mrs. L. W. Kesling, also known as Birdie Louise Kisling, also known as Birdie Louise Kesling, deceased, on the petition of Anna Cowin, for the probate of decedent's will, wherein Ben H. Brown was appointed administrator with will annexed. Albert E. Loomis, opposed by Florence Adair Hanney, petitioner, and administrator with will annexed, contested decedent's will and offered a purported holographic will for probate. From an order admitting the will to probate and for letters of administration with will annexed, from decree determining contest to probate of will, and from decree denying purported holographic will admission to probate, Albert E. Loomis appeals.

Affirmed.

Henry E. Bianchi, of Los Angeles, for appellant.

Chas. R. Stead, of Pomona, for respondents.

WHITE, Justice.

This is an appeal from a decree denying a purported holographic will admission to probate. Appellant Albert E. Loomis, a nephew of decedent, offered the following document for probate as her last will and testament:

"Rosslyn Hotels
"111 West Fifth Street
"Los Angeles, California
"May 24, 1943

"Mr. R. B. Bidwell Atty
"Dear Mr. Bidwell:

"I am Serious Ill my Dr. ask me to tell you to Come in and make out a new

will I have not been fair to my nephew Albert E. Loomis I wish him to have all my Personal properties, and all securities all of my Jewelry—my nephew lives in Fifield Wisconsin he now resides in Jackson Michigan doing Defense work—my step neice Mrs. Harold G. Hanney known also Mrs. Florence Adair Kisling to have the two Properties in Glendora, all money in bank's to go to my nephew Albert E. Loomis, come early as its convenient yours Resp.

"Mrs. L. W. Kisling
"648 Rossliny Hotel
"Losos Angeles
"California"

In reply to the foregoing, Mr. Bidwell, to whom it was addressed and who was decedent's attorney, wrote to her under date of May 26, suggesting certain changes in the testamentary plan outlined in the document forwarded to him by decedent under date of May 24, and advising her that he would call upon her on June 2nd and would "prepare and bring with me a new will for you to execute then." However, decedent died May 29, 1943.

The question for decision is whether the foregoing document written by decedent and directed to her attorney is to be regarded as a testamentary disposition of her property in the manner therein set forth. With reference to the document in question, the trial court found as follows:

"That the alleged holographic will dated May 24, 1943, attached to the Second petition for probate of will filed by Albert E. Loomis was not in the handwriting of said deceased except the signature thereto and the following words: '648 Rosslyn Hotel, Los Angeles, California'.

"That said document of May 24, 1943 was not intended by said deceased to be her last will and testament."

Was there substantial evidence to sustain the foregoing findings of the trial court? As to the first quoted finding, there was testimony given by decedent's attending physician and another witness that they were present when the document dated May 24th was prepared and that the same was written in its entirety by the decedent in the presence of both such witnesses and without assistance from any one. The decedent had stated to them that "she had not been fair to her nephew" (Appellant Loomis); that "she had made a will previously and that she wanted to make him inherit all her property except two pieces in Glendora." Opposed to the foregoing was the testimony of Clark Sellers, an examiner of questioned documents whose qualifications "as a handwriting expert or as an expert on questioned documents" was stipulated by appellant. This witness testified that, from an examination of the above mentioned document, "It is my positive conclusion that the person who signed the name, 'Mrs. L. W. Kisling, 648 Rosslyn Hotel, Lofos Angeles, California'—the person who wrote that writing did not write any part of the body of the document, Contestant's Exhibit A,—I mean any part of the document above the signature. In other words, the signature and the body are of two different writers, in my judgment." In support of his announced conclusion, Mr. Sellers produced some photographs "dealing with the subject of whether or not the person who wrote the signature on Contestant's Exhibit A (the document dated May 24, 1943) also wrote the body of Contestant's A", and, using such photographs, he pointed out claimed variations in the writings shown thereon and gave, among other reasons, as the basis of his conclusions that

"* * * based on a study of the handwriting of Mrs. Kisling as it is in these various exhibits marked here, Exhibits 3 to 10 inclusive, and a comparison with the handwriting in Contestant's Exhibit A. In my judgment the person who wrote the body of this document, Contestant's Exhibit A, was a much surer penman, from a writing standpoint than was Mrs. Kisling; that writer who wrote the body of Contestant's Exhibit A had developed an entirely different set of writing habits than those developed by Mrs. Kisling over the period of her lifetime."

[1, 2] By reason of the foregoing testimony and from an examination of the questioned document, the photographs and writings admittedly that of decedent, by the court, which was proper, the court pointed out certain variations in the exemplars and the questioned document, from all of which the court concluded that the claimed testamentary document was not entirely in the handwriting of decedent, saying "this is one case where I don't think you need so much handwriting expert as good eyes". Based upon the testimony of the expert witness and upon his own examination of the questioned document, the trial court

stated that he could not give any credence to the testimony proffered by appellant that the document under consideration was written by the decedent. Under well established and oft repeated rules which require no citation of authority, it must be held that the evidence relied upon by the court for its decision is of sufficient substantiality to sustain the finding made thereon.

[3-7] We come now to a consideration of the second above quoted finding of the court, which was that the document dated May 24, 1943, was not intended by the decedent to be her last will and testament. That question must be determined in the light of the following principles of law and their application to the facts of the case with which we are here concerned. In the construction of wills, the primary and cardinal rule to be observed is to ascertain the intent of the testator, and once that intent is ascertained it will prevail unless it violates some positive rule of law. However, before a document will be admitted to probate as the last will and testament of a decedent, it must satisfactorily appear that the maker of the instrument intended *by the very paper itself* to make a disposition of his property in favor of the party or parties claiming thereunder. In re Estate of Major, 89 Cal. App. 238, 241, 264 P. 542; In re Estate of Button, 209 Cal. 325, 331, 287 P. 964. Unless it be made to appear plainly and satisfactorily that the maker of the instrument intended that very paper itself to be his last will, such paper must be denied probate. And, where on its face the instrument is free from ambiguity, it may not be shown that the maker thereof intended it to operate differently than what the language used indicates. In re Estate of Pagel, 52 Cal.App.2d 38, 42, 125 P.2d 853. However, in the instant case, the court did not accept as true the oral testimony as to the decedent's intention regarding the instrument in question, and it is not within our province to determine the credibility of witnesses. Moreover, an examination of the document under consideration clearly warranted the court in concluding that the paper itself was not intended by the decedent to be a will, but was simply a request by her directed to her attorney that he come to see her for the purpose of making a will. It is plain that the principal purpose of the writing was to have her attorney visit her, as she says therein, to "make out a new will," and then again she exhorts him to "come early as its convenient." Such language certainly justified the conclusion reached by the trial court that the decedent did not intend the document to be her last will, but merely intended by it to advise her attorney of her plan for disposing of her property, and that she desired to confer with him with reference to incorporating such suggestions in what she referred to as "a new will" which she desired him to prepare for execution by her.

The attempted appeal from the order denying the motion for a new trial is dismissed and for the foregoing reasons, the decree from which this appeal was taken is affirmed.

YORK, P. J., and DORAN, J., concur.



68 Cal.App.2d 168

AITKEN v. HAYWARD.

Civ. 12737.

District Court of Appeal, First District, Division 2, California.

Feb. 23, 1945.

1. Limitation of actions ⇐66(6)

Where agreement between residuary legatees relating to distribution of estate stated that adjustment between parties was to be made at convenience of parties, a demand by one or both parties to institute further negotiations was contemplated, so that statute of limitations would not begin to run until demand was made. Code Civ. Proc. § 337, subds. 1, 2.

2. Limitation of actions ⇐46(6)
Wills ⇐741

Where residue was to be divided so that testatrix' son and daughter would receive property of equal value, and parties in 1938 entered into preliminary agreement for distribution of property providing for adjustment between parties at their convenience, but son's duties as ship captain in war zone and serious injury in 1942 prevented him from claiming an adjustment until January, 1943, his suit against sister

to obtain amount owing to him, filed in February, 1943, was not barred by laches, or by four year statute of limitations based on theory that cause of action accrued in 1938 when decree of distribution and final account were filed. Code Civ. Proc. § 337, subds. 1, 2.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Suit by Arthur Wallace Aitken against Gainor Wilson Hayward to obtain the amount owing under a will and an agreement relating to distribution of residuary estate. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

J. Rainey Hancock, of San Jose, for appellant.

Richard V. Bressani and Robert E. Hayes, both of San Jose, for respondent.

NOURSE, Presiding Judge.

This is an appeal from a judgment awarding respondent the sum of $1,557.43. The sole defense of appellant is that the action is barred by the statute of limitations. Respondent and appellant, brother and sister, were the beneficiaries under the will of their mother, Gainor G. Aitken, who died October 15, 1937, a resident of the County of Santa Clara, leaving an estate therein. This appellant was appointed executrix of said estate. The will contained a number of provisions which are material to an understanding of the circumstances of this case. These provisions are:

"Second: I give, bequeath and devise to my said daughter Gainor Wilson Hayward all of my jewelry and personal effects.

"Third: I give, bequeath and devise to my said daughter Gainor Wilson Hayward all claims, sums or indebtedness due to me from my son-in-law, Charles S. Hayward, including all promissory notes and deeds of trust.

"Fourth: I give, bequeath and devise all the remainder and residue of my estate to my said daughter, Gainor Wilson Hayward, and to my son, Arthur Wallace Aitken, in such proportion that the total value of the property given, bequeathed and devised and to be distributed to each, including the specific bequest contained in paragraph Second, shall be equal."

Under the equality provision just quoted, it became necessary, in order to determine the amount due the appellant, to ascertain the value of the jewelry and personal effects bequeathed by paragraph second, and the value of the promissory notes, deeds of trusts and other indebtedness of Charles S. Hayward (the husband of the executrix) bequeathed by paragraph third. The promissory notes had been appraised at $3,600 at the time of the inventory, but their real value was not known.

To facilitate the winding up of the estate appellant, who resided in Los Gatos, caused to be prepared, and forwarded to respondent, then in New York, an agreement dated May 18, 1938, reading in part as follows:

"Whereas, it is not possible to make equal distribution without an agreement between the parties hereto, or a sale of the assets of said estate, owing to the fact that certain promissory notes of Charles S. Hayward are specifically bequeathed to said party of the first part, amounting in appraised value to $3,600.00; and

"Whereas, said party of the first part is entitled to fees as such executrix of $779.42 and funds are not available in said estate to pay such fees; of which one-half thereof or $389.71 is properly chargeable to said party of the second part.

"Now, therefore, it is agreed by and between the parties hereto as follows, to-wit: the bequest of said personal effects and notes to said party of the first part, as set forth in paragraphs second and third of said will shall stand; the remainder of said estate shall be distributed to the parties hereto, share and share alike, the said party of the first part shall pay said party of the second part the sum of $1,800. (less the said sum of $389.71, fees of executrix), or $1,410.29 in all, such payment to be made at the time and in the manner and subject to such deductions for advances made by said party of the first part to take care of debts of said estate and costs of administration as may be mutually agreed upon, it being expressly understood that said estate may be distributed forthwith as herein provided; the adjustment between the parties hereto of such payment and advances to be made *at the convenience of the parties hereto* and not as a condition to immediate distribution of said estate as herein provided." (Emphasis ours.)

The $1,410.29 specified in the agreement was never paid respondent, both parties ap-

parently agreeing to wait until they were able to settle the entire amount.

According to respondent, who was the sole witness, it was not practicable to ascertain the exact amount or to agree on the method of payment at that time owing to the straitened financial condition of the executrix, and the fact that respondent, who was throughout all of this time a ship captain, was not available and his duties prevented him from giving the matter sufficient attention to work out a plan of payment.

In addition, respondent claims he made an overpayment of $147.14 of the sum he contributed for debts and expenses at the request of the executrix. The facts of the overpayment are not disputed.

It is true that when respondent was in California, he resided in one half of a double house, the other half of which was the residence of his sister, the appellant. However, the testimony shows that until 1942, respondent had spent only a few days of each year in California, the first time, after the agreement, being in March 1939. Until 1942, respondent was severely restricted by his duties since his ship was almost constantly engaged in transport through war zones. In March, 1942, respondent was wounded and was returned to California. He testified he was not fully conscious for a period of two months and was hospitalized approximately eight months. For most of the year he was thus incapacitated.

The first demand made upon appellant to adjust and pay the amount owing under the will and agreement was made in January, 1943. The court found that the action was not barred either by the statute of limitations or laches.

Appellant bases her appeal entirely upon the application of the four year statute. C.C.P. § 337(1) and § 337(2). She contends the cause of action accrued on June 13, 1938, when the decree of distribution and final account were filed, since at that time the exact amount owing was ascertainable. The first demand was made in January, 1943, and this suit was filed February 17, 1943. The trial court found: "That January 1943 was the first time when it was reasonable or convenient for the parties, and particularly the plaintiff, to discuss the matters set forth in said agreement or for plaintiff to request an adjustment or payment."

[1] There is no question but that the contract contemplated that a demand be made by one or both of the parties to institute further negotiations and that the time of performance under the contract was uncertain. As this court said in Kaplan v. Reid Bros., Inc., 104 Cal.App. 268, 272, 285 P. 868, 869: "In cases where a demand is necessary before a cause of action arises, the statute of limitations does not begin to run until the demand is made. The demand, however, must be made within a reasonable time, and a time coincident with the period of the statute of limitations will ordinarily be deemed to be reasonable; but, 'where delay in making the demand is expressly contemplated, even though the obligation is payable on demand, there is no rule of law that requires that demand shall be made within the statutory period for bringing an action.' Wood on Limitations (4th Ed.), vol. I, § 118, p. 617; 37 Cor. Jur., pp. 966, 967; Vickrey v. Maier, 164 Cal. 384, 390, 391, 129 P. 273, 274. In Vickrey v. Maier, the Supreme Court had under consideration a contract for the repurchase of stock 'at any time after six months,' and held that a delay of more than four years in making a demand after the lapse of the six-month period was not unreasonable. In our case the delay was somewhat longer, but the question of what was a reasonable time was primarily a question to be decided by the trial court, and we cannot hold that the trial court's determination that the option was exercised within such time as to entitle respondent to recover under the contract was erroneous." See also Neale v. Morrow, 150 Cal. 414, 88 P. 815; Hughes v. Heffner, 29 Cal.App.2d 382, 386, 84 P.2d 540; Woollomes v. Gomes, 26 Cal.App.2d 461, 79 P.2d 728.

[2] In the case at bar the trial court was justified in finding that a delay was definitely contemplated in the contract. When the parties specified in their agreement that an adjustment be made at their "convenience" they were taking into consideration the peculiar nature of respondent's duties and the financial predicament of the appellant. The finding that under the facts a reasonable time and opportunity for adjustment did not occur until January, 1943, is supported by the evidence, and the conclusions of law that the action is therefore not barred by any provision of the statute of limitations properly followed.

Though appellant does not argue her defense of laches the adverse finding is fully supported by the same evidence and the trial court correctly held that this defense was not sustained.

The judgment is affirmed.

GOODELL, J., and DOOLING, Justice pro tem., concur.



68 Cal.App.2d 204

In re PALM'S ESTATE.

WEBER v. PALM et al.*

Civ. 7090; Sac. 5668.

District Court of Appeal, Third District, California.

Feb. 26, 1945.

Rehearing Denied March 27, 1945.

Hearing Denied April 26, 1945.

1. Executors and administrators ⇐35(8)

"Mismanagement" of an estate which may authorize revocation of letters testamentary or letters of administration means merely that business of the estate has been badly, improperly or unskillfully conducted, and does not mean that executor or administrator has been guilty of fraud or of willful or deliberate acts detrimental to the estate. Probate Code, § 521.

See Words and Phrases, Permanent Edition, for all other definitions of "Mismanagement".

2. Executors and administrators ⇐35(15)

Proof that administrator with will annexed was holding an allowed claim secured by trust deeds on ranches, which constituted chief asset of the estate, adverse to interests of the estate and heirs, and that administrator had asserted rights and performed acts detrimental thereto, was sufficient ground for revocation of letters of administration. Probate Code, § 521.

3. Executors and administrators ⇐35(2)

Where administrator with will annexed took possession of ranch as representative of the estate, administrator's claim made for first time more than two years after death of decedent's widow that he held ranch as a beneficiary and mortgagee in possession was adverse to interest of the estate so as to authorize revocation of the letters of administration. Probate Code, § 521.

4. Mortgages ⇐194

The rights and advantages which accrue to a mortgagee who is given possession of real property by mortgagor are superior to mere rights of a mortgagee or a beneficiary under a trust deed.

5. Executors and administrators ⇐35(1, 19)

The probate court possesses a wide discretion in determining whether facts warrant removal of administrator, and except for clear abuse of that discretion, an order either removing an administrator for violation of his trust, or refusing to do so, may not be interfered with on appeal.

6. Executors and administrators ⇐75

An executor or administrator is a quasi-trustee of the estate which he represents, and his relationship is fiduciary in its nature with respect to heirs and creditors.

7. Executors and administrators ⇐91

The powers of an executor or administrator are limited to authority conferred upon him by law.

8. Executors and administrators ⇐91

An executor or administrator has duty of taking possession of property of an estate and of preserving it for benefit of heirs and creditors, but his possession and handling of property are subject to control of probate court. Probate Code, § 300.

9. Executors and administrators ⇐91

A representative of an estate may be specifically authorized by statute, or be given implied authority of law for preservation of the estate, to perform many acts without first securing orders of probate court therefor, but ordinarily such acts are subject to approval of the court. Probate Code, § 300.

10. Executors and administrators ⇐35(2)

An administrator of an estate may be removed and his letters revoked when it appears that he possesses an interest in property of the estate and performs acts with relation thereto inimical to rights and interests of heirs or creditors.

11. Executors and administrators ⇐35(15)

Proof that administrator with will annexed attempted to sell ranch constituting

* Subsequent opinion 162 P.2d 863.

asset of estate for less than its appraised value, pursuant to foreclosure of trust deed on the ranch held by administrator himself, constituted "mismanagement" of the estate warranting revocation of letters of administration. Code Civ.Proc. § 692; Civ.Code, § 2924; Probate Code, § 521.

12. Appearance ⇐24(13)

Where administrator with will annexed appeared specially in proceedings seeking revocation of his letters of administration for purpose of his motion to dismiss the proceedings because no citation had been issued by clerk under seal of court as required by statute, but administrator voluntarily participated in subsequent proceedings on the merits after his motion was overruled, administrator waived informality of issuance of the citation. Probate Code, §§ 521, 1206.

13. Courts ⇐202(1)

In a probate proceeding, the court has jurisdiction of the rem, and office of the citation is to give notice of a proceeding and to procure presence of person involved, and it is not jurisdictional in same sense that summons may be. Probate Code, § 1206.

14. Executors and administrators ⇐265

Where administrator with will annexed, who was also holding note secured by trust deed on ranch which constituted an asset of estate, agreed to waiver of interest on the note upon express condition that no accounting should be demanded of him in handling of affairs of the estate, proof that heirs demanded an accounting established that administrator was entitled to interest on the note.

Appeal from Superior Court, Yolo County; C. C. McDonald, Judge.

Proceeding in the matter of the estate of Edward A. Palm, also known as E. A. Palm, also known as Edward Palm, deceased. From an order revoking his letters of administration and from that portion of an order settling his first and second accounts which relates to disallowance of interest on two notes secured by trust deed on certain property belonging to the estate, Frank Weber, as administrator with the will annexed of the estate of Edward A. Palm, deceased, appeals, opposed by Elmer E. Palm and Florence E. Farris.

Affirmed in part, and in part reversed with directions.

Thomas B. Leeper, of Sacramento, for appellant.

Armfield & Eddy, of Woodland, for respondents Farris and Palm.

A. J. Harder, of Sacramento, for respondent Steen.

PER CURIAM.

Frank Weber, as administrator with the will annexed of the estate of Edward A. Palm, deceased, has appealed from an order revoking his letters on the grounds of mismanagement and possession of interests adverse to the estate. He has also appealed from that portion of an order settling his first and second accounts which relates to the disallowance of interest on two notes secured by trust deeds on certain property belonging to the estate.

Edward A. Palm and Wilhelmina Palm were husband and wife. Respondents are their son and daughter respectively. The spouses were possessed of an estate of considerable value, including an undivided one-half interest in a Yolo County ranch and the entire community interest in another ranch in Sacramento County. On October 1, 1930, the spouses and Mary K. Holland executed a promissory note payable to Frank Weber, for the sum of $10,000 secured by a trust deed on the Yolo County farm. Mary K. Holland owned an undivided one-half interest in the last mentioned ranch. She subsequently deeded her interest in that ranch to Mr. Weber in full payment of her share of indebtedness on that note. February 3, 1933, the spouses executed a promissory note payable to Frank Weber for the sum of $31,152.30 secured by another trust deed on the Sacramento ranch. December 7, 1934, Edward A. Palm died testate. His wife, Wilhelmina, who was the sole beneficiary under his will, was duly appointed and qualified as executrix. May 25, 1935, Weber's claim against the estate for said indebtedness was approved and filed in the total sum of $44,084.95. November 20, 1935, Wilhelmina Palm resigned as executrix, and upon her nomination Frank Weber was appointed and qualified on December 9, 1935, as administrator of said estate with the will annexed. An inventory was filed in the estate appraising the Sacramento ranch at $30,000. There is evidence that values of real property have

recently increased and that said ranch is now worth in excess of $35,000.

The evidence shows and the trial court found that at the time Weber took over the operation of the property and assumed his duties as administrator, the property was not in a condition to produce to advantage; that the Yolo County land was planted to pear trees that were diseased and had to be removed, and that the Sacramento County property was planted to prune trees that were unprofitable; that Weber removed the trees from the lands and planted the Yolo ranch to grain, and the Sacramento property in hops, the latter crop proving highly successful and profitable. Thereafter Mr. Weber operated the hop ranch and rebuilt a hop dryer which was destroyed by fire, advancing his own moneys for the benefit of the estate. He also cared for the other property of the estate. He paid bills of the estate, including a portion of his own claim. He maintained a bank account in his name as administrator, from which expenses and costs of administration of the estate were paid by checks. June 22, 1937, Wilhelmina Palm signed a document by the terms of which she "consents to and confirms all the acts and management of Frank Weber, as administrator * * *" and also "waives the reporting of any of said acts to the court or obtaining the confirmation of said acts by the court." May 31, 1940, Mrs. Palm signed a similar document ratifying all acts of Mr. Weber, performed as administrator, including the borrowing and expenditure of money, the making of improvements and the handling of the estate. No account was filed in the estate by Mr. Weber during the lifetime of Mrs. Palm. She died March 11, 1941.

December 2, 1941, after the death of their mother, E. E. Palm and Florence E. Farris, a son and daughter of the deceased, gave notice to Mr. Weber to show cause why he should not file an account of his administration of the estate. That motion was not heard or determined. In June, 1942, the administrator filed his first account. January 5, 1943, E. E. Palm and Florence E. Farris, the previously mentioned heirs, filed objections to that account. February 10, 1943, the administrator filed a "Second Annual Account and Report of Frank Weber, Administrator." May 25th of that year the same heirs filed objections to that account. After hearing upon said accounts, both the first and the second accounts were settled by the court December 16, 1943.

It appears from the findings adopted by the court on the motion to revoke the letters that on December 2, 1942, the administrator published notice of probate sale of said hop ranch, and sold the same to Sophie Oeste for $28,000 subject to approval; that the reasonable value of said ranch was not less than $35,000; that upon return of said sale to the probate court said heirs filed their objections to confirmation, and said sale was abandoned. Regarding said sale the court further found that Frank Weber persuaded Sophie Oeste to bid $28,000 for said hop ranch promising to protect her against higher bids therefor, agreeing that if higher bids were offered he would bid in the property for any necessary amount with which to purchase it "up to the sum of $35,000," and convey it to her for said sum of $28,000.

The administrator testified that he handled said hop ranch as the property of the estate of Edward A. Palm, deceased, until "sometime in June of 1943," after which he claimed the right to, and managed it as mortgagee and trustee in possession of the property. On March 5, 1943, Mr. Weber procured notice to be given of sale of said hop ranch under his trust deed, as required by Section 692 of the Code of Civil Procedure.

September 20, 1943, the petition to revoke the letters of administration with the will annexed was filed, upon the grounds of alleged mismanagement, and possession and exercise by the administrator of an interest in property adverse to the estate. After complete hearing on said petition the court adopted findings adverse to the administrator on the essential issues involved and thereupon revoked his letters upon the grounds previously mentioned.

The findings on the motion to revoke the letters consist of 24 pages of recitations of facts and figures determining numerous amounts loaned to the estate by the administrator in the course of administration by him, the sums expended by him in full payment of all claims other than his own claim, the various amounts credited by him to the payment of principal and interest on his own claim, and the sums paid by him for improvements and costs of operating the ranches and property of the estate during his administration covering a period of about seven years, without any order of court or sub-

sequent approval by the court. The court does not specifically find that any designated payments were wrongfully or fraudulently made, except that it does find that Mr. Weber waived the interest prior to December 21, 1942, on his allowed claim secured by his trust deeds, the inference being that he therefore wrongfully paid himself such items of interest. But the court did specifically find that the administrator's said claim secured by trust deeds constituted a claim adverse to the interest of the estate and to the heirs of the deceased, and that he asserted and testified on September 25, 1943, that he held the hop ranch as a beneficiary and mortgagee in possession of the ranch, and not as administrator.

The court found that notwithstanding the solvency and prosperity of the farming enterprise of the estate from which "there was produced on and sold from the said hop ranch," during the years 1938 to 1942, inclusive, crops "in the amount of not less than $142,000," and that the products of said ranch during the year 1943 "will not be less than $50,000," the administrator failed to satisfy his own claim in full, and took no steps to renew or to refinance the mortgage claim, or to avoid foreclosure, although "under proper management the said claim can be fully paid * * * by the income which would be derived from the proper farming of said lands in the course of two years." On the contrary, the court found that the administrator gave notice of probate sale of the hop ranch to Sophie Oeste for $28,000, although it was appraised at $30,000, and that it was worth at least $35,000, and that he agreed to protect her bid therefor against any increased bid in open court up to the sum of $35,000, and in the event of such increased offer, he would bid the property in and convey it to her for said sum of $28,000. Finally the court found that the administrator, on March 5, 1943, commenced proceedings under Section 2924 of the Civil Code to foreclose his said trust deed.

Upon those findings of facts the court concluded that the administrator held an interest in property of the estate adverse thereto; that he exercised acts hostile to the estate and detrimental thereto in regard to that interest; that he had mismanaged the estate, and would continue to do so if permitted to continue as administrator, and that it was for the best interest of the estate that his letters be revoked. The court thereupon ordered that his letters be revoked. From that order this appeal was perfected.

[1, 2] It is not necessary for this court to determine whether the findings and evidence sufficiently support the court's determination that the administrator mismanaged the estate. Mismanagement of an estate which may authorize the revocation of letters under Section 521 of the Probate Code does not necessarily mean that the executor or administrator shall be guilty of fraud or of wilful or deliberate acts detrimental to the estate. The term "mismanage" has been construed to mean merely that the business of the estate has been badly, improperly or unskillfully conducted. McKnight v. United States, 9 Cir., 78 F.2d 931, 933. Regardless of whether the evidence in this case satisfactorily shows mismanagement of the estate on the part of the administrator, there is adequate proof to support the findings that he holds an allowed claim secured by trust deeds on the ranches which constitute the chief asset of the estate, adverse to the interests of the estate and the heirs of the deceased, and that he has asserted rights and performed acts hostile and detrimental thereto. That is sufficient ground for the revocation of the letters of administration with the will annexed.

[3, 4] We also assume that the claim which the administrator made for the first time in June, 1943, more than two years after the death of Mrs. Palm, the mortgagor, that he then held the hop ranch as a beneficiary and mortgagee in possession, was adverse and inimical to the rights and interest of the estate and the heirs. The court specifically found that Frank Weber took possession of the ranch as representative of the estate and not otherwise. The facts support that finding. The rights and advantages which accrue to a mortgagee who is given possession of real property by the mortgagor are quite different from and superior to the mere rights of a mortgagee or a beneficiary under a trust deed. Spect v. Spect, 88 Cal. 437, 26 P. 203, 13 L.R.A. 137, 22 Am.St.Rep. 314; Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 81 P.2d 944; 41 C.J. 613, sec. 581; 17 Cal.Jur. 1028, sec. 299. For instance, the authority last cited declares that:

"The right [of a mortgagee in possession of land by consent of the mortgagor]

to retain possession is independent and distinct from any right springing from the mortgage; it is a right additional to and independent of, not coincident with, the right to foreclose the mortgage, * * *. The fact that the mortgage debt is barred by the statute of limitations, therefore, does not affect the rule that a mortgagee in possession cannot be ejected nor interfered with by the mortgagor, until payment of the debt. The debt is not satisfied by mere lapse of time."

[5, 6] The probate court possesses a wide discretion in determining whether the facts of a particular case warrant the removal of an administrator. Except for a clear abuse of that discretion, its order either removing an administrator for violation of his trust, or refusing to do so, may not be interfered with on appeal. That rule is applicable even though the evidence is of such nature that reasonable minds would differ regarding the facts. Estate of Healy, 137 Cal. 474, 70 P. 455; Estate of Watterson, 130 Cal.App. 741, 20 P.2d 772; 11A Cal.Jur. 403, sec. 283. An executor or administrator is a quasi-trustee of the estate which he represents. That relationship is fiduciary in its nature with respect to the heirs and the creditors. Estate of Conkey, 35 Cal.App.2d 581, 585, 96 P.2d 383; 11A Cal.Jur. p. 72, secs. 22 and 23; 2 Bancroft's Probate Pr. 644, sec. 338. An administrator with the will annexed may have less discretionary power in handling the affairs of an estate than an executor. Section 409 of the Probate Code provides in part that: "If a power or authority conferred upon an executor is discretionary, and is not conferred by law, it shall not be deemed to be conferred upon an administrator with the will annexed." In 2 Bancroft's Probate Practice, 648, section 339, it is said regarding the fiduciary relationship of an executor or an administrator:

"The relations of both executors and administrators to the estate and to those they represent are confidential and fiduciary, and they act in a highly fiduciary character in their dealings with the estate and its funds."

[7] The powers of an executor or an administrator are limited to the authority conferred upon him by law. 11A Cal.Jur. 75, sec. 22. In 11B California Jurisprudence, 213, section 811, it is said in that regard:

"The powers of an executor are such as are given by statute, including those which the statute authorizes the testator to confer upon him; and the extent to which the legislature has authorized the exercise of those powers is to be determined from a consideration of the entire legislation upon the subject."

[8] It is the duty of an executor or administrator to take possession of the property of an estate and to preserve it for the benefit of the heirs and the creditors, but his possession and handling of the property are subject to the control of the probate court. County of Los Angeles v. Morrison, 15 Cal.2d 368, 371, 101 P.2d 470, 472, 129 A.L.R. 443; Probate Code, sec. 300; 11 Cal.Jur. 214, sec. 6. In the Morrison case, supra, it is said:

"The probate court or judge is the guardian of estates of deceased persons and all proceedings are under the direction of the judge. An executor or administrator derives his power to act from the order of the court."

[9] Of course a representative of an estate may be specifically authorized by statute, or be given implied authority of law for the preservation of the estate, to perform many acts without first procuring orders of the court therefor, but ordinarily such acts are subject to the approval of the probate court. Section 300 of the Probate Code provides in part:

"All of his [the decedent's] property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purpose of administration, sale or other disposition, * * *."

[10] An administrator of an estate may be removed and his letters revoked when it appears that he possesses an interest in property of the estate and performs acts with relation thereto inimical to the rights and interests of the heirs or creditors. Estate of Bell, 135 Cal. 194, 67 P. 123; Withington's Estate, 60 Cal.App.2d 105, 140 P.2d 491; In re Newell's Estate, 18 Cal. App. 258, 122 P. 1099; 11A Cal.Jur. 77, sec. 25. In the authority last cited it is said: "If a personal representative occupies a position hostile to the estate he may not represent it."

[11] In the present case we assume that the administrator's failure to attempt to retain and preserve for the benefit of the

estate and heirs the hop ranch, which was evidently a valuable and productive asset, and his effort to sell it through the probate court for much less than its appraised or actual value, with an agreement to increase any open court bids thereon up to the sum of $35,000, and to sell it to the prospective purchaser for the sum of $28,000, on the assumption and claim that he was not required to account to the probate court for its actual value, constitute acts inimical to the estate and to the heirs, which fully warranted the court in revoking his letters. Such conduct has been held to constitute mismanagement of the administration of an estate warranting the revocation of letters of administration. It is only fair to Weber to state, however, that the evidence shows that he took over the management of the property at the request of Mrs. Palm, and because she was unable to manage it and to finance the necessary improvements thereon; that he devoted his time and attention to it and advanced his own moneys for its benefit, and that by reason of his management it was improved and rendered profitable; and that the trial court in the course of the proceedings stated that Weber's conduct had been "honest and upright."

[12, 13] The appellant was not prejudiced by denial of his motion to quash the citation to show cause why his letters of administration should not be revoked, for the reason that he subsequently appeared with counsel and participated in the entire proceedings. A petition was filed under Section 521 of the Probate Code by certain heirs of the deceased to revoke the letters for mismanagement of the estate. The judge of the probate court signed an order directing the administrator to show cause at a time and place specified why his letters should not be revoked for the reasons assigned in the petition. No citation was issued by the clerk under the seal of the court as required by Section 1206 of the Probate Code. But both the petition and the order of the court fixing the time of hearing were served on the appellant. He appeared specially in court at the time fixed with his attorney and moved to dismiss the proceeding for lack of jurisdiction. The motion was denied. He then remained in court with his attorney and participated in all the proceedings. He was fully heard upon the merits of the petition with opportunity to adduce all material evidence. There is no showing that he was prejudiced in any respect by the order denying his motion to dismiss the proceeding. While he did appear specially for the purpose of his motion to dismiss, he voluntarily remained and participated in the subsequent proceedings on the merits. By that voluntary participation in proceedings he waived the informality of the issuance of the citation. Raps v. Raps, 20 Cal.2d 382, 125 P.2d 826; Abila v. Padilla, 14 Cal. 103; Estate of Maescher, 78 Cal.App. 189, 198, 248 P. 537; 11A Cal.Jur. 163, sec. 95; 1 Bancroft's Probate Pr., 109, sec. 58. In San Francisco Protestant Orphan Asylum v. Superior Court, 116 Cal. 443, 48 P. 379, 382, it is said that the application of the statutes with relation to summons does not govern the issuance of citations; that the functions of citations are "very unlike those of a summons." In a probate proceeding the court has jurisdiction of the rem. The office of the citation is to give notice of a proceeding and to procure the presence of the persons involved. It is not jurisdictional in the same sense that a summons may be. 11A Cal.Jur. 157, sec. 91.

For the reasons heretofore mentioned, the order revoking the letters should be affimed.

[14] This brings us to a consideration of the appeal from that portion of the order settling the first and second accounts which disallows credit for certain payments of interest which Weber made to himself as interest on the notes secured by his trust deeds, which interest the court held had been specifically waived. We are persuaded the court erred in disallowing those interest items. The so-called waiver dated April 20, 1942, upon which the court evidently chiefly relied, was merely an offer by Weber to waive on condition that he not be required to file an accounting. We are of the opinion the conditions upon which the waiver was specifically based failed, and that the waiver of interest was therefore ineffectual. The essential language of that instrument, applicable to the alleged waiver of interest, reads as follows:

"The undersigned has waived and does hereby waive any right to any and all interest due upon said claim of $36,532.50, down to this date, * * *

"Said waiver of said interest against said estate for said time is made upon

the express condition and understanding that none of the heirs of said estate nor any of the other creditors nor any future administrator nor the court, shall demand or require an accounting from the undersigned or his executor of his administration of said estate or the handling or dealing with all the money, property, or affairs of said estate, and said heirs shall, if requested so to do, file a written waiver of all or any of said accounts. Any breach of any of these conditions by any of said parties shall entitle the undersigned or his executor to collect all of said interest which has been so conditionally waived.

"Dated: April 20th, 1942.

"(Signed) Frank Weber."

It is immaterial whether the administrator could bind either the heirs or the court to an agreement to give him a free hand to receive and disburse money, lease, sell or dispose of real or personal property, make improvements, or handle the affairs of the estate without being required to render any account of his fiduciary transactions. But clearly he agreed to waive his interest on the secured claim prior to December 21, 1942, only on condition that he should be permitted to act as administrator without interference or the necessity of accounting. The evidence is undisputed that he was not permitted to so handle the estate without accounting in detail to the court. It is true that he did handle the estate in that manner without rendering any account for a period of about seven years, and that Mrs. Palm, the sole beneficiary under her husband's will, in June, 1937, and again in May, 1940, confirmed in writing all of his acts as such administrator. Mrs. Palm died in March, 1941. The following December, and prior to the filing of the so-called waiver, E. E. Palm and Florence E. Farris, two of the children of Mr. and Mrs. Palm, and heirs of their estates, procured and served upon the administrator a citation from the probate court to show cause why he should not render an accounting of his administration. The hearing of that citation was continued from time to time, without disposing of it. But it was kept alive. These heirs insisted on the filing of that account. Evidently the hearing on the citation was continued by consent to enable the administrator to prepare and file his account. The attorney representing the above-named heirs wrote to the attorney of the administrator two letters insisting on the filing of the account. One letter was dated April 23, 1942, and the other was dated May 18th, of the same year. In the first letter he said:

"After a full consideration of the entire matter Mrs. Farris and Mr. E. E. Palm, whom I represent, have instructed me to proceed with the proceedings heretofore filed by me looking to the filing of an account by Mr. Frank Weber, the administrator in the above entitled estate."

In the second letter the attorney for the heirs said:

"Mr. E. E. Palm and Florence E. Farris after considering the matter of accounting have instructed me to proceed forthwith and require the filing of an accounting. Therefore, I have no other alternative in the matter than to proceed with the motion for an order directing the administrator to account."

Pursuant to that demand of the heirs, the administrator filed his first account in June, 1942, to which account the heirs filed detailed objections. The following February the administrator filed his second account, to which the heirs also filed objections. It is evident that the administrator filed his accounts because of the insistent demands of the heirs. The accounts were not voluntarily filed as the respondents assert.

Clearly the requirement on the part of the heirs for the administrator to render his accounts, and the oppositions which they filed thereto, wise and justifiable as they may have been, was conduct in violation of the sole condition upon which the interest on the secured claim was to be waived. That interest was a part of the allowed claim to which he was legally entitled. The written waiver of interest specifically provides that for breach of that condition Mr. Weber, who signed the document, would be entitled "to collect all of said interest which has been so conditionally waived."

That portion of the order settling the accounts from which the appeal was perfected is reversed, and the trial court is directed to amend its findings and order settling first and second accounts in accordance with this opinion and to allow appellant all interest due and unpaid upon his claim previously approved and allowed by said court.

The order revoking the letters of administration with the will annexed is affirmed.

The administrator is entitled to recover his costs on appeal.

Hearing denied; CARTER, J., dissenting.



68 Cal.App.2d 23

JAMES et al. v. MYERS.

Civ. 14588.

District Court of Appeal, Second District, Division 1, California.

Feb. 14, 1945.

1. Automobiles ⇐9

The power of state Legislature to regulate traffic upon the streets of a municipality is superior to that of the local authorities. Const. art. 11, § 11.

2. Municipal corporations ⇐592(1)

While municipalities may make new and additional regulations in aid and furtherance of purpose of general law, where Legislature has undertaken to regulate by prohibitory enactments a general course of conduct, a city ordinance which attempts to impose additional requirements in a field which is fully occupied by state legislation is invalid. Const. art. 11, § 11.

3. Municipal corporations ⇐592(1)

If language of statute admits of the conclusion that Legislature did not intend its regulations to be exclusive, additional supplementary local regulations are valid. Const. art. 11, § 11.

4. Automobiles ⇐213

Motorcycle operator and companion by riding on single seat intended for exclusive use of operator violated statute prohibiting any person from riding on any portion of vehicle not designed or intended for passengers, since operator is not a "passenger" and seat intended for his use was not intended or designed for use of passengers within meaning of statute. Vehicle Code, § 596.5, St.1937, p. 620.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger".

5. Automobiles ⇐9

Los Angeles city ordinance prohibiting motorcycle operators from carrying any other person except upon properly attached seat to the rear of operator is in substance the same as statute prohibiting any person from riding on any portion of vehicle not designed or intended for use of passengers, and since Legislature has indicated intention of exclusively occupying the field of regulation in so far as riding upon a motorcycle upon public highways of state is concerned, the ordinance is invalid. Vehicle Code, §§ 458, 459, 472, St.1935, pp. 164, 169; Vehicle Code, § 596.5, St.1937, p. 620; Const. art. 11, § 11.

6. Appeal and error ⇐216(1)

Defendant could not complain of failure to give instruction in absence of request therefor. Code Civ.Proc. §§ 608, 609.

7. Trial ⇐255(1)

Trial court in charging jury may state to them all matters of law which court thinks necessary for their information in giving verdict, and either party may request special instructions to be given covering any law pertinent and applicable to case. Code Civ.Proc. §§ 608, 609.

8. Appeal and error ⇐216(1)

Verdict will not be set aside for failure of trial court to submit instructions to jury in absence of a request therefor by aggrieved party. Code Civ.Proc. §§ 608, 609.

YORK, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Joseph D. James, a minor, by Walter P. James, as guardian ad litem, and by Walter P. James against Martha Myers for personal injuries sustained by minor plaintiff when his motorcycle collided with an automobile operated by defendant. Verdict and judgment for plaintiffs, and defendant appeals.

Judgment affirmed.

C. F. Jorz, of Los Angeles, for appellant.

Victor J. Obegi, of Van Nuys, and Albert E. Wheatcroft, of Los Angeles, for respondents.

WHITE, Justice.

This action was instituted by plaintiffs to recover from defendant damages for personal injuries sustained by the minor plaintiff while operating a motorcycle which collided with an automobile operated by defendant on a public highway. The complaint is the usual one alleging carelessness and negligence on the part of the defendant. By her answer defendant denied the alleged negligence on her part and set up as a special defense contributory negligence on the part of the minor plaintiff in the operation of his motorcycle.

With the issues thus framed, the cause proceeded to trial before a jury, which returned a verdict in favor of both plaintiffs for the aggregate sum of $2,900. From the judgment entered upon such verdict, defendant prosecutes this appeal.

The factual background surrounding this litigation may be thus epitomized: The accident happened on March 24, 1943, near the intersection of Woodman and Victory Boulevards in the city of Los Angeles. The minor plaintiff, 18 years of age, was operating his motorcycle in an easterly direction on Victory Boulevard. Occupying the seat on the vehicle with the minor plaintiff was another young man, also 18 years of age. The seat was described as a "large seat" 24 inches in length, and at its widest point (the rear thereof) was 18 inches in width. The minor plaintiff was seated on the front portion or horn of the seat. He testified he had "plenty of room", was able to reach the clutch and footbrake, could actuate the handbrake and manipulate the gas. Prior to the happening of the accident here in question, the minor plaintiff had made many stops, had travelled through traffic and, according to his testimony, was able to operate the brakes and throttle without difficulty. According to his testimony, the leg of his companion might have touched the minor plaintiff, but the latter "was not resting upon him". The minor plaintiff's companion testified that he was riding upon "the back area, the back half" of the seat, that his feet rested upon the running boards, while his hands were "on the back of the seat." That the knee of his right leg "might have touched the back" of the driver's right leg, but other than that their bodies did not touch.

Victory Boulevard runs in a general easterly and westerly direction, while Woodman Boulevard runs generally north and south. On the southeast corner is located a gasoline service station, and it was out of this service station that appellant drove her automobile onto the highway. The minor plaintiff, according to his testimony, was about to enter the intersection of Woodman and Victory Boulevards when he first saw defendant's automobile, which was just pulling out of the service station, and the rear of her vehicle was still in the service station. To quote from the minor plaintiff's testimony, "She was either stopped or just pulling out slowly out of the driveway". The minor plaintiff slowed down his speed and did not accelerate his motorcycle at all in the belief that defendant would continue her course on across Victory Boulevard. There were other disinterested witnesses one of whom testified with reference to defendant's automobile, "It pulled right on out and after it got out into the street, it seemed to me when the rear end got out, she just checked". Another such witness testified, "Yes. I saw her car drive out onto the pavement and it almost stopped, it was so slow * * *"; while yet another disinterested witness testified, "When I first noticed the car, the Packard, it had just pulled out a little bit; it seemed as if she checked her speed, stopped, maybe not a complete stop, but it was not moving enough to notice".

As the minor plaintiff came closer to defendant's automobile, he became apprehensive that the latter would not completely clear his path. He applied his brakes and turned right in an attempt to pass behind defendant's automobile. The left front fork of his motorcycle came in contact with the automobile and his left leg struck the left end of the rear bumper on defendant's vehicle. According to the minor plaintiff, he was thrown from his motorcycle and, while lying on the ground, looked back and saw defendant's automobile still on the pavement with the front wheels of defendant's vehicle at the centerline of Victory Boulevard, and that it was occupying the south half of the highway.

Defendant testified that she drove out of the service station, "proceeded in low gear from the soft shoulder into the middle of the intersection, and right at this point I put my left arm out indicating to the vegetable truck (This was a truck which defendant testified she saw proceeding slowly along the boulevard) that I was going to make a left turn on Woodman. I proceeded this way in the intersection, and

then my car stopped". With reference to when she first observed the minor plaintiff and his motorcycle, defendant testified that she stopped her automobile on the soft shoulder coming out from the service station onto Victory Boulevard, that she then "looked up and down Victory, and saw about 300 feet up Victory. * * * This is open road, and you can see about 11 blocks without interference". Testifying further, the defendant stated, "and I saw two boys on a motorcycle somewhere away up in here, and observed they were going rather fast, and that there were two of them on the motorcycle, so I figured out just exactly how much time it would take to go ahead and get out there". With reference to the accident, the defendant testified, "I made a complete left turn and then I saw a commotion in the mirror, so I knew something was wrong, so I drove right straight back to this station". According to the defendant, she was unaware of the fact that there had been an accident at the time it occurred and her testimony at the trial was, "I had my left arm out to make a left turn, and I never knew they hit me. I heard nothing at all." The foregoing is a concise factual resume of the testimony pertaining to the happening of the accident.

Upon the trial of this action defendant relied for a defense primarily upon the minor plaintiff's violation of certain traffic regulations as set forth in Los Angeles Municipal Code, Ordinance No. 77,000, as amended, to and including Ordinance No. 88,136, and particularly section 80.27 thereof. A certified copy of said ordinance was offered in evidence. The pertinent provision thereof reads:

"Riding on Motorcycles and Bicycles. A person operating a motorcycle or bicycle shall not ride other than upon the permanent and regular seat attached thereto, nor carry any other person upon such motorcycle or bicycle other than upon a firmly attached seat to the rear of the operator, nor shall any person ride upon a motorcycle or bicycle other than as above authorized."

Plaintiffs objected to the introduction into evidence of this ordinance on the ground that the same was invalid and unconstitutional and therefore incompetent, irrelevant and immaterial. In the trial court plaintiffs asserted, and now on appeal they urge, that the ordinance in question attempts to impose additional requirements in a field which is fully occupied by state statutes and, being in conflict with general laws, cannot be enforced. Constitution of California, Article XI, Section 11.

Upon the grounds urged by plaintiffs, the court sustained the objection to the introduction in evidence of a certified copy of said city ordinance.

[1-3] That the power of the State Legislature to regulate traffic upon the streets of a municipality is superior to that of the local authorities was the holding in Ex parte Daniels, 183 Cal. 636, 641, 192 P. 442, 21 A.L.R. 1172, and Pipoly v. Benson, 20 Cal.2d 366, 369, 125 P.2d 482, 147 A.L.R. 515. While municipalities may make new and additional regulations in aid and furtherance of the purpose of the general law, where the Legislature has undertaken to regulate by prohibitory enactments a general course of conduct, "Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute. Thus, it has been held from an early date that an ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute." Pipoly v. Benson, supra, 20 Cal.2d at page 370, 125 P.2d at page 485, 147 A.L.R. 515. The rule is thus stated in Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 663, 262 P. 334, 336: "The effect of these several decisions is to declare that, whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned."

If the language of the statute admits of the conclusion that the Legislature did not intend its regulations to be exclusive, then the general rule permitting additional supplementary local regulations has been applied. Pipoly v. Benson, supra, 20 Cal. 2d at page 371, 125 P.2d 482, 147 A.L.R. 515.

In connection with the all important and oft times difficult question of whether the state law was intended to occupy the entire field, insofar as the carrying of passengers upon a motorcycle is concerned, we find in Division IX, Chapter 2, Section 458, of the

Vehicle Code, the following: "The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein."

This is followed by section 459, giving express authorization to local authorities for adoption by them of rules and regulations governing processions, the operation of vehicles for hire and the regulation of traffic by means of officers or traffic signals. Section 472 of the Vehicle Code empowers local authorities to adopt special rules and regulations dealing with the parking of vehicles. Chapter 14, Division IX, of the Vehicle Code is entitled "Miscellaneous Rules", and in said chapter, we find section 596.5, St.1937, p. 620, which provides:

"Unlawful Riding. No person shall ride on any vehicle upon any portion thereof not designed or intended for the use of passengers. This provision shall not apply to an employee engaged in the necessary discharge of a duty or to persons riding within vehicle bodies in space intended for merchandise."

[4] We are persuaded that the provisions of section 596.5 of the Vehicle Code and the provisions of the city ordinance here under consideration in substance and effect mean exactly the same thing. The first sentence of the pertinent Code section provides: "No person shall ride on any vehicle upon any portion thereof not designed or intended for the use of passengers." Under the undisputed facts, no portion of the motorcycle in question was designed or intended for the use of passengers. There was but one saddle, or seat, which obviously was designed and intended for the use and occupancy of the operator of the vehicle. The operator of such a vehicle is in no sense a passenger. No provision is made for passengers on a vehicle such as the one with which we are here concerned. Therefore, the act of the minor plaintiff and his companion in riding on a single seat, intended and designed for the exclusive use of the operator of the vehicle, was a violation of the foregoing provision of the Vehicle Code.

[5] In view of the foregoing, it is manifest that the Legislature has clearly signified its intention of completely occupying the field of regulation in so far as riding upon a motorcycle upon the public highways of this state is concerned. The statute and the ordinance being in substance and effect the same, there is within that field no scope for supplementary local regulations adopted by the city of Los Angeles, and the trial court was correct in declaring the ordinance invalid for that reason. Pipoly v. Benson, supra.

[6-8] Defendant was entitled, had she so requested, to have the jury instructed as to the legal meaning and application of section 596.5 of the Vehicle Code to the case at bar and that the conduct of the minor plaintiff amounted to a violation of the statute. However, our attention has not been directed to any refused instructions offered by the defendant bearing on the provisions of section 596.5 of the Vehicle Code. Therefore, appellant cannot complain of the failure to give such instruction, even though it was applicable. Scandalis v. Jenny, 132 Cal.App. 307, 313, 22 P.2d 545. In charging the jury, the court may state to them all matters of law which it thinks necessary for their information in giving their verdict, Section 608, Code Civ.Proc., and either party may request special instructions to be given covering any law pertinent and applicable to the case, Sec. 609, Code Civ.Proc. By a long line of cases it is established as the law in this state that the verdict of the jury will not be set aside for failure of the court to submit instructions to a jury in the absence of a request therefor by the aggrieved party. The reason for this salutary rule is obvious. Rogers v. Interstate Transit Co., 212 Cal. 36, 44, 297 P. 884; Flynn v. Young, 25 Cal.App.2d 614, 620, 78 P.2d 245; Bramble v. McEwan, 40 Cal. App.2d 400, 414, 104 P.2d 1054; Peckham v. Warner Bros. Pictures, 42 Cal.App.2d 187, 189, 108 P.2d 699; Hiatt v. Brockman, 7 Cal.App.2d 88, 90, 45 P.2d 411; Baldridge v. Cunningham, 31 Cal.App.2d 128, 132, 87 P.2d 369; People v. Talbott, 65 Cal. App.2d 654, 151 P.2d 317; Diel v. Baxter, 58 Cal.App.2d 383, 388, 136 P.2d 789; Nelson v. Southern P. Co. 8 Cal.2d 648, 653, 67 P.2d 682; Parker v. James Granger, Inc., 4 Cal.2d 668, 677, 52 P.2d 226. No other grounds for reversal are urged upon this appeal.

For the foregoing reasons, the judgment is affirmed.

DORAN, J., concurs.

YORK, P. J., dissents.

RIVIECCIO v. BOTHAN.*

No. 12725.

District Court of Appeal, First District, Division 1, California.

Feb. 28, 1945.

Hearing Granted April 26, 1945.

1. Divorce ⇐165(5½)

Burden rests on party seeking to set decree aside of proving extrinsic fraud charged, and such charge must be established by clearest and most satisfactory evidence.

2. Divorce ⇐165(4)

Generally, before a divorce decree will be set aside on ground of extrinsic fraud, many factors will be taken into consideration, among them being whether party seeking relief has been guilty of laches, and fact, if it be such, that party who has obtained divorce has since died.

3. Divorce ⇐165(3)

Where it appears that party to whom divorce was granted has remarried and that there has been delay in seeking to vacate divorce decree on ground of extrinsic fraud, court will consider public policy to prevent bastardizing of children of the second marriage and also resulting injury to innocent party to second marriage.

4. Fraud ⇐50, 58(1)

The presumption is in favor of honesty and fair dealing, and burden is upon party asserting fraud to prove it by substantial evidence.

5. Fraud ⇐58(1)

If an inference of fraud is drawn, it must be a reasonable inference, not a mere suspicion, and if two inferences may be drawn from facts which are equally reasonable it is duty of court to adopt one favorable to presumption in favor of honesty and fair dealing.

6. Judgment ⇐343

A stronger showing is required to justify annulment of a judgment than is required for opening of a default as provided under statute. Code Civ.Proc. § 473.

7. Divorce ⇐167

Proof of husband's averment in his affidavit for publication of summons in divorce action that he believed he had a good cause of action for divorce upon ground of desertion was known to be false, if established, would amount to no more than an intrinsic fraud and would not authorize setting aside of divorce decree.

8. Judgment ⇐386(7)

If fraud relied on to set aside a judgment is intrinsic and the time for appeal has expired, party seeking relief from such intrinsic fraud must under statute make application for such relief within 6 months after judgment. Code Civ.Proc. § 473.

9. Divorce ⇐167

The court has inherent power to set aside divorce decree for extrinsic fraud regardless of limitation prescribed by statute, even after death of party to whom divorce was granted, provided action is brought without delay after it is learned that divorce has been granted. Code Civ.Proc. § 473.

10. Divorce ⇐165(3)

Where defendant in divorce action is unaware of pendency thereof because plaintiff has made a knowingly false declaration in affidavit for publication of summons as to defendant's residence, in consequence of which process is mailed to defendant at an address known to be false, a case of extrinsic fraud is established sufficient to set aside decree.

11. Divorce ⇐167

An action to set aside divorce decree on ground of extrinsic fraud may not be maintained by divorced spouse after death of party to whom divorce was granted unless divorce decree or subsequent action to set it aside involves some property right in which surviving spouse is beneficially interested.

12. Divorce ⇐167

Judgment for declaratory relief which had effect of setting aside divorce decree secured by plaintiff's husband for extrinsic fraud, which judgment was entered after husband's death, was improper, in absence of any finding that some property right was involved in which plaintiff was beneficially interested.

13. Divorce ⇐167

Where action is brought to set aside a divorce upon ground of extrinsic fraud after death of party to whom divorce was granted, which involves some property

* Subsequent opinion 165 P.2d 677.

right, all persons whose interests will be adversely affected by vacation of the decree must be made parties defendant to the action and must be served with summons.

14. Divorce ⇐167

Where action to set aside divorce decree on ground of extrinsic fraud after death of plaintiff's husband who had secured the divorce was brought upon theory that property right involved consisted of Industrial Accident award for husband's death, adopted child of husband and woman whom he married after securing divorce, in addition to woman whom husband subsequently married, was a necessary party to the action.

WARD, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by Anna Rivieccio against Edna Bothan, alias Edna Rivieccio, for declaratory relief involving marital status of the parties thereto. From a judgment for plaintiff, the defendant appeals.

Reversed.

Lemuel Dalton Sanderson, of San Francisco, for appellant.

Leon Prescott and Charles Bagby, both of San Francisco, for respondent.

KNIGHT, Justice.

This action involves the marital status of the parties thereto. It is denominated by plaintiff as an action for declaratory relief. The judgment was in favor of plaintiff and the defendant appeals. The controversy arises out of the following factual situation: Giovanni Rivieccio and Anna Zaccardelli were married in Quincy, Massachusetts, in 1924, and parted in Italy in 1928. Anna returned to Massachusetts and Rivieccio went to Australia, and several years later located in San Francisco. They corresponded frequently up to 1931; but after they separated in Italy in 1928 they never again saw each other. In December, 1932, Rivieccio brought an action for divorce in San Francisco against his wife upon the ground of desertion. It was a childless marriage, and no property rights were involved. At all times prior to the commencement of the action for divorce, during the pendency thereof, and at all times thereafter up to the filing of the present action in 1942, Anna Rivieccio resided either in Massachusetts or in the state of New York; and service of summons in the divorce action was had by publication and mailing based on Rivieccio's affidavit, in which it was averred "That the last known place of residence of defendant was and is Hancock and Water Streets, Quincy, Massachusetts." On the date that the order for publication was made Rivieccio's attorney mailed a copy of the summons and complaint to "Anna Zaccardelli Rivieccio * * * at Hancock and Water Streets, Quincy, Massachusetts." There was no appearance in behalf of the wife, and on April 5, 1933, Rivieccio was granted an interlocutory decree. The final decree was entered on April 10, 1934; and on September 17, 1934, Rivieccio married Edna Bothan, a resident of Australia. The marriage took place in Australia, and two months thereafter they adopted a child born unto them out of lawful wedlock in Australia on January 22, 1930. Shortly after the adoption proceedings they all came to San Francisco and lived together until December 23, 1940, when Rivieccio was killed in Oakland in an accident which occurred during the course of his employment as truck driver for Columbia Machine Works. In 1942, Anna, the divorced wife, learned for the first time, so she claimed, of Rivieccio's death, and of the divorce and his subsequent marriage. She was then living in Boston, and a few months later she came to San Francisco, and on November 12, 1942, brought the present action against Edna Bothan Rivieccio.

The complaint bears the title "Complaint for Declaratory Relief"; but an examination of the allegations and the prayer thereof shows that the cause of action set forth therein is one to obtain a judgment annulling the interlocutory and final decrees of divorce upon the ground of extrinsic fraud, which if granted would operate necessarily as a nullification of the marriage between Rivieccio and Edna. The charge of extrinsic fraud was based on allegations that the affidavit made by Rivieccio for the publication of summons contained two false averments, which it is alleged he knew to be false. The first was that after stating his case fully to his attorneys he was advised by them and that he verily believed he had a good cause of action for divorce against his wife upon the ground of desertion; and the second was "That the last

known place of residence of the defendant was and is Hancock and Water Streets, Quincy, Massachusetts." The allegations of fraud were put in issue by the answer, and the statute of limitations and laches were pleaded as special defenses. The judgment ordered, adjudged and decreed: "1. That the Interlocutory and Final Decrees of Divorce * * * be and the same are hereby annulled, vacated and set aside. 2. That plaintiff is the surviving widow of Giovanni Rivieccio, deceased.

The three principal findings upon which the judgment is based are, first, that the averment in the affidavit made by Rivieccio that after stating his case to his attorneys he was advised by them and that he verily believed he had a good cause of action against his wife upon the ground of desertion, was false, and known by him to be false; secondly, that the averment in the affidavit "That the last known place of residence of the defendant was and is Hancock and Water Streets, Quincy, Massachusetts," was false and known by Rivieccio to be false. In amplification of the last finding the court further found that Hancock and Water Streets do not intersect; that plaintiff had never lived on either street, and that both streets were located a considerable distance from where plaintiff resided; and the court further found that plaintiff did not receive any notice of the pendency of the action nor have any knowledge that it was pending. The third principal finding was that plaintiff was not guilty of laches, and that the action was not barred by the statute of limitations. Insufficiency of the evidence to support the above findings is one of the main grounds urged for reversal.

[1-6] It is well settled that in an action to set aside a decree of divorce upon the ground of extrinsic fraud the burden rests on the party seeking to set it aside of proving the fraud charged, and that such charge must be established by the clearest and most satisfactory evidence. Furthermore it is held generally that before a decree of divorce will be set aside many factors will be taken into consideration, among them being whether the party seeking the relief has been guilty of laches; also the fact, if it be such, that the party who has obtained the divorce has since died; and where it appears that the party to whom the divorce was granted has remarried and there has been delay in seeking to vacate the decree, the court will take into consideration also the public policy to prevent the bastardizing of children of the second marriage and also the resulting injury to the innocent party to the second marriage. 17 Am.Jur. pp. 375-378. In dealing with charges of fraud generally the courts of this state have said repeatedly that the presumption is in favor of honesty and fair dealing, and that the burden is upon the party asserting fraud to prove it by substantial evidence; that if an inference of fraud is drawn, it must be a reasonable inference, not a mere suspicion, and that if two inferences may be drawn from the facts which are equally reasonable it is the duty of the court to adopt the one favorable to the presumption. American Box & Drum Co. v. Harron, 44 Cal.App.2d 370, 112 P.2d 332. And where fraud is charged as the basis for setting aside a judgment it is said: "The grounds upon which a judgment legally entered may be set aside must be of a very substantial character. A stronger showing is required to justify the annulment of a judgment than is required for the opening of a default as provided by section 473, Code of Civil Procedure." Wattson v. Dillon, 6 Cal.2d 33, 56 P.2d 220, 224.

[7, 8] In the present case appellant contends that respondent failed to meet the burden of establishing a case of extrinsic fraud, and that in any event the evidence shows as a matter of law that plaintiff was guilty of laches in that she did not bring the action to annul the divorce until approximately eight years after the decree had become final, and until two years after Rivieccio's death. It is evident that the finding based on the averment in Rivieccio's affidavit that he verily believed he had a good cause of action against his wife for desertion cannot legally serve as support for the judgment of annullment, for even assuming as found that the averment was false and known to be false, it would amount to no more than intrinsic fraud (Godfrey v. Godfrey, 30 Cal.App.2d 370, 86 P.2d 357; McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110); and the rule is that "If the fraud is intrinsic and the time for appeal has expired, then the party seeking relief from such intrinsic fraud must, under the provisions of section 473 of the Code of Civil Procedure make application for such relief within six months after judgment." Tomb v. Tomb, 120 Cal.App. 438, 7 P.2d 1104, 1105; see also McGuinness v. Superior Court, supra. In actions based on charges of extrinsic

fraud the rule is different. See Chiarodit v. Chiarodit, 218 Cal. 147, 21 P.2d 562.

[9, 10] In the latter class of cases the court has the inherent power to set aside the decree of divorce regardless of the limitation prescribed by section 473, even after the death of the party to whom the divorce was granted, provided the action is brought without delay after it is learned that the divorce has been granted. McGuinness v. Superior Court, supra; Chiarodit v. Chiarodit, supra, and cases cited therein. And where it is proved that the defendant in the divorce action was unaware of the pendency thereof because the plaintiff had made a knowingly false declaration in his affidavit for publication of summons as to the residence of the defendant, in consequence of which process was mailed to the defendant at an address known to be false, a case of extrinsic fraud is established sufficient to set aside the decree. 9 Cal.Jur. p. 748; Aldrich v. Aldrich, 203 Cal. 433, 264 P. 754.

With reference to the soundness of the findings herein on the issues of extrinsic fraud and laches, the record shows among other facts the following: Rivieccio went to Italy in 1928 to visit his mother, who was fatally ill, and he was soon joined there by his wife. The mother died shortly after their arrival, whereupon Anna returned to Massachusetts. She testified that her husband did not return with her because he had entered the United States illegally—"by jumping ship"; and that the next she heard from him he was in Australia. She stated that thereafter and up to the end of 1930 they corresponded frequently, in affectionate terms, and that he always indicated he would again join her in this country. Many of the letters she received from him were produced in court. The last one so produced was written in 1930. After Rivieccio arrived in Australia he worked for about a year as a peddler, and then obtained employment with the Matson Navigation Company as a steward on its steamers operating between Australia and San Francisco, and some of the letters Anna received from him were written on the ship's stationery.

While Hancock and Water Streets in Quincy do not intersect they end within a few blocks of each other. All of the streets in that vicinity are exceedingly short and circuitous. Before going to Italy the Rivieccios lived on Granite Street, a short street just two or three blocks from the termini of Hancock and Water Streets. Anna's family lived nearby on the same street. The family, including Anna, had been residents of Quincy for many years. After Anna returned from Italy she lived at three different places in Quincy, but they were all within two or three blocks of the termini of Hancock and Water Streets; and much of the time thereafter she went under the assumed name of Ried. Furthermore the Zaccardelli family continued to live in the same locality up to the year 1942.

By occupation Anna was a waitress, and in 1931 she moved to New York and then to Boston, wherein she lived at several different addresses. In 1934 she returned to Quincy and lived with her mother until 1939, at which time she again moved to Boston and lived at different places up to the time she came to California in 1942. She testified that in 1933 she was told by a friend that Rivieccio was living in San Francisco and she wrote to him at the address given her; that in reply Rivieccio said nothing about the divorce and gave as his reason for not having returned to Quincy that he did not have the money to get there; that soon afterwards she sent him $100 by Western Union, and not receiving any response from him for a while she wrote again and in reply was told that he had been in some sort of trouble and it was necessary to use the money she had sent him for attorney's fees; that thereafter she wrote him again several times, but that her letters were returned undelivered. It is significant, however, that none of the correspondence which she claimed passed between them in 1933 was produced in court. She testified that she had destroyed it. She further testified that between 1933 and 1942 she had made inquiries as to his whereabouts from people she thought might know, but was unable to learn anything definite until 1942.

The defendant in the present action testified that she met Rivieccio in Australia soon after his arrival there, at which time she was 18 years of age and living with her parents; that several weeks after meeting him their relations became intimate and that when she realized she was going to have a baby she told him about it; that she then learned for the first time that he was married; that in 1930 he obtained employment with the Matson company, but that he continued to support the child, and that during the layover period of the steam-

er in Australia he lived on the steamer but visited her and the child at her home; that after the birth of the child he talked about securing a divorce, but that she had nothing to do with the commencement of his action and had no knowledge whatever of the contents of the pleadings. She further testified that so far as she knew Rivieccio never received any letters from Anna after she (the defendant) became acquainted with him.

The record discloses other facts and circumstances pertaining to these particular issues, but it would seem unnecessary to go into greater detail, for it is apparent that the situation is not one wherein it may be held as a matter of law that the findings are entirely wanting in evidentiary support. Nevertheless the record does reveal many facts and circumstances other than those above narrated which in our opinion would have legally supported findings on those issues adverse to the plaintiff herein.

[11, 12] Aside from the question of the soundness of the findings on the issues of extrinsic fraud and laches, however, the record does call for reversal on other grounds. As said in Britton v. Bryson, 216 Cal. 362, 14 P.2d 502, 505, "It is now well settled in California that subsequent to the death of one of the parties, the other may have said decree set aside upon proof that the judgment of divorce was procured by extrinsic fraud. McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110; [Tomb] v. Tomb, 120 Cal. App. 438, 7 P.2d 1104." But in this connection the courts have held that such an action may not be maintained by the divorced spouse after the death of the party to whom the divorce was granted unless the divorce decree or the subsequent action to set it aside involve some property right in which the surviving spouse is beneficially interested. This doctrine is founded upon the reasoning that if some property right is not involved in which the surviving spouse is beneficially interested, the only object which could be attained by such an action would be sentimental in its nature, for in any event the death of the parties effectually severs the marriage relationship and the principal effect of the decree of divorce would not be affected. In other words, such an action is permitted after the death of the party obtaining the divorce not for the purpose of continuing the controversy touching the right to the divorce itself, but for the ascertainment of the property rights of the parties involved. 17 Am.Jur. 378, 379. In all three of the California cases which have been brought to our attention upholding judgments annulling a divorce after the death of the party to whom the divorce was granted involved some such property rights. See McGuinness v. Superior Court, supra; Tomb v. Tomb, supra; Britton v. Bryson, supra. It follows, therefore, in the present case that it was essential to the rendition of a valid judgment setting aside the divorce that the trial court find that some property right was involved in which the plaintiff herein was beneficially interested; and no such finding was made. In paragraph XXIX of the complaint as amended it is alleged that there is pending before the Industrial Accident Commission "an inquiry for the purpose of determining the award of compensation to the widow of the said Giovanni Rivieccio * * *"; and in paragraph XXX of said complaint it is alleged that the award "is claimed by the plaintiff and the defendant herein, both of whom have represented themselves to the Commission to be the widow of the said Giovanni Rivieccio * * *." But the allegations of these paragraphs were denied in the answer, and no evidence was introduced in support of the allegations, nor were any findings made on the issues raised thereby. It would seem clear, therefore, that in the total absence of any finding that some property right is involved in which the plaintiff is beneficially interested, the judgment herein annulling the divorce is not sustainable. Counsel for defendant herein introduced in evidence an order made by the probate court in San Francisco on February 26, 1941, setting aside to Edna Rivieccio as surviving widow the balance of a savings account representing the earnings of her deceased husband; but at the time the order was received in evidence counsel for plaintiff objected thereto; and neither in plaintiff's complaint nor in the trial court's findings is any reference made to that order. It must be presumed, therefore, that plaintiff makes no claim with respect thereto.

[13] Morever and in any event it is the established rule that where an action is brought to set aside a divorce upon the ground of extrinsic fraud after the death of the party to whom the divorce was granted, which involves some property right, all persons whose interests will be adversely affected by the vacation of the

judgment or decree must be made parties defendant to the action and must be served with summons. 17 Am.Jur. p. 375.

[14] In the present case, according to the allegations of the complaint, the action was brought upon the theory that the property right involved consisted of an Industrial Accident Commission award. That being so, under the rule above stated the adopted child was a necessary party to the action for the reason that as a dependent of the deceased, the child was, under the provisions of the Workmen's Compensation Act, beneficially interested in the award. But it was not made a party defendant to the action; therefore, under the theory on which the action was brought, plaintiff was not entitled to a judgment because one of the persons whose rights were adversely affected thereby was not made a party defendant to the action.

It is our conclusion, therefore, that for the reasons stated the judgment should be reversed; and it is so ordered.

PETERS, P. J., concurs.

WARD, Justice (dissenting).

I dissent.

It is not claimed by appellant that the findings are wanting in evidentiary support, but rather that "The trial judge did not have a profound grasp of the rules of equity or of evidence applicable to this case." The conduct and disposition of the issues demonstrate the contrary. I adopt the memorandum opinion of the trial judge as expressive of my views on the subjects therein mentioned. It reads as follows:

"I have concluded that plaintiff is entitled to the relief asked for. The decedent, Giovanni Rivieccio, in his affidavit for publication, adopted and made his complaint a part of his affidavit. In that complaint he alleged that the plaintiff herein had deserted him on or about May 14th, 1927, and that thereafter they had lived separate and apart. I find that allegation to be wholly and wilfully false. It was at that time, it will be recalled, that the decedent went to Italy where plaintiff joined him in October of the same year remaining with him until the following March. His letters to plaintiff beginning in December, 1925, and running to September, 1930, which have been put in evidence, are wholly inconsistent with that charge of desertion. Moreover, in his affidavit for publication, decedent also states that the last residence of plaintiff that was known to him was 'Hancock and Water Streets, Quincy, Mass.' Not only do those streets not intersect but, according to the uncontradicted testimony of plaintiff, she had never lived on either street. I can imagine the decedent not recalling a number of the street nor, possibly, the name of the street on which plaintiff last lived, but I cannot reconcile such a meaningless address as he gave with good faith on his part. It will be recalled that decedent had, himself, lived in Quincy for a considerable period of time. It will also be recalled that, according to the uncontradicted testimony of plaintiff, Quincy, at that time, had a population of but approximately forty-four thousand.

"Whatever room for argument there may be on this question of the good faith of the decedent in the matter of the place of residence there is none in the matter of the alleged desertion. In my opinion the following cases are decisive on the question of plaintiff's right to the relief asked for: Dunlap v. Steere, 92 Cal. 344, 28 P. 563, 16 L.R.A. 361, 27 Am.St.Rep. 143, cited with approval in Doyle v. Hampton, 159 Cal. 729, 733, 116 P. 39; Parsons v. Weis, 144 Cal. 410, 77 P. 1007 (see headnote 5); Williams v. Williams, 57 Cal.App. 36, 206 P. 650; Wells v. Zenz, 83 Cal.App. 137, 142, 256 P. 484.

"I should add that the circumstances do not suggest laches or any lack of diligence on the part of plaintiff in instituting her action."

Appellant did not contend in her briefs that the minor child should have been made a party to the action. The matter was mentioned—rather casually as I recall—by one of the justices during the oral argument, but the subject was not briefed. In my opinion this case should not be reversed upon that ground without opportunity given respective counsel to be further heard. If the ground of improper findings is sound, why is it necessary to hold as a ground of reversal that the child should have been made a party to the proceeding? If the latter point is sound and is the real ground of reversal, then the case should be returned to the lower court with directions to make the child a party.

68 Cal.App.2d 115

GRAETCH et al. v. DIX et al.

Civ. 14678.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1945.

Hearing Denied April 19, 1945.

1. Master and servant ⇐332(3)

The determination of whether a commission salesman is an employee or independent contractor is ordinarily the function of jury, but, if only one reasonable inference can be drawn from the evidence, the question becomes one of law for the court.

2. Appeal and error ⇐1001(1)
Master and servant ⇐332(3)

Generally, whether commission salesman is an employee or independent contractor is a mixed question of law and fact and jury's determination of such question is binding upon reviewing court if supported by substantial evidence.

3. Master and servant ⇐318(1)

An important test in determining whether one is in fact an employee is whether alleged employer has the right to control employee's activities and the right to direct and give orders, regardless of whether such right is exercised, and whether alleged employer has the right to discharge should also be considered.

4. Master and servant ⇐318(1)

That a certain amount of freedom of action is inherent in the nature of the work does not necessarily mean that person so employed is an independent contractor instead of an employee.

5. Master and servant ⇐332(3)

In absence of agreement on subject of alleged employer's right to control mode and manner of doing work, jury may determine existence or nonexistence of such right by drawing reasonable inference from the circumstances shown in evidence.

6. Automobiles ⇐244(29)

Evidence from which jury could reasonably infer that livestock commission merchant had right to control activities of salesman working on commission basis, but with guaranteed minimum monthly compensation, sustained implied finding as basis for verdict against merchant for personal injuries sustained by third persons as result of negligent operation by salesman of his own automobile that salesman was an agent of commission merchant and not an independent contractor and that he was working within the scope of his employment when accident occurred.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Agnes Graetch and another against Peter Dix and J. W. Henderson, doing business as Henderson Livestock Commission Company, for personal injuries sustained by plaintiffs in an automobile collision. Verdict and judgment for plaintiffs, and second named defendant appeals.

Judgment affirmed.

George R. Larwill, George S. Dennison, and Thomas A. Wood, all of Los Angeles, for appellant.

Parker, Stanbury & Reese, Harry D. Parker, and Edward J. Guirado, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiffs commenced this action to recover for personal injuries which they suffered on June 4, 1943, when the automobile in which they were riding was struck by an automobile driven by defendant Dix. They allege that Dix was at the time of the accident the agent of defendant Henderson Livestock Commission Company, acting within the course of his employment. A jury returned a verdict in favor of plaintiffs in the sum of $7500. In this appeal, which is prosecuted by Henderson Livestock Commission Company only, it is asserted that the evidence is insufficient to sustain the implied finding of the jury that Dix was the agent of his co-defendant, and that it is affirmatively shown that the status of Dix was that of independent contractor.

The evidence upon which the jury based its verdict is to be found mainly in the testimony of Dix, which is not in substantial conflict with any other evidence. Dix commenced his employment with Henderson Livestock Commission Company, hereinafter referred to as Henderson, on March 15, 1943. Henderson maintained offices in the Union Stock Yards and charged a commission from owners for selling their livestock. Dix was "hired" by Henderson, receiving seventy-five per cent of the commission from the sale of stock which he

delivered. Henderson guaranteed to Dix compensation of $250 per month, but Dix did not earn a sufficient sum as commission to cover his guarantee until several months after the accident in question. Dix furnished his own car but was allowed five cents per mile while using it. He worked out of Henderson's office and used a business card on which was printed:

"Res. Phone, Covina 14605
Henderson Livestock
Commission Company
Union Stock Yards.
Los Angeles, California. Office:
Phone: Jefferson 6690
Peter Dix."

Henderson deducted from the earnings of Dix certain sums for Social Security and Unemployment Insurance. Dix testified:

"Q. Whatever Mr. Henderson tells you to do you do it? A. Well, he doesn't have to tell me what to do, *but he can tell me what to do.*

"Q. Who hired you? A. He hired me. If I was working on a straight commission, that would be one thing, but it is up to me to work my own business up. He can tell me to do certain things at times, but he doesn't really do it. In other words, I am left to my own."

Dix also stated that he could "trade" in livestock if he saw "something to make a piece of money" and in that case he traded through the Henderson Livestock Commission Company and got his percentage out of the profits of the purchase and sale of the stock. He did not make any formal report to Henderson but he kept Henderson informed as to his activities. When asked if Henderson directed him to call on any particular persons to solicit business he replied that Henderson "left that entirely up to me as I saw fit". Dix received his pay from Henderson every two weeks. Mr. Henderson testified that Dix had a "hog and sheep concession" with his company. He stated that he had gone into business for himself when he hired Dix and that it was necessary for him to have a salesman. He testified: "A. And if he did not sell any sheep or hogs and that went on for two or three months you would terminate your connection with him, wouldn't you? A. No, I would keep him as a necessary evil."

[1-6] It is ordinarily the function of the jury to determine the issue whether a commission salesman is an employee or an independent contractor. If only one reasonable inference can be drawn from the evidence the question becomes one of law for the court but in most cases it is a mixed question of law and fact and the jury's determination of the question is binding upon the reviewing court if it is supported by substantial evidence. Lee v. Nanny, 38 Cal.App.2d 90, 100 P.2d 832. In resolving the issue whether one is in fact an employee it is very important to apply the test whether the alleged employer has the right to control his activities, the right to direct and give orders, whether that right be exercised or not. It is also important to take into consideration whether the alleged employer has the right to discharge. Curcic v. Nelson Display Co., 19 Cal.App.2d 46, 64 P.2d 1153. The fact that a certain amount of freedom of action is inherent in the nature of the work does not require that one be characterized as an independent contractor. George v. Chaplin, 99 Cal.App. 709, 279 P. 485. In the absence of an agreement on the subject of the right to control the mode and manner of doing the work, the jury may determine the existence or nonexistence of the right to control by drawing a reasonable inference from the circumstances shown in evidence. George v. Chaplin, supra. That Henderson had the right to discharge Dix, who in turn had the right to quit at any time, is apparent from the evidence. It is clear that the jury could reasonably draw the inference that Henderson had the right to control the activities of Dix not only from the facts and circumstances above related but from the direct testimony of Dix, who referred to Henderson as his "boss" and stated: "Well, he didn't have to tell me what to do, but he can tell me what to do."

In support of his claim that Dix was shown to be an independent contractor as a matter of law appellant refers to that part of the testimony of Dix in which he stated that he had a similar contract with another commission house. Dix testified:

"Q. Were you engaged in any business or occupation at the same time that you were also selling stock? A. Not while I was selling stock for Mr. Henderson.

"Q. On any of the cattle or stock that was consigned to you, did you sell those through any other commission house or firm? A. I had that arrangement with one other commission firm, whereby I sold hogs for them and sheep for them also."

Dix did not make his testimony clear on the point of his agreement with the other commission house but he testified: "Q. The Henderson Livestock Commission Company gets a certain commission and you get part of that; is that the situation? A. That is right.

"Q. *If you had made this particular deal,* then the Henderson Livestock Commission Company would have gotten a commission and that would have also resulted in a partial commission to you; is that right? A. Right."

If Dix had been on a mission for some other commission house at the time of the accident appellant unquestionably would not be liable for plaintiffs' injuries but we are satisfied that the jury was justified in finding that at the time of the accident Dix was on a mission for Henderson and was working within the scope of his employment with Henderson.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



68 Cal.App.2d 48

SOUTHERN PAC. CO. v. McCOLGAN, Franchise Tax Com'r.

Civ. 12631.

District Court of Appeal, First District, Division 1, California.

Feb. 16, 1945.

1. Statutes ⇐147

The presumption is that Legislature, by deleting express provision in Bank and Corporation Franchise Tax Act for allocation of income from intangibles, intended a substantial change in the law St.1935, p. 965, § 10.

2. Taxation ⇐376(4)

Receipt of dividend income by a holding company which engages in no other activities does not constitute "doing business" within meaning of Bank and Corporation Franchise Tax Act, and such dividend income is not as to the holding company to which it is paid, income from business done. St.1935, p. 965, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

3. Taxation ⇐376(4)

If corporation engages in other activities but also acts as a holding company, its holding company activities do not constitute "doing business", within Bank and Corporation Franchise Tax Act, nor are dividends paid to it, income from business done. St.1935, p. 965, § 10.

4. Taxation ⇐397

Where foreign corporate taxpayer, which was engaged in transportation business in California and six other states, did not engage in trading in corporate stocks nor in any activity with respect thereto other than receipt and disbursement of dividends, dividend income was not subject to allocation among states in which taxpayer was doing business for purpose of assessment of taxes under Bank and Corporation Franchise Tax Act. St.1935, p. 965, § 10.

5. Taxation ⇐376(4), 397

The Bank and Corporation Franchise Tax Act purports to include in measure of the tax all net dividend income of corporations doing business in state, whether corporation is foreign or domestic, without regard to whether securities from which income is derived have a business situs in California, or whether corporation, if a foreign one, has a commercial domicile in state. St.1935, pp. 960, 995, §§ 4(3), 8(h); St.1933, p. 694, § 6.

6. Taxation ⇐98

Traditionally, and based on principle of mobilia sequuntur personam, situs of intangible property for tax purposes is at domicile of owner, but intangibles may also be declared to have a business situs in a jurisdiction other than legal domicile of owner when connected with business conducted in such other jurisdiction.

7. Corporations ⇐52

The legal domicile of a corporation is generally in state where it is incorporated.

8. Taxation ⇐98, 166

While intangibles may for tax purposes have a situs in more than one jurisdiction, intangibles do not have a situs for taxation in a state merely because corporation which owns them does some of its business there.

9. Constitutional law ⇐283
Taxation ⇐37

A franchise tax imposed on foreign corporation doing business within a state and measured by value of all its capital property is invalid as to foreign corporations which own property without the state. U.S.C.A.Const.Amend. 14.

10. Constitutional law ⇐283
Taxation ⇐37

Since state may not measure franchise tax by value of entire capital stock of foreign corporation which does business and has property both within and without the state, state may not measure the tax by net income from all property of foreign corporation, including income from property without the state. U.S.C.A.Const. Amend. 14.

11. Taxation ⇐6

The prohibition of the state from interfering with instrumentalities of national government does not condemn a state tax which is neither a property tax on tax exempt government securities nor a direct income tax on income derived from them, but a franchise tax measured by net income.

12. Commerce ⇐69(1)
Constitutional law ⇐283
Taxation ⇐37

A franchise tax as to foreign corporations is for privilege of doing business within the state, and it is reasonable to measure that tax by net income from business done within the state, or from property within the state, that is, by the fruits of the privilege, and such income from business done within state may include income from interstate business to extent that it is done within state as well as income from purely intrastate business. U.S.C.A.Const. Amend. 14.

13. Constitutional law ⇐283

The constitutional limitation on state's power to impose a franchise tax on a foreign corporation is that the measure of the tax must bear some reasonable relation to the privilege granted. U.S.C.A.Const. Amend. 14.

14. Constitutional law ⇐283
Taxation ⇐20

The Bank and Corporation Franchise Tax Act purporting to include in tax measure all dividend income of foreign corporations doing business in state is valid only as applied to dividend income derived from stocks which have a taxable situs in state. St.1935, pp. 965, 995, §§ 10, 8(h); St.1939, p. 2944, § 10; U.S.C.A.Const.Amend. 14.

15. Taxation ⇐116

If a corporation is incorporated in state and has its legal domicile in state, all intangibles owned by corporation have a situs in state for taxation.

16. Taxation ⇐166

Corporate stock owned by a foreign corporation doing business in state or income from such stock is taxable within state only if it is in some way connected with the California corporate franchise granted to foreign corporation. St.1935, pp. 965, 995, §§ 10, 8(h); St.1939, p. 2944, § 10.

17. Taxation ⇐98

The "mobilia sequuntur personam" maxim means simply that property for certain purposes will be regarded as being located at domicile of owner for purpose of applying law of that place to it, although such property may be actually located elsewhere, and the maxim is not limited to intangibles, and is not limited to field of taxation and does not apply to taxation of tangible personal property.

See Words and Phrases, Permanent Edition, for all other definitions of "Mobilia Sequuntur Personam".

18. Taxation ⇐47(1)

The rule against double taxation applies to tangible property.

19. Taxation ⇐98

In absence of evidence to contrary, it will be presumed that intangibles have taxable situs at domicile of their owner.

20. Taxation ⇐167

The maxim of mobilia sequuntur personam does not preclude imposition of a tax on intangible property owned by corporation by state of business situs of corporation imposed for advantages enjoyed by corporate owner in that state.

21. Taxation ⇐167

In order to authorize application of "business situs rule" in regard to taxing intangible property of corporation, the physical evidence of the intangibles need not be located in business situs state.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Situs Rule".

22. Taxation ⇐167

Under "business situs rule", where corporation carries on its activities in a foreign state and uses its intangibles there, corporation should pay tax for protection and benefit it receives from law of that state.

23. Taxation ⇐167

In order to authorize application of "business situs rule" so as to authorize taxation of intangibles of a corporation in a state outside the corporate domicile, business of corporation in state seeking to apply the rule need not be local in sense of being confined to a single state, but it is sufficient that the intangibles are associated with that portion of the business carried on in state claiming business situs.

24. Taxation ⇐397

Fact that neither Kentucky as state of domicile of railroad company which was doing business in California and six other states, nor New York as state where corporate stock owned by railroad company was located, attempted to tax dividend income derived by company from the stock, was an important, though not a conclusive, factor in determining whether dividend income could be included in determining amount of tax the company was required to pay under California Bank and Corporation Franchise Tax Act. St.1935, p. 965, § 10.

25. Taxation ⇐397

Fact that board of directors of railroad company, which was incorporated in Kentucky and which was doing business in California and six other states meets in New York, was an important, though not a conclusive, factor in determining whether dividend income received by company on corporate stock held by it could be included in determining amount of tax company was required to pay under California Bank and Corporation Franchise Tax Act. St.1935, p. 965, § 10.

26. Constitutional law ⇐283
Taxation ⇐37

Where corporation has only a paper domicile, the state where the greatest portion of corporation's control exists is regarded as the "commercial domicile" with constitutional power to tax income from intangibles. U.S.C.A.Const.Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Domicile".

27. Constitutional law ⇐283
Taxation ⇐37

Where railroad company, incorporated in Kentucky, was not authorized to do business in Kentucky, but did its business in California and six other states, and over 50 per cent. of its transportation business was done in California, company had its "commercial domicile" in California, and hence dividend income received by company on corporate stock, which was reasonably connected with its transportation business, could be included in measure of tax under California Bank and Corporation Franchise Tax Act, though stock was held in New York. St.1935, p. 965, § 10; U.S.C.A.Const.Amend. 14.

28. Constitutional law ⇐283
Taxation ⇐37

State may include in measure of tax under Bank and Corporation Franchise Tax Act, free from constitutional objection, all income from intangibles which have a situs in state for tax purposes. St. 1935, p. 965, § 10; U.S.C.A.Const.Amend. 14.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Southern Pacific Company against Charles J. McColgan, Franchise Tax Commissioner of the State of California, to recover back taxes assessed against plaintiff for the taxable year 1935 under the Bank and Corporation Franchise Tax Act, Gen.Laws 1931, Supp.1933 and Supp.1935, Act 8488, and paid under protest. From a judgment for defendant, the plaintiff appeals.

Affirmed.

C. W. Durbrow and Harry H. McElroy, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and John L. Nourse and James E. Sabine, Deputy Attys. Gen., for respondent.

PETERS, Presiding Justice.

Plaintiff, Southern Pacific Company, appeals from a judgment denying it a refund of taxes assessed against it for the taxable year 1935 under the Bank and Corporation Franchise Tax Act. Deering's Gen.

Laws 1931, Act 8488, p. 4763; 1933 Supp. p. 2329; 1935 Supp. p. 1929.

Under the act, taxes for the year 1935 are computed on 1934 income. Sec. 4. In making its tax return plaintiff showed no net income for the year 1934, but a net loss of $7,359,133.03. Accordingly, plaintiff paid the minimum flat tax of $25. Thereafter, the defendant franchise tax commissioner assessed an additional tax against plaintiff on the ground that in its return it had omitted taxable net income from intangibles in the amount of $10,431,539.96. Deducting from this amount the figure for net loss as recomputed at $8,415,717.05, left net income of $2,015,822.91. The tax due on this sum is $80,632.92, of which plaintiff had paid $25, leaving a balance of $80,607.92. Plaintiff paid this sum under protest, plus interest, a total of $99,550.78. After the filing of this action by reason of recomputations not here material, plaintiff's liability for the tax here involved was reduced, and the larger part of the sum of $99,550.78 paid by plaintiff under protest was refunded. Plaintiff therefore seeks recovery in the present action of only the unrefunded portion of the sum paid under protest, that is, of $6,901.56 plus interest.

The figure of $10,431,539.96 represents the net income from dividends paid to plaintiff by other corporations in which plaintiff owns stock, subject to the deduction provided for in § 8(h) of the statute. It is the contention of the commissioner that, under the statute, and subject only to the deduction provided in § 8(h), there must be included in the measure of the tax of this taxpayer all net income from intangibles. Section 8(h) provides that income from dividends shall be deductible to the extent that the dividends are paid by the corporation declaring them from income arising out of business done by it within this state. Plaintiff contends that to include this dividend income of $10,431,539.96 in computing the assessment against it is to tax property and business outside California in violation of the 14th amendment to the federal Constitution.

Plaintiff was incorporated in Kentucky, but engages in no business there, and under its charter has no legal right to engage in the railway business there. It operates a railroad transportation business in California and six other western states. The unitary transportation business, not including income from intangibles, was operated at a loss in 1934. In determining what percentage of the gains and losses of this business should be allocated to California as attributable to business done here, application of the allocation formula directed by the commissioner resulted in a figure of 56.11046%. The loss figure of $8,415,717.05, referred to above, is 56.11046% of the net loss from plaintiff's unitary railroad transportation business as operated in the seven western states.

Plaintiff contends that no part of the dividend income included in the tax as revised by the commissioner is income from business done in California, or from property having a situs for taxation in California, and hence to include it in the measure of the tax is to tax business and property outside the jurisdiction of this state. Plaintiff further contends, in the alternative, that if this dividend income may be taken into consideration at all, the act requires that the same allocation percentage should be applied to it as to plaintiff's railroad operating income, that is, that only 56.11046% of plaintiff's net dividend income, or $5,853,185.06 may be allocated to California. This amount would be more than offset by plaintiff's net loss of $8,415,717.05, with the result that no additional tax would be due California for the taxable year in question.

Plaintiff's theory is that the stocks which gave rise to the dividends do not have a situs for tax purposes in California; that under the principle of mobilia sequuntur personam intangibles have a situs at the legal domicile of the corporation, that is the state of its incorporation, unless they have acquired a business situs by reason of being used in a business conducted elsewhere. In the case herein, Kentucky is the legal domicile of plaintiff and, so plaintiff contends, the stocks have acquired a business situs in New York "by reason of dominant control and use" there. The by-laws of plaintiff corporation provide that the general management of the company shall be vested in a board of directors and in an executive committee, and that both groups, unless otherwise ordered, shall hold their meetings in New York. It is an admitted fact that during all periods here pertinent, both groups have in fact met in New York.

The theory of the commissioner, sustained by the trial court, is that the statute purports to tax this income and that California constitutionally may include in the measure of the tax all dividend income of

plaintiff because the facts show that the city of San Francisco is the commercial domicile of plaintiff. It is urged that under recent decisions of the United States Supreme Court the state of the commercial domicile may tax all income from intangibles. Plaintiff challenges the view that California is its commercial domicile as regards its stockholding activities, which, in plaintiff's analysis, are no part of its unitary railroad business. That is, plaintiff contends that its stockholding activities constitute a separate enterprise from its unitary railroad business, and that New York is its commercial domicile as regards those activities. The concepts of business situs and commercial domicile will be examined more fully hereafter.

It is stipulated that for the years 1934 and 1935 neither Kentucky nor New York, nor any other state, collected or levied a property tax on the intangibles the income from which is involved in this action, nor did either state collect or levy any tax directly or indirectly measured by the income from these stocks. The result is that unless the right of California to include this large amount of dividend income in the measure of its tax is sustained, such income will be free from state taxation.

Plaintiff contends that it is immaterial whether some other state has taxed these stocks or the income they yielded to it. We disagree. We shall hereafter refer to decisions of the Supreme Court of the United States which hold that at least in certain circumstances there is no constitutional objection to double taxation of intangibles, and that more than one state may have jurisdiction to tax them. But nevertheless a state may declare, in its tax statutes, that it is opposed to the policy of that state to impose double taxation. That is a matter for each state to decide for itself. The Bank and Corporation Franchise Tax Act contains such a provision in § 10 as regards the commissioner's duty to allocate income from business done partly within and partly without the state. If upon the facts of a particular case California has jurisdiction to tax and another state also may tax the same interest and has done so, there would be a problem as to whether the California statute contains a general provision against double taxation of dividend income, and if so, as to which state had the better right to tax. Here our problem is not thus complicated. No other state has collected or levied a tax in respect to the stocks here involved or dividends therefrom. The question is whether California legally can impose, and by statute has imposed, the tax paid by plaintiff under protest.

Plaintiff's argument that in any event the act requires the commissioner to allocate only 56.11046% of its dividend income to California may be rejected first.

In this connection plaintiff relies upon the allocation provision of § 10, which refers to all income from business done. Plaintiff contends that this provision applies to its dividend income, and that unless its dividend income is income from business done, in which event it is subject to the allocation provision, it cannot be included in the measure of the tax at all. That is, plaintiff contends that dividend income is either subject to allocation by the terms of the act, or under its provisions not to be included in the measure of the tax at all.

Section 10 as it read in 1935 provided: "If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacture, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation." Stats.1935, Chap. 275, p. 965.

For a time § 10 contained the following provision: "Income from intangible personal property which is not deductible under the provisions of subsection (h) of section 8 hereof shall be subject to allocation." This provision was added to § 10 in 1931, two years after adoption of the Bank and Corporation Franchise Tax Act. Stats.1931, Chap. 1066, p. 2226. It was omitted from the section as amended in 1935. Stats.1935, Chap. 275, p. 965. Plaintiff concedes that the statute as amended in 1935 governs its tax liability. The same legislative chapter which amend-

ed § 10 by omitting the express provision for allocation of income from intangibles, made railroad corporations subject to the Bank and Corporation Franchise Tax Act for the first time. Sec. 4(3), Stats.1935; Chap. 275, p. 960; Chap. 353, p. 1246. The amendments became effective in June 1935. Section 4(8) provided: "The provisions of this subdivision, and of all other amendments to this act enacted during the year 1935, shall apply to taxable years beginning after December 31, 1934." The tax here involved is for the taxable year beginning January 1, 1935, although measured by income for the year 1934.

If the provision for allocation of income from intangibles remained in the section it would be necessary to determine whether the allocation fraction applied to plaintiff's railroad operating income should be used in allocating its dividend income, or whether such income should be considered separately. See, Fargo v. Hart, 193 U.S. 490, 24 S.Ct. 498, 48 L.Ed. 761; Ballantine, California Corporation Laws (1932) p. 762, § 581; 17 Cal.L.Rev. 512. A formula which would be equitable as to railroad operating income might not be appropriate to dividend income, which, in a particular case, might be attributable all to California, all to another state, or in part to California, but on a different basis than railroad operating income. But in our view it is unnecessary to consider these matters further in view of the omission of the allocation provision in § 10 as amended in 1935.

[1] The presumption is, of course, that the legislature by deleting the express provision for allocation of income from intangibles intended a substantial change in the law. See 23 Cal.Jur. p. 778, § 154; 10 Cal.Jur.Supp. p. 407, § 154. But plaintiff contends that the effect of the amendment was merely to eliminate a surplus provision, and that dividend income is income from *business done,* as to which § 10, after, as well as before, the 1935 amendment, provides for allocation, without need for a special provision. The answer to this contention is that the dividend income here involved is not income from "business done" within the meaning of the Bank and Corporation Franchise Tax Act. In Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 292, 98 A.L.R. 1499, the court held that a holding company which engaged in no other activities was not doing business within the Bank and Corporation Franchise Tax Act, which imposed a tax on corporations of certain classes "doing business within the limits of this State." This decision was in line with a long list of cases interpreting federal revenue acts. Flint v. Stone Tracy Co., 220 U.S. 107, 31 S. Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312; Zonne v. Minneapolis Syndicate, 220 U.S. 187, 31 S.Ct. 361, 55 L.Ed. 428; McCoach v. Minehill Railway Co., 228 U.S. 295, 33 S.Ct. 419, 57 L.Ed. 842; United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 35 S.Ct. 499, 59 L.Ed. 825; Von Baumbach v. Sargent Land Co., 242 U.S. 503, 37 S.Ct. 201, 61 L.Ed. 460; Edwards v. Chile Copper Co., 270 U.S. 452, 46 S.Ct. 345, 70 L.Ed. 678; Rose v. Nunnally Inv. Co., 5 Cir., 22 F.2d 102; Eaton v. Phoenix Securities Co., 2 Cir., 22 F.2d 497. Those acts imposed a tax measured by the value of their capital stock on corporations doing business.

[2, 3] If a holding company which engages in no other activities is not a corporation doing business, it follows that its receipt of dividend income does not constitute "doing business" within the meaning of the Act, and that dividend income is not as to the holding company to which it is paid income from business done. If a corporation engages in other activities, but also acts as a holding company, its holding company activities do not constitute doing business, nor are dividends paid to it income from business done. The concept that the activities of a holding company do not constitute a doing of business, but, rather, the receipt of the fruits of ownership of property, with activities incidental thereto, is a well established one, not to be re-examined at this date in interpreting our statute, which has been construed as perpetuating it. Union Oil Associates v. Johnson, supra. Indeed, in 1933 the act was amended to provide expressly that a holding company should not be considered "a financial, mercantile, manufacturing or business corporation or a corporation doing business in this State for the purposes of this act." Sec. 4, Stats.1933, Chap. 303, p. 871.

[4] It is true that recent federal cases indicate a tendency to find that holding companies have engaged in other activities in addition to functioning as a holding company, by reason of which other activities they are subject to the federal tax imposed on the capital stock of corporations doing business. Argonaut Consolidated Mining Co. v. Anderson, 2 Cir., 52 F. 2d 55; Associated Furniture Corporation

v. United States, Ct.Cl., 44 F.2d 78; Barker Bros. Corporation v. Rogan, 9 Cir., 126 F.2d 917. But these decisions do not overthrow the tenet that when a corporation's relation to other corporations in which it owns stock is that of a holding company only, such activity is not doing business, and it follows that its dividend income is not income from business done. Hence, since the omission of the express provision for allocation of income from intangible personal property there is no authorization in the act for allocation of the dividend income of a holding company. It was stipulated that plaintiff did not engage in trading in the stocks here involved, nor in any activity with respect thereto, other than the receipt and disbursement of dividends.

[5] Plaintiff next contends that unless dividend income is income from business done, the act does not include it in the measure of the tax at all. There is no such limitation in the act. Apparently it is the thought of plaintiff that the tax imposed is so limited by § 10 that the only tax imposed is on "business done" income. While it is true that the statute imposes a tax measured by net income only on corporations doing business in this state, there is no provision that only income from business done shall be included in the measure of the tax to be paid by such corporations. Quite to the contrary, the tax imposed on a corporation subject thereto is "according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year." Sec. 4(3). The tax measure is not restricted by this section to income from business done. Furthermore, since its enactment in 1929 the act has provided expressly that gross income includes "*all* dividends received on stocks" except as otherwise provided in the act. Sec. 6. (Italics added.) The only provision otherwise providing is § 8(h), to which reference has been made heretofore. An analogy may be found in the federal revenue acts mentioned above. If a corporation functions as a holding company only, it is not subject to the tax measured by the value of its own capital stock, but if it engages in other activities which constitute a doing of business, the capital stock tax is charged against the full value of its capital stock, not merely against such proportion as reflects the value of property used in activities which constitute doing business.

With the exception contained in § 8(h), the act purports to include in the measure of the tax all net dividend income of corporations doing business in this state, whether the corporation is foreign or domestic, and without regard to whether the securities from which the income is derived have a business situs here, or whether the corporation, if a foreign one, has its commercial domicile here. But, of course, the statute is effective only to the extent that the state constitutionally can include such dividends in the measure of the tax. People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 129 N. E. 202, 206.

The commissioner, however, does not contend in this case that the state legally may include in the measure of the tax all dividend income of foreign corporations doing business here. Rather, it is his position that, as to foreign corporations doing business in this state, the dividend income may not be included unless the stocks from which the dividends are derived have a business situs here, or the corporation has its commercial domicile here; that as to domestic corporations, all dividend income may be included, subject, of course, to § 8(h) in the case of both foreign and domestic corporations. Under regulations framed by the commissioner, taxes have been assessed in accordance with this view since 1935. Ballantine, California Corporation Laws (1932), Chap. XX, Franchise Tax Act, by Traynor, pp. 703-705; 17 Cal.L.Rev. pp. 515, 516. This policy was first embodied in a formal regulation adopted by the commissioner on December 4, 1936, which concluded as follows: "This regulation shall be applied in the computation of taxes based upon income for the calendar year 1934, fiscal years ended during that year, and all subsequent fiscal or calendar years." The tax in the case herein, as noted above, is for the year 1935, based on income for the calendar year 1934. However, if the regulation excludes from the measure of the tax income which this state may lawfully include, the commissioner's regulation is in conflict with the statute and to that extend void. If the state can constitutionally include all dividend income in the measure of the tax imposed on foreign corporations doing business here (subject to § 8(h)), as the statute purports to do, it is unnecessary to consider whether, as the commissioner contends, plaintiff has a commercial domicile here and whether, by reason of that fact,

its dividend income is taxable here. We shall, therefore, consider the extent of the state's power in this connection.

[6-8] For tax purposes a situs is ascribed to intangible property. Traditionally, and based on the principle of mobilia sequuntur personam, their situs is at the domicile of the owner. In the case of a corporation its legal domicile is generally in the state where it was incorporated. In more recent years, intangibles have been declared to have a business situs in a jurisdiction other than the legal domicile of the owner when connected with business conducted in such other jurisdiction. Since certain decisions of the Supreme Court of the United States sanction double taxation of intangibles as violating no rights under the federal Constitution, this species of property may for tax purposes have a situs in more than one jurisdiction. State Tax Commission of Utah v. Aldrich, 316 U.S. 174, 86 L.Ed. 1358, 139 A.L.R. 1436; Graves v. Schmidlapp, 315 U.S. 657, 62 S.Ct. 870, 86 L.Ed. 1097, 141 A.L.R. 948; Graves v. Elliott, 307 U.S. 383, 59 S.Ct. 913, 83 L.Ed. 1356; Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900 83 L.Ed. 1339, 123 A.L.R. 162; Cream of Wheat Co. v. Grand Forks County, N. D., 253 U.S. 325, 40 S.Ct. 558, 64 L.Ed. 931. But it is held that intangibles do not have a situs for taxation in a state merely because the corporation which owns them does some of its business there.

[9] For example, a franchise tax imposed on a foreign corporation doing business within a state and measured by the value of *all* its capital stock, is invalid as to foreign corporations which own property without the state. Western Union Tel. Co. v. State of Kansas, 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355; Pullman Co. v. State of Kansas, 216 U.S. 56, 30 S.Ct. 232, 54 L.Ed. 378; Looney v. Crane Co., 245 U.S. 178, 38 S.Ct. 85, 62 L.Ed. 230; International Paper Co. v. Commonwealth of Massachusetts, 246 U.S. 135, 38 S.Ct. 292, 62 L.Ed. 624, Ann.Cas.1918C, 617; Cudahy Packing Co. v. Hinkle, 278 U.S. 460, 49 S.Ct. 204, 73 L.Ed. 454; Perkins Mfg. Co. v. Jordan, 200 Cal. 667, 254 P. 551; contra, Horn Silver Mining Co. v. State of New York, 143 U.S. 305, 12 S.Ct. 403, 36 L.Ed. 164; extensive annotation, 105 A.L.R. 1, 27–30. The decisions are based on two grounds, that the tax is a direct burden on interstate commerce where the corporation does interstate as well as intrastate business, and, secondly, that it is an attempt to reach for tax purposes property outside the state insofar as the capital stock represents property beyond the limits of the state. The state cannot tax such property directly. It cannot do so indirectly through the guise of a franchise tax.

In following the decision in Western Union Telegraph Co. v. Kansas, supra, the court in International Paper Co. v. Massachusetts, 246 U.S. 135, 142, 38 S.Ct. 292, 294, 62 L.Ed. 624, said of the earlier case that it was there held that a "license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

"When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state."

[10] If a state may not measure a franchise tax by the value of the entire capital stock of a foreign corporation which does business and has property both within and without the state, because to do so is to reach property outside the limits of the state, we perceive the law to be that it may not measure the tax by net income from all property of such corporation, including income from property without the state; that it may not include in the measure of the tax income from any property which for tax purposes is without the state. Ballantine, California Corporation Laws (1932), Chap. XX, Franchise Tax Act, by Traynor, pp. 703–716; 17 Cal.L.Rev. pp. 512–516. Decisions of the Supreme Court of the United States sustain taxes measured by net income where provision is made for an allocation or apportionment designed to yield a figure fairly representing the net income from business done within the state or from property having

its situs there. Butler Bros. v. McColgan, 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991, affirming 17 Cal.2d 664, 111 P.2d 334; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165; Bass, etc., Ltd. v. State Tax Comm., 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282; Hans Rees' Sons v. State of North Carolina, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879. It is implicit in these decisions that a formula would not be valid if it assigned to a state as a tax measure income that could not reasonably be said to result from activities or property within its borders.

In People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N.Y. 48, 129 N.E. 202, the author of the opinion, Mr. Justice Cardozo, clearly indicated his view that a state could not include in the measure of a franchise tax imposed on foreign corporations all income from intangibles without regard to their situs. He said in part: "I think the statute is invalid, in its application to the relator, insofar as it lays upon income a burden that is irrespective of the situs of the assets by which income is produced. The power of a state to attach conditions to the transaction of intrastate business by foreign corporations is not unlimited to-day, whatever under earlier decision it may once have seemed to be. The field of law is one where new rules are in the making. Only the Supreme Court of the nation can definitively fix their content. The judgment of a state court can hardly fail, in the meantime, to be tentative and groping. We must shape our path and our progress by such light as we have. No doubt in the earlier cases there was much said, if not decided, that would seem to emancipate the state from all restrictions in conditioning the local business. [Citing cases.] Later cases have explained and qualified these judgments, and, to the extent of conflict, overruled them. [Citing authority.]" (230 N.Y. 48, 129 N.E. 202, 204.)

[11] It is true that certain statutes have been upheld which include in the computation of a tax measured by net income the income from tax exempt government securities, although an ad valorem tax or a direct income tax on them would be invalid. Pacific Co. v. Johnson, 285 U.S. 480, 52 S.Ct. 424, 76 L.Ed. 893, in California Supreme Court, 212 Cal. 148, 298 P. 489; Educational Films Corp. v. Ward, 282 U.S. 379, 51 S.Ct. 170, 75 L.Ed. 400, 71 A.L.R. 1226, with note, also note in 57 A.L.R. 899; Macallen Co. v. Commonwealth of Massachusetts, 279 U.S. 620, 49 S.Ct. 432, 73 L.Ed. 874, 65 A.L.R. 866; Flint v. Stone Tracy Co., 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312; Home Ins. Co. v. State of New York, 134 U.S. 594, 10 S.Ct. 593, 33 L.Ed. 1025; Traynor, National Bank Taxation in California, 17 Cal.L.Rev. 232, 238–257; Ballantine, California Corporation Laws (1932), Chap. XX, Franchise Tax Act, 693–703, § 555. But the present case is governed by the capital stock cases cited above, and not by the exempt securities cases. The absence of a right to tax exempt securities directly does not depend on their being outside the territorial jurisdiction of the state for tax purposes, but on the fact that the state cannot interfere with instrumentalities of the national government. This prohibition is deemed not to condemn a tax which is neither a property tax on the exempt securities, nor a direct income tax on the income derived from them, but a franchise tax measured by net income.

[12] A franchise tax as to foreign corporations is for the privilege of doing business within the state. It is reasonable to measure that tax by net income from business done within the state, or from property within the state, that is, by the fruits of the privilege. It is true that income from business done within the state may include income from interstate business to the extent that it is done within the state, as well as income from purely intrastate business. Matson Nav. Co. v. State Board, 297 U.S. 441, 56 S.Ct. 553, 80 L.Ed. 791, in the Supreme Court of California, 3 Cal.2d 1, 43 P.2d 805; State of Wisconsin v. Minnesota Min. Co., 311 U.S. 452, 61 S.Ct. 253, 85 L.Ed. 274; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165; United States Glue Co. v. Oak Creek, 247 U.S. 321, 38 S.Ct. 499, 62 L.Ed. 1135, Ann.Cas. 1918E, 748; International Shoe Co. v. Shartel, 279 U.S. 429, 49 S.Ct. 380, 73 L. Ed. 781. This is so although the right to do interstate business within the state does not depend on privilege from the state, which can neither grant nor deny that right. Crutcher v. Commonwealth of Kentucky, 141 U.S. 47, 57, 11 S.Ct. 851, 35 L. Ed. 649; see note, 105 A.L.R. 11–17, citing cases. But although a foreign corporation does not owe its right to do interstate business to the state, it has the

benefit and protection of the law and government of the state in the conduct of that business. There is a reasonable relation, therefore, between the measure of the tax and the rights and benefits enjoyed by the corporation, which is lacking when the state attempts to include income from business or property without the state. Traynor, National Bank Taxation in California, 17 Cal.L.Rev. 232, 249-257.

[13, 14] From these cases and the reasoning therein, we think there is a fundamental and constitutional limitation on a state's power to tax a franchise, such limitation being that the measure of the tax must bear some reasonable relation to the privilege granted. We think that to include all dividend income in the tax measure where that dividend income is in no way connected with the California franchise granted would be unreasonable and void. We are of the opinion that although the statute as it read in 1935 purported to include in the tax measure all dividend income (subject to § 8(h) of foreign corporations doing business here, it is valid only as applied to dividend income derived from stocks which have a taxable situs here. This is recognized by § 10 of the act as it now reads, that section requiring the included income to be "derived from or attributable to sources within this State" and providing that: "income derived from or attributable to sources within this State includes income from tangible or intangible property located or having a situs in this State * * *." Stats.1939, Chap. 1050, p. 2944.

[15, 16] If a corporation is incorporated in this state it has its legal domicile here and by virtue thereof all intangibles owned by it have a situs here for taxation. As to stock owned by foreign corporations doing business here, such stock or its income is taxable within this state only if it is in some way connected with the California franchise granted. The commissioner contends that plaintiff's commercial domicile, its principal place of business, is in this state; that for that reason the stocks have acquired a taxable situs in this state; that this conclusion is supported by certain decisions of the Supreme Court of the United States. These contentions rest on the premise of plaintiff having its commercial domicile in this state, which turns upon the facts. These were stipulated to by the parties.

Plaintiff operates its railroad transportation business as a common carrier in the states of California, Oregon, Nevada, Utah, Arizona, Texas and New Mexico. This transportation business is known as "Pacific Lines." In addition, plaintiff owns all or part of the stock in other transportation companies, which together with plaintiff's Pacific Lines it designates as its transportation system. It operates a steamship line from New York to New Orleans. It operates no railroad in New York, but its board of directors meets there.

Under its charter plaintiff is without right to operate a railroad in Kentucky, the state of its incorporation. To comply with Kentucky law it maintains an office there, with four employees, the principal one an assistant clerk, who is designated as plaintiff's statutory agent for accepting service of process. Stockholders' meetings are held in Kentucky.

Appellant's track mileage is 13,920.09 miles, of which 54.4% is in California. The next highest mileages are in Oregon and Arizona, 12.96% and 12.39% respectively. Fifty per cent of its operating revenue, or more than $59,000,000, is derived from California, 13.62% from Nevada, and 11.87% from Arizona. Of its payroll, 72.58% is in California, 6.33% in Oregon, 5.70% in Arizona, 3.05% in New York. Plaintiff has 24,107 employees in California, as compared with 1,094 in New York. It has 2,547 employees at its San Francisco office, 128 at the New York office. Of its legal staff, 58 have offices in San Francisco, five in New York. The 166 members of the engineering staff are all in San Francisco, as are the 118 members of the purchasing agent's staff. It has $333,315,907.89 invested in road and equipment in California, $102,281,815.63, in Oregon, the next highest state, and $15,327,325.50 in New York, which figure represents the investment in steamships, tugs, barges and lighters registered at the Port of New York and used in plaintiff's New Orleans-New York steamship service. Thus it appears that plaintiff does substantially more business and has substantially more property in California than in any of the other states where it carries on its activities. Its operating revenue from California is greater than from all other states combined.

Under the by-laws of plaintiff "general management and supervision of the affairs and policies of the company" are in a board of fifteen directors, who hold their meet-

ings in New York City. The by-laws also provide for an executive committee of seven, including the chairman of the board, the vice-chairman and the president. The committee holds its meetings in New York.

The by-laws require the chairman, vice-chairman, controller, secretary and treasurer to maintain their offices in New York City, the president and auditor to maintain their offices in San Francisco. The by-laws also make provision for a "local treasurer," with his office in San Francisco. It is provided that the chairman of the board "shall have general control and management of the affairs, property and business of the Company, subject to the Board of Directors, the Executive Committee and the provisions of the By-laws," that the president "acting under the direction of the chairman, shall have immediate charge of the management, operation and traffic (except traffic under the jurisdiction of the vice-chairman) of the railroads and other properties of the Company."

It is stipulated that the president spends 90% of his time at his headquarters in San Francisco; that he has immediate charge of the management, operation and traffic of the railroad and other railroad properties of Pacific Lines; that matters relating to investment expenditures and retirements, annual budget covering expenditures for maintenance of way, structures, equipment, advertising, capital account, execution and cancellation of surety bonds relating to the transportation business are under the supervision of the president, but must be approved by the board of directors or the executive committee.

In addition to the president, five vice-presidents, a general manager and assistant secretary maintain their offices in San Francisco. The actual management of the transportation business of the company is divided among these last named California officers under the general supervision of the president. Detailed accounting records of plaintiff's transportation business are kept in San Francisco and the results passed on to New York in the form of ledger balances and financial exhibits. Surplus cash balances not required for the transportation business are forwarded to the treasurer in New York. Payments in connection with maintenance and operation of plaintiff's transportation business are made from the San Francisco office, including the payroll. During the year 1934 the average bank accounts at depositories amounted to $11,964,959 in California, $7,364,391 in New York, and $2,351,179 in all other states. Budgets for each year's operations and for capital expenditures in improvements of railway equipment for Pacific Lines are compiled at San Francisco and submitted to the board of directors at New York for approval. After the budget has been approved no further authorization by the board is necessary for expenditures for operating expenses unless such expenditures are in excess of the budget or in excess of any special authorization, in which cases there must be approval by the board, the executive committee, or the chairman of the board.

It is stipulated that plaintiff has "its principal place of business in California in the city of San Francisco." Note that plaintiff does not stipulate that San Francisco is its principal place of business, but, rather, its principal place of business in California. It is further stipulated that "plaintiff maintains *a commercial domicile* and headquarters known as its general headquarters in the City of San Francisco, in the State of California, for the management of its transportation business." (Italics added.) Plaintiff does not stipulate that *the* commercial domicile of the company is in San Francisco.

Plaintiff was incorporated in Kentucky in 1884. Collis P. Huntington, Charles Crocker, Leland Stanford and Mark Hopkins, all residents of California, owned a controlling interest in the Central Pacific Railroad Company and in the Southern Pacific Railroad Company, California corporations, and predecessors of the present plaintiff, and in a number of subsidiary railroad corporations. The combined operations of these lines extended from Ogden to San Francisco, from San Francisco to Portland, from San Francisco to Los Angeles, from Los Angeles to New Orleans, and by steamship from New Orleans to New York.

According to the stipulation, the purpose of the four associates in organizing plaintiff was to consolidate their holdings. Thus plaintiff is the successor of two California corporations, with their subsidiaries. Although the stipulation is not explicit, the inference is that the management of these two corporations functioned in California, and until 1901 meetings of plaintiff's board of directors were held in San Francisco. It does not appear from the stipulation

just how the meeting place came to be changed to New York. The brief of the commissioner states that about 1900 the last of the four associates died and eastern interests acquired control of the stock, as a result of which certain functions of plaintiff were transferred to New York.

It does not appear when plaintiff acquired the stocks herein involved with reference to the change of the place of the directors' meetings to New York. The stock certificates are kept in New York City in custody of plaintiff's treasurer there, and dividends are collected and deposited there. It was stipulated that "plaintiff does not engage in the business of buying and selling for profit any of the stocks involved herein, nor were any of such stocks purchased, sold, hypothecated or otherwise disposed of during the year 1934," and that "plaintiff did not engage in trading in such stocks or in any activity with respect thereto other than the receipt and disbursement of dividends from such stock during the times material to this action." The power to vote the stock is vested in the president except when such power is exercised by the chairman. Of these stocks, stock of the par value of $12,000,000 of the Pacific Fruit Express Company is pledged at Washington, D. C., with the Reconstruction Finance Corporation, while stock of the Southern Pacific Railroad Company of a par value of $35,000,000, and stock of Southern Pacific Terminal Company of a par value of $1,999,500, are pledged at New York. The stipulation further recites that plaintiff's stock investments, except as to the stock it owns in "non-affiliated companies," were made as permanent investments. Stocks in other corporations are classified in railway regulation and accounting prescribed by the Interstate Commerce Commission as non-operating property, and the dividends therefrom are not railroad operating income.

The companies from which plaintiff received the net dividend income of $10,431,539.96 are the following:

1. Southern Pacific Terminal Company, a Texas corporation, described in the stipulation as a "wholly owned subsidiary" of plaintiff. It owns property in Galveston, Texas, consisting of docks, wharves, terminal tracks, a grain elevator, power plant, fuel oil storage plant and 321.8 acres of land. Its properties are operated under lease by Texas and New Orleans Railroad Company, another wholly owned subsidiary of plaintiff.

2. Pacific Fruit Express Company, a Utah corporation, with its principal place of business in San Francisco. Plaintiff owns 50% of its stock. It owns and operates refrigerator cars over plaintiff's lines and other lines throughout the United States, and owns ice manufacturing plants, ice ponds, natural ice houses and car repair shops. Earnings of this company consist principally of car rentals and refrigeration service charges.

3. Pacific Greyhound Corporation, a Delaware corporation. Of its stock outstanding, 200,000 common and 101,962 preferred shares, plaintiff owns 60,000 shares of common stock and 18,000 shares of preferred stock. This corporation is a holding company, which through subsidiaries operates motor coach lines. Its earnings are principally derived from dividends received on stock of Pacific Greyhound Lines, Inc.

4. Rockaway Pacific Corporation, a Delaware corporation, of which plaintiff owns all the stock. Its earnings are derived principally from interest received on a note given in connection with the sale of real property in New York.

5. Rio Bravo Oil Company, a Texas corporation, of which plaintiff owns all the stock, except five qualifying shares. Plaintiff organized the corporation to acquire and develop oil lands, with the intent of using the oil developed in operation of Texas and New Orleans Railroad, wholly owned subsidiary of plaintiff. Its earnings are derived from the operation of oil properties in Texas and Louisiana.

6. Southern Pacific Building Company, a Texas corporation, of which plaintiff owns all the stock except five qualifying shares. It owns and operates a nine-story office building in Houston, Texas, which is occupied under lease by the general Texas offices of plaintiff and of the Texas and New Orleans Railroad.

7. The Pacific Motor Transport Company, a California corporation, of which plaintiff owns all the stock. Its principal place of business is at San Francisco. It "conducts a motor transport service, including store-door pick-up and delivery services, using, under contracts with the carriers, as underlying carriers, the Southern Pacific Company and its various rail-

way subsidiaries, together with certain independent rail and truck line connections, in the States of California, Oregon, Nevada and Arizona."

The above corporations are described in the agreed statement of facts as "Affiliated Companies." The taxable dividend income as determined by the commissioner also includes dividends from two corporations which are described as "Non-affiliated Companies."

1. Kansas, Oklahoma & Gulf Railway Company, an Oklahoma corporation, which operates a freight and passenger service in Oklahoma, Kansas and Texas. Plaintiff owns less than 1/10 of 1% of its outstanding capital stock.

2. Standard Oil Company of California, a Delaware corporation, with its principal place of business in San Francisco. Of the 13,102,900 outstanding shares of this company, plaintiff owns 14,292 shares, acquired in exchange for certain other stock.

On these facts the trial court found, "as an inference drawn by the court from the stipulated facts * * * at all times herein involved the commercial domicile of plaintiff was in the State of California, and that plaintiff did not have a commercial domicile in either the State of New York or the State of Kentucky."

The questions now necessary to discuss are whether this finding is supported by the evidence, and if it is, whether, under the facts and the law, these intangibles have acquired a taxable situs in this state. So far as the legal question is concerned, the problem is solely one of constitutional law. As already pointed out, there is no doubt that the statute purports to tax this income, the only question being whether this state constitutionally may do so. The proper determination of this problem requires a discussion of the general principles governing the taxation of intangibles, and a critical analysis of the cases establishing the so-called commercial domicile concept.

[17, 18] There are both logical and legal difficulties in ascribing to intangibles a taxable situs. In their very nature they have no physical location at all. But they constitute a very valuable type of property, and as such should, of course, bear their just burden of the cost of government through taxation. Because of the complexities of modern business organizations operating on a nation-wide or world-wide basis, the difficulties of fairly and constitutionally apportioning the tax burden among the various taxing entities becomes extremely difficult. As already pointed out, the general rule is that intangibles, by an application of the maxim of mobilia sequuntur personam, are usually taxable at the domicile of the owner. In the case of corporations, since a corporation is deemed for most purposes to be domiciled in the state of its incorporation, intangibles are usually taxable in that state. The mobilia maxim, of Roman law origin and taken over by the common law, is not limited to intangibles and is not limited to the field of taxation. It means simply that property for certain purposes will be regarded as being located at the domicile of the owner for the purpose of applying the law of that place to it although such property may be actually located elsewhere. See discussion, Story on Conflict of Laws, 8th Ed., pp. 533–540. The maxim does not apply to the taxation of tangible personal property, such property being taxable in the state where located, unless its presence there is but fleeting and transitory. Union Refrigerator Transit Co. v. Commonwealth of Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150, 4 Ann.Cas. 493; Frick v. Commonwealth of Pennsylvania, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316. The theory as to tangible personal property is that the owner is protected in his ownership and enjoyment of such property by the state where it is located to a greater degree than by the state of his domicile. The rule against double taxation applies to such property.

[19] The rule that ascribed to intangibles a taxable situs at the domicile of the owner developed when corporate operations were less complex than now, and when the practice of incorporating in a state with no intention of doing business there was far less prevalent than at present. Thus it was the fact that the corporation carried on its activities in the state of incorporation and generally had its principal place of business there which led the courts to adopt the mobilia rule as to the taxation of intangibles. In such a case the corporation benefited from the functions of government in respect to its activities generally, and in relation to its intangibles, more in that state than in any other. It is still the law that, in the absence of evidence to the contrary, it will be presumed that intangibles have their taxable situs at the domicile of their owner. Newark Fire Ins. Co. v. State Board of Tax Appeals, 307 U.S.

313, 59 S.Ct. 918, 83 L.Ed. 1312. But the courts have consistently recognized that in applying the mobilia rule to the taxation of intangibles they were applying a fiction, and for that reason it has been frequently held that the fiction should not be indulged in where the result would be unjust, unreasonable, or undesirable. Liverpool & London & Globe Ins. Co. v. Board of Assessors in Parish of Orleans, 221 U.S. 346, 31 S.Ct. 550, 55 L.Ed. 762, L.R.A.1915C, 903; Blackstone v. Miller, 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439; De Ganay v. Lederer, 250 U.S. 376, 39 S.Ct. 524, 63 L.Ed. 1042. In other words, when the mobilia rule was not in accord with the realities of the situation it was either disregarded or held not to preclude another state which had become definitely connected with these intangibles from taxing them or their income. This concept that another state than the state of legal domicile had jurisdiction to tax intangibles was enunciated in a series of cases holding that where the intangibles had acquired a "business situs" in a foreign state, that state could tax. The following cases are frequently cited to show the genesis of that rule: City of New Orleans v. Stempel, 175 U.S. 309, 20 S.Ct. 110, 44 L.Ed. 174; Bristol v. Washington County, 177 U.S. 133, 20 S.Ct. 746, 44 L.Ed. 701; State Board of Assessors v. Comptoir National D'Escompte, 191 U.S. 388, 24 S.Ct. 109, 48 L.Ed. 232; Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395, 27 S.Ct. 499, 51 L.Ed. 853; Liverpool & L. Ins. Co. v. Orleans Assessors, 221 U.S. 346, 31 S.Ct. 550, 55 L.Ed. 762, L.R.A.1915C, 903, supra.

A short analysis of these cases will serve to illustrate generally the types of factual situations to which the business situs rule has been applied.

In New Orleans v. Stempel, supra, a resident of New York through an agent in Louisiana made loans evidenced by notes secured by mortgages on real property in Louisiana. The notes and mortgages at all times remained in Louisiana. Payments of principal and interest were deposited in banks in Louisiana to be reinvested through further loans. It was held that the notes, mortgages and bank deposits were taxable in Louisiana.

In Board of Assessors v. Comptoir National, supra, a foreign banking company did a lending business in Louisiana. Loans were evidenced by checks drawn on the company's agent in Louisiana, which were treated as overdrafts and secured by collateral. Checks and collateral remained with the agent in Louisiana, and were held taxable there.

In Bristol v. Washington County, supra, a New York resident through a local agent carried on the business of lending money in Minnesota on notes and mortgages on property in that state. The notes were sent to the domicile of the owner and kept there. The mortgages remained in Minnesota. The right of Minnesota to tax the notes and mortgages was upheld. It should be emphasized that here the notes were not physically present in the state held to be the business situs of such notes.

Metropolitan Life Ins. Co. v. New Orleans, supra, and Liverpool & L. Ins. Co. v. Orleans Assessors, supra, involved credits due New York insurance companies which the state of Louisiana had taxed. In the first of these cases the company had made loans on its policies in Louisiana. Notes given for the loans were forwarded to the home office of the company in New York to be kept there. It was held that the notes were taxable under the Louisiana law. In the second case, overdue premiums for insurance issued to Louisiana residents for which credit had been extended were held subject to taxation in Louisiana. These cases definitely established that the physical evidences of the intangibles did not have to be present in the state claiming to be the business situs of such intangibles. See, also, Newark Fire Ins. Co. v. State Bd., 307 U.S. 313, 59 S.Ct. 918, 83 L.Ed. 1312, supra.

[20, 21] In these cases, and many more that might be cited, we find an individual or a corporation engaging in activities with its intangible property with a view to profit outside the corporate domicile. In all the business situs cases it was held that the intangibles were so tied in with the activities of their owner carried on in the foreign state and under the protection of the law and government provided by the foreign state, that they had acquired a taxable situs, described as a "business situs" in the foreign state. It was held that the maxim of mobilia sequuntur personam did not preclude the imposition of a tax by the state of the business situs imposed for the advantages enjoyed by the owner in that state. These cases also established the principle that for the business situs rule to be applied it is not necessary that the physical evidences of the intangibles should be located in the business situs state. As to wheth-

er the state of legal domicile might also tax such intangibles where it is a mere paper domicile the cases are not clear. See the two opinions in Newark Fire Ins. Co. v. State Bd., supra; see concurring opinion of Mr. Justice Reed in the four, four, one, decision in Curry v. McCanless, 307 U.S. 357, 375, 59 S.Ct. 900, 83 L.Ed. 1339, 123 A.L.R. 162. At any rate we do know, under the rule of the cases heretofore cited, that the fact that double taxation of the intangibles might result is not necessarily a constitutional bar to both states imposing a tax on the same intangibles.

[22, 23] The business situs cases are based on the realities of the situation. When a corporation carries on its activities in a foreign state and uses its intangibles there, it should pay a tax for the protection and benefits it receives from the law of that state. In speaking of the above cited business situs cases later decisions have characterized the intangibles there involved as "integral parts of some local business." Wheeling Steel Corporation v. Fox, 298 U. S. 193, 210, 56 S.Ct. 773, 777, 80 L.Ed. 1143; see, also, Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 213, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000; Beidler v. South Carolina Tax Commission, 282 U.S. 1, 51 S.Ct. 54, 75 L.Ed. 131; First National Bank of Boston v. State of Maine, 284 U.S. 312, 52 S.Ct. 174, 77 A.L.R. 1401. This does not mean that the business must be local in the sense of being confined to a single state, but simply that the intangibles must be associated with that portion of the business carried on in the state which claims business situs. The business itself may be part of an enterprise extending over a number of states, as in Metropolitan Life Ins. Co. v. New Orleans, supra, and Liverpool & L. Ins. Co. v. Orleans Assessors, supra.

In recent years the doctrine that the state of the business situs of intangibles may tax has been greatly extended. It is extremely difficult to tell the exact limits of the doctrine. Each case must turn upon its own facts, and from those facts it must be determined whether in that case the business situs of the particular intangibles in fact and in law, is in the taxing state. One of the extensions of the business situs rule, or perhaps an independent exception to the mobilia rule, is to be found in those cases that hold that the foreign state where a corporation has established its "commercial domicile," at least in reference to the intangibles in question, has jurisdiction to tax those intangibles. The three cases that are cited as establishing this rule are Wheeling Steel Corporation v. Fox, 298 U.S. 193, 56 S.Ct. 773, 80 L.Ed. 1143; First Bank Stock Corporation v. Minnesota, 301 U.S. 234, 57 S.Ct. 677, 81 L.Ed. 1061, 113 A.L.R. 228; Smith v. Ajax Pipe Line Co., 8 Cir., 87 F.2d 567. The commissioner places his main reliance to support his holding that the income from the securities here involved are taxable by this state upon these cases. He contends that, under the rule there announced, where the state of incorporation is a paper domicile, a mere technical legal domicile, in which the corporation carries on none of its activities, such corporation may be said to have its domicile in fact, its commercial domicile, in that state where it has its principal place of business, and that state, in return for the advantages, opportunities and protection accorded the corporation in the conduct of its business there, may tax the intangibles of such corporation.

These cases must be carefully analyzed to ascertain the factual situations there presented, and to ascertain the exact rules of law there announced. In the Wheeling Steel Corporation case, supra, the state of West Virginia levied an ad valorem property tax on accounts receivable and bank deposits of the plaintiff, a Delaware corporation. The corporation manufactured products for sale. Its principal manufacturing plants were located in Ohio, although it did some manufacturing in West Virginia. It maintained sales offices in a number of states. It had designated a "principal place of business" in Delaware in compliance with the law of that state, where it maintained an office through the Corporation Service Company. This designation, says the opinion, "was a technical one" and that office was "not a principal office so far as the actual conduct of business is concerned." 298 U.S. at page 211, 56 S.Ct. at page 777, 80 L.Ed. 1143. The "general business offices" 298 U.S. at page 205, 56 S.Ct. at page 775, 80 L.Ed. 1143, of the corporation were located at Wheeling, West Virginia. The board of directors and the stockholders met in West Virginia and the officers resided there. The accounts receivable upon which the tax was levied were for goods sold to purchasers throughout the United States. Although contracts were negotiated and orders taken at the various sales offices, they were subject to

acceptance or rejection at the Wheeling office and accounts due were payable there. Of a total of $2,234,743.11 accounts and notes receivable, $374,410.42 was for goods sold and manufactured in and shipped from West Virginia. The corporation had been assessed in Ohio on accounts and notes receivable amounting to $250,133.42. The lower court in West Virginia had permitted the deduction of this amount in determining the tax due West Virginia, and the defendant tax commissioner had not appealed therefrom.

Checks and drafts in payment of accounts after receipt in West Virginia were sent in their original form to banks in several states for deposit. The tax was assessed against the bank accounts in other states as well as against those in West Virginia banks. The deposits were not segregated for the purpose of keeping separately receipts from products manufactured in West Virginia. Ordinarily, the opinion says, not more that 20% of the total on deposit within and without West Virginia was from the sale of products manufactured in that state. At least 80% of the sums spent by the corporation in the conduct of its business were for operations of its plants and business outside West Virginia. Of real and tangible personal property of the corporation of an assessed value of $31,977,600, twenty-seven per cent, or an assessed value of $8,673,205, was in West Virginia.

The court held that the accounts receivable and bank deposits had their situs for tax purposes in West Virginia. The court said: "The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned." 298 U.S. at page 212, 56 S.Ct. at page 778, 80 L.Ed. 1143.

Of the bank deposits the court said: "It appears that the corporation has deposit accounts in several states. The deposits outside West Virginia were made by sending from the Wheeling office to the various banks the original checks or drafts received by the corporation from its customers. From these deposit accounts the corporation, by executive action at Wheeling, pays the amounts required for payrolls, materials, equipment, maintenance, and operating expenses as these amounts become payable in the course of its operations in Ohio and other states. Checks and drafts on these bank accounts are drawn at Wheeling, except in connection with the payment of pay rolls at certain manufacturing plants where pay-roll checks or orders are drawn against moneys sent to banks at such points for that express purpose and for meeting incidental items. The agreed statement shows that: 'All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, such immediate expenditure is made only under specific or general direction and control of the Wheeling office.' The so-called 'money in bank' is not cash or physical property of the corporation but is an indebtedness owing by the bank to the corporation by virtue of the deposit account. From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled. In the light of this course of business as shown by the agreed statements of fact, we find no sufficient basis for concluding that the bank accounts thus maintained and controlled were properly attributable to the corporation at any place other than at its general office at Wheeling. If there were any special circumstances by which any of these deposits could be deemed to have been localized elsewhere, they do not appear upon the present record." 298 U.S. at pages 213, 214, 56 S.Ct. at page 778, 80 L.Ed. 1143.

The court further said: "The corporation established in West Virginia what has aptly been termed a 'commercial domicile.' It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the corporation. There, as appellant's counsel well says, 'the management functioned.' The corporation has manufacturing plants and sales offices in

other states. But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The corporation has made that the actual seat of its corporate government." 298 U.S. at pages 211, 212, 56 S.Ct. at page 778, 80 L.Ed. 1143.

In speaking of the rights of Delaware, the legal domicile of the corporation, the court said: "To attribute to Delaware, merely as the chartering state, the credits arising in the course of the business established in another state, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering state all the tangible possessions of the Corporation without regard to their actual location." 298 U.S. at page 211, 56 S.Ct. at page 777, 80 L.Ed. 1143.

In Smith v. Ajax Pipe Line Co., 8 Cir., 87 F.2d 567, an ad valorem property tax assessed by Missouri on bank deposits in New York of a Delaware corporation doing business in Missouri was held legal on the authority of the Wheeling case. The business of the company consisted of transportation of crude oil for hire by means of two pipe lines extending from Oklahoma through Missouri into Illinois. In Illinois the oil was delivered into the pipe lines of others for further transportation. The pipe lines which made delivery to the consignee collected the total charge and deposited the company's share in a New York bank. It conducted no business in Delaware, the state of its incorporation.

The company's "general office" was in Missouri. All meetings of the board of directors were held at the office in Missouri. The stock of the company was owned by a holding company, of which the court says that it, apparently "determined the general policies and made the contracts for appellee. The nearest direct testimony is that 'They (the board of directors of appellee) had absolute control, subject to certain limitations by the parent company, that is limitations placed upon them by a holding company. I would say the board at Springfield could not say the accounts receivable should be paid into the Springfield office and not into the Chase National Bank even though we were a majority of the board of directors of the Ajax Company, because we had certain fixed policies that we followed in connection with the parent company.'" 87 F.2d at page 571.

The court further says: "The corporate direction, insofar as general policies, seems to have been by a holding company." 87 F.2d at page 569. Of the Missouri office the court said, "All operations were conducted from there except no contracts for nor collections for carriage of oil were made there nor did the men there 'shape the internal policy' of appellee." 87 F.2d at page 569.

The court refers to "commercial situs" of the company as follows: "What constitutes this 'business situs' or 'commercial situs' has not been, probably cannot be, definitely defined. Whether it exists is usually the crucial inquiry in this character of cases." 87 F.2d at page 571.

The third case, and the last in point of time, is First Bank Stock Corporation v. State of Minnesota, 301 U.S. 234, 57 S.Ct. 677, 81 L.Ed 1061, 113 A.L.R. 228. The state of Minnesota levied a property tax on shares of stock in Montana and North Dakota state banks owned by appellant, which was incorporated under the law of Delaware. The Supreme Court of the United States affirmed the legality of the tax. The taxpaying corporation owned all stock of a number of state banks, trust companies and other financial institutions incorporated in other states, including those in Montana and North Dakota, and each doing business in the state of its incorporation. The states of Montana and North Dakota had imposed taxes on the shares of the banks incorporated there. The appellant had paid without protest the tax on shares of stock in banks of states other than Montana and North Dakota, which other states did not attempt to impose a tax on shares issued by banks organized under their own laws.

The appellant corporation held its stockholders' and directors' meetings in Minnesota. The stock certificates were kept there, and there it received dividends on the stock and distributed them.

The court said of the corporation's activities: "Through a wholly-owned subsidiary corporation, organized and doing business in Minnesota, it maintains a compensated service for the banks which it controls. It offers advice as to their accounting practices, makes recommendations concerning loans, commercial paper and interest rates, and makes suggestions regarding their purchase and sale of securities. It also plans

for them advertising campaigns, and supplies advertising material. *Appellant thus maintains within the state an integrated business of protecting its investments in bank shares, and enhancing their value, by the active exercise of its power of control through stock ownership of its subsidiary banks.*" 301 U.S. at page 237, 57 S.Ct. at page 678, 81 L.Ed. 1061, 113 A.L.R. 228. (Italics added.)

The court also said:

"Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles [citing cases], at least in the absence of activities identifying them with some other place as 'their business situs.' But it is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a 'commercial domicil' there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus 'become integral parts of some local business.' [Citing cases.]

"The doctrine that intangibles may be taxed at their business situs, as distinguished from the legal domicil of their owner has usually been applied to obligations to pay money, acquired in the course of a localized business. [Citing cases.] But it is equally applicable to shares of corporate stock which, because of their use in a business of the owner, may be treated as localized, for purposes of taxation, at the place of the business. [Citing cases.] Appellant's entire business in Minnesota is founded on its ownership of the shares of stock and their use as instruments of corporate control. They are as much 'integral parts' of the local business as accounts receivable in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. Compare Wheeling Steel Corporation v. Fox, supra, 298 U.S. 203, 212-214, 56 S.Ct. 773, 778, 80 L.Ed. 1143 [1149], 1150. Thus identified with the business conducted by appellant in Minnesota, they are as subject to local property taxes as they would be if the owner were a private individual domiciled in this state. * * *

"The economic advantages realized through the protection, at the place of domicil, of the ownership of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicil, at least where they are not shown to have acquired a business situs elsewhere, as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership." 301 U.S. at page 241, 57 S.Ct. 678, 81 L.Ed. 1061, 113 A.L.R. 228.

The fact that a corporation may have a commercial domicile as defined in these cases separate from its legal domicile, has been recognized, and the Wheeling case cited with approval, in Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 652, 656, 62 S.Ct. 857, 86 L.Ed. 1090; Southern Natural Gas Corporation v. Alabama, 301 U.S. 148, 154, 57 S.Ct. 696, 81 L.Ed. 970; Wirt Franklin Petroleum Corporation v. Gruen, 5 Cir., 139 F.2d 659; Maryland & Virginia Milk Producers' Ass'n v. Dist. of Columbia, 73 App.D.C. 399, 119 F.2d 787; Cargill, Inc., v. Spaeth, 215 Minn. 540, 10 N.W.2d 728; see, also, Chestnut Securities Co. v. Oklahoma Tax Commission, 10 Cir., 125 F.2d 571.

In Memphis Gas Co. v. Beeler, supra, the transcript shows that the board of directors did not meet in the state held to be the commercial domicile. That this was the fact in Maryland & Virginia Milk Producers' Ass'n v. Dist. of Columbia, supra, appears from the opinion 73 App. D.C. 399, 119 F.2d at page 788.

[24] Now how do the rules established by the above cases apply to the facts of the present case? We find here a Kentucky corporation that not only does not, but under its charter cannot, engage in the railroad business in the state of its incorporation. That corporation owns millions of dollars of stocks and bonds, and neither they nor their income are taxed in Kentucky. The actual securities are in New York where the dividends are collected and banked. The Board of Directors of the corporation meets in New York. Some of its officers are there. New York has not taxed the stocks or bonds or their income. Thus, neither the state of domicile, nor the state where the securities are located has attempted to tax the income in question. This is an important, but by no means conclusive, factor.

If another state claimed to be the commercial domicile or claimed the securities had a business situs there, and had purported to tax the income, that fact would at least indicate that there was a material conflict between taxing entities over where the taxable situs of this stock was located. But here no such conflict has been claimed. Plaintiff does urge that New York is the business situs of the stock, that while California is a commercial domicile of its railroad transportation business, New York is its commercial domicile as to its holding company activities. We have held above that plaintiff's holding company activities did not constitute a doing of business. Plaintiff stipulated that it engaged in no activities with respect to the stocks here involved except the receipt and disbursement of dividends. There is no sound basis for holding that New York constituted a separate commercial domicile as to activities of plaintiff which did not even constitute a doing of business, and which, as hereafter pointed out, were not truly separate and disconnected from its railroad transportation business, but, on the contrary, served the interests of that business.

[25] The fact that the board of directors of plaintiff meets in New York is an important, a very important factor, to be considered in determining whether California is in fact the commercial domicile of this company. But that factor is not conclusive. Thus in Memphis Gas Co. v. Beeler, and in Maryland & Virginia Milk Producers' Ass'n v. Dist. of Columbia, above cited, the commercial domicile was in a state other than the one in which the board met. That the state where ultimate control is exercised is not necessarily the commercial domicile is implicit in the holding in Smith v. Ajax Pipe Line Co., 8 Cir., 87 F.2d 567, where the stock of the corporation involved was wholly owned, and therefore the corporation was ultimately controlled, by a holding company located outside the taxing state. When a corporation severs its ties with the state in which it is incorporated and engages in no corporate activities there, but engages in activities elsewhere, the contention that, as a matter of law the only state that can possibly be held to be its commercial domicile is that state where its board of directors meets, is as unrealistic, unsound, and artificial as the concept that the corporation for all tax purposes is domiciled in the state of incorporation. It was to free the law from this last mentioned artificial and fictional concept that the concepts of business situs and commercial domicile were applied by the courts. The true test must be to consider all the facts relating to the particular corporation, and all the facts relating to the intangibles in question, and to determine from those facts which state, among all the states involved, gives the greatest protection and benefits to the corporation, which state, among all the states involved, from a factual and realistic standpoint is the domicile of the corporation. That is partially a question of fact and partly a question of law.

So far as plaintiff's railroad transportation business is concerned, there can be no doubt that substantially more activities are carried on, more actual control is exercised, more protection is given this corporation, and more benefits conferred on it by California than by any other state. This is admitted. The securities involved are not totally unrelated to this transportation business. An examination of the stipulation of facts relating to the businesses of the corporations whose stocks are owned by plaintiff will demonstrate that all but one or two of them are engaged in businesses related to, and most of them directly connected with, plaintiff's transportation business. Indeed, in the stipulation, they are described as "affiliated companies." All but one or two of them underlie the transportation business of plaintiff. The Pacific Fruit Express Company, from whom the major portion of the dividends were received, is directly connected with plaintiff's corporation. It is true that such relationship is based upon contract, but can we be so unrealistic as to believe that the ownership of fifty per cent of that company's stock by plaintiff, in no way connects the transportation business of plaintiff with that company? Of course not. The same can be said in varying degrees as to the other stocks involved. None of them were stocks of unrelated companies. All of them obviously were owned by plaintiff to further its transportation business. They play a part in the conduct of that transportation business of which the commercial domicile is in this state. They obviously enter into the exercise of the franchise granted by this state. All but one or two of them in greater or lesser degree, were in companies whose

businesses were connected or related to that of plaintiff.

[26, 27] Under such circumstances, we are of the opinion that this tax statute is constitutional as applied to the income here involved. We perceive the law to be that where the corporation has only a paper domicile, where the only function performed by the state of incorporation is to breathe life into the corporation, and where no substantial corporate activities are thereafter carried on in that state, then the law looks at such corporation and says that that state where, under the facts, the corporation receives its greatest protection and benefits, that state where the greatest proportion of its control exists, that state shall be the commercial domicile, with constitutional power to tax income from intangibles. Whether the commercial domicile is on a parity with the legal domicile, whether its power to tax is the same as that of the legal domicile, or whether it becomes a complete substitute for the technical domicile for tax purposes, are questions not yet decided by the United States Supreme Court, and not involved in this case. Until the highest court speaks on these interesting but exceedingly difficult questions, a state court can merely give its best judgment as to their solution. But, here we are not faced with the necessity of deciding those questions. Here, the evidence shows that the main business of plaintiff has its commercial domicile here. The securities, the income from which is included in the measure of the tax, are reasonably connected with that business. As a matter of both fact and law the commercial domicile of the corporation is here, realistic control is here, and the statute in purporting to include the challenged income is therefore constitutional.

In an attempt to overthrow this conclusion, plaintiff urges that its dividend income must either be separable from its railroad operating income, in which event its situs is not in California, but in New York or Kentucky, or if not separable it is subject to unitary allocation as is the income from plaintiff's railroad transportation operations.

[28] There is, of course, no difficulty in segregating plaintiff's dividend income from its railroad operating income, and hence no reason for applying the unitary allocation formula to that dividend income. It is held above that plaintiff's dividend income is not income from "business done," and that only income from business done is allocated by § 10. The state may include in the measure of its tax, free from constitutional objection, all income from intangibles which have a situs in this state for tax purposes. Plaintiff's dividend income is separable from its railroad operating income to the extent that it is not subject to unitary allocation. But since plaintiff owns and holds stock in other corporations to advance the interests of its transportation business, the connection between its stock ownership and its railroad transportation business is such that the stocks owned may be said to be integrally connected with that business, and, in our view, subject to taxation at the commercial domicile of that business.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

25 Cal.2d 862

PEOPLE v. HARPER et al.

Cr. 4549.

Supreme Court of California.

Feb. 7, 1945.

1. Homicide ⇐253(1)

Evidence supported conviction of first-degree murder.

2. Homicide ⇐268

In prosecution of two men for murder, conflict in several witnesses' testimony as to times and places at which one defendant was seen on day of crime in support of his claim that he did not return to scene of assault on victim with codefendant, claimed to have inflicted fatal blow on second trip, was for jury.

3. Conspiracy ⇐48

A murder, actually committed by one of two men charged therewith after returning to scene of their robbery of and assault on victim pursuant to conspiracy, was not, as matter of law, a distinct or independent offense committed after accomplishment of conspirators' plan and termination of conspiracy, in view of evidence that defendants deliberately conspired to rob and then kill victim so that he could not "kick" or "squawk".

4. Conspiracy ⇐48

Whether conspirators' act, reasonably and naturally related to crime which they conspired to commit, was ordinary and probable effect of common design or fresh and independent product of one conspirator's mind outside of or foreign to such design, is for jury.

5. Conspiracy ⇐47

In prosecution of two men for murder, evidence was sufficient to support jury's finding, implied from its verdict of conviction, that defendants conspired to rob victim and then kill him, so that he could not "kick" or "squawk".

6. Homicide ⇐29

One conspiring with another to rob and kill third person was not absolved from guilt of murder of such person, even if other conspirator returned alone to scene of both conspirators' robbery of and initial assault on victim and delivered fatal blows in absence of coconspirator.

7. Conspiracy ⇐41

Every act of each of two or more persons conspiring to commit unlawful act in pursuance of their original plan is act of all of them in contemplation of law.

8. Homicide ⇐330, 332(1)

In prosecution of two men for murder committed pursuant to conspiracy to rob and kill victim, whether defendants contemplated killing victim to avoid hazard of his complaining and testifying against defendants was fact question, which jury, in rendering verdict finding both defendants guilty, must be presumed to have resolved against defendant claiming that murder was actually committed by codefendant alone, and such finding is conclusive on Supreme Court on appeal.

9. Homicide ⇐14(1)

To convict defendant of murder actually committed by codefendant in furtherance of both defendants' common design to rob victim and avoid detection, jury was not required to find that killing was actually agreed on by conspirators, either expressly or impliedly.

10. Conspiracy ⇐24

To establish conspiracy to commit crime, proof that conspirators met and actually agreed to undertake criminal action jointly is unnecessary.

11. Criminal law ⇐338(1)

Evidence may be given of any facts from which facts in issue are presumed or logically inferable.

12. Criminal law ⇐745

The jury, by exercise of their judgment or reason, warranted by consideration of usual propensities or passions of men, may make such deductions or draw such inferences from facts proven as will establish ultimate fact or facts in issue.

13. Criminal law ⇐511(2)

The law does not require that accomplice's testimony against defendant be corroborated in every detail, but only that it be corroborated by other evidence tending to connect defendant with commission of offense charged. Pen. Code, § 1111.

14. Homicide ⇐268, 332(1)

In prosecution of two men for murder, where evidence showed that one defendant, claiming that codefendant actually committed murder, was party to, promoted, and

originated conspiracy to rob victim, participated in robbery, and repeatedly expressed concern that project be so carried out that there would be no "squawk" by victim, jury was bound to consider codefendant's testimony that other defendant finally struck fatal blows, and Supreme Court, on appeal from conviction of both defendants, cannot disregard such testimony or hold that jury could not believe it. Pen. Code, § 1111.

15. Criminal law ⇐512

While jury may consider fact that witness was defendant's accomplice in passing on such witness' credibility, his testimony may not be rejected merely because he was accomplice, but must be considered and given weight to which jurors find it entitled, if there is other evidence tending to connect defendant with commission of crime charged. Pen.Code, § 1111.

16. Criminal law ⇐511(1, 2)

Evidence corroborating accomplice's testimony need not tend to establish precise facts to which accomplice testified, and strong corroborative testimony is unnecessary to support conviction founded on accomplice's testimony, but corroborative evidence is sufficient, though circumstantial and slight, if it tends to connect accused with commission of offense. Pen. Code, § 1111.

17. Criminal law ⇐511(7)

Defendant's own statements and admissions, made in connection with other testimony, may afford sufficient proof, corroborative of accomplice's testimony, to sustain conviction. Pen. Code, § 1111.

18. Criminal law ⇐511(1)

Evidence corroborating accomplice's testimony need not go so far as to establish by itself, without aid of such testimony, that defendant committed offense charged. Pen. Code, § 1111.

19. Homicide ⇐29
Robbery ⇐15

One soliciting another to commit murder or robbery, which is actually committed, is punishable as principal in such crime. Pen. Code, §§ 31, 653f.

In Bank.

Appeals from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

McElwee Harper and one Bolden were convicted of murder in the first degree, and they appeal.

Affirmed.

George D. Pollock, Paul L. Pioda, and Raymond W. Shellooe, all of Salinas, for appellants.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] These are automatic appeals (Pen. Code, § 1239(b)) from judgments sentencing each defendant to death, after verdicts finding them guilty of murder in the first degree without recommendation as to penalty, and, as to defendant Bolden, from an order denying his motion for a new trial. Each defendant was represented at the trial by able counsel but defendant Harper is without benefit of counsel on the appeal. As to him the proceedings appear to have been regular in all respects, we have discovered no prejudicial error, and his testimony alone, voluntarily given, amply supports the verdict of the jury against him. Defendant Bolden, whose counsel presses his appeal, vigorously contends that the evidence is insufficient to connect him with the crime of murder and that the trial court therefore erred in denying his motions for an advised verdict and for a new trial. An examination of the record discloses that the evidence is legally sufficient to support the verdict against him and that the trial court did not err in denying his motions. The judgments as to each defendant and the order denying Bolden's motion for a new trial must therefore be affirmed.

The record depicts one of the foulest and most aggravated first degree murder cases in the history of this state. On Sunday morning, November 21, 1943, the defendants prevailed upon the kindness and generosity of their victim, one W. E. Bennett, who was a fellow employee and acquaintance of Harper, to drive them in his automobile to a lonely spot some ten miles out in the country from the city of Salinas on the pretext of taking a supply of gasoline (they actually took with them a can containing a gallon of gasoline) to an imaginary friend assertedly stranded in a car out of fuel. There they robbed Bennett of his money and *after the robbery,* according to the testimony of defendant

Bolden himself, as well as the statement of Harper, with an iron pinch bar taken along expressly for the purpose they assaulted and apparently endeavored to kill the man who had befriended them, dragged him some fifty feet off the road into a field, left him unconscious and for dead, and returned to Salinas. The evidence amply establishes that both defendants then believed that their victim was probably dead, although they were not positive as to the fact. Within the hour one or both of them returned to the scene of the crime "to see about the body," according to Bolden; to retrieve the can of gasoline which they had inadvertently left and feared would identify them, according to Harper.

There is a substantial conflict in the evidence, as appears in more detail later herein, as to whether Harper alone or both Harper and Bolden made this return trip. In any event the one or ones who returned found that the victim was not dead and immediately completed the grisly project.

Bolden's testimony indicates that Harper returned alone, while Harper testified that Bolden also returned and that it was he who did the actual killing. (The testimony of a doctor at the trial declares that the wounds inflicted on Bennett in the first assault would not necessarily have proved fatal if he had received timely and proper medical attention.) Certain circumstances seem to corroborate Bolden on this point while others tend to corroborate Harper. Among the circumstances tending to corroborate Harper are the facts that Bolden from the inception of the conspiracy admittedly showed much concern that there be no "kick" or "squawk" arising from the projected crime; obviously he desired to avoid detection and apprehension; he inquired of Harper, prior to starting out on the criminal mission, as to whether Harper had gloves and as to whether there was another pair available for himself (Bolden); Harper did wear gloves; Bolden did not, but on returning secured Harper's promise to wipe off the car to remove fingerprints. The blows on the first assault, admittedly struck by Harper, were only two in number, were applied to the face or side of the head of the victim, and did not crush the skull fatally, while those of the second assault were three in number, applied to the back of the head, and each crushed the skull sufficiently to have caused death. The jury may have believed that different hands wielded the pinch bar on the second occasion. Bolden also was shown by the testimony of an unimpeached and disinterested witness, one McGee, to have been active in promoting and planning the project to rob Bennett. McGee testified that on the morning of the day of the crime Bolden approached him and said, "Will you go with this Nigger and help roll that petty [white man] for some money?"; that he replied that he "was not going to do that and tried to get him not to do it." Bolden admitted in his testimony that he had asked McGee to assist in robbing Bennett. As to the origination of the plan Bolden testified that Harper solicited him to participate in it but Harper testified that Bolden first suggested, four days before the crime, that they "make a piece of money" and sought Harper's assistance in *selecting a victim* who would have considerable money. This assistance Harper apparently readily furnished, selecting, as previously mentioned, his accommodating fellow employee, Bennett, but the fact that on the very morning of the crime Bolden was still trying to procure someone other than Harper, i. e., the witness McGee, to assist in the actual perpetration of the projected crime strongly suggests that Bolden, rather than Harper, was the dominating leader in the enterprise and that Bolden was not sure he could depend upon Harper to aid in carrying out all the details of his plan. The domination of the project by Bolden rather than by Harper is further evidenced by his own (Bolden's) testimony as follows: "Q. Did you and Harper, before you met McGee, talk about getting McGee into the deal? A. No, that was my idea. Q. You hadn't said a word to Harper? A. No." Obviously the jury could conclude that the project was Bolden's and that he dominated it so completely that he felt free to invite others to participate without first consulting Harper.

[2] In support of his claim that he did not accompany Harper on the second trip to the scene of the crime Bolden refers to the testimony of certain witnesses as to times and places where he was seen on the day in question. As to this the most that can be said in favor of Bolden's contention is that the evidence is in serious conflict respecting the testimonies of the several witnesses who testified as to the respective times at which various events happened, but this conflict was for the determination of the jury and is not for the reviewing court. In our opinion from the evidence

before the jury they were warranted in concluding that, insofar as the element of time entered into the case, it was not a physical impossibility for Bolden to have made the second trip to the scene of the crime before leaving with Thornton (a taxi driver) for Moss Landing "somewhere about 12 o'clock." However, as appears further on herein, it was not essential for the jury's finding of guilt as to Bolden that they believe that he accompanied Harper on the return trip.

[3] Bolden next contends that there is no testimony except that of his accomplice, Harper, to connect him with Harper's return trip to "see about the body" or secure the can of gasoline, on which trip the coup de grace was administered to Bennett after it was discovered that he had not died from the first beating; that Harper's testimony as to the events occurring on the second trip is entirely without corroboration; and that we must therefore accept Bolden's testimony that he and Harper parted company when they first returned to Salinas. For the purposes of this opinion we can accept such contention, regardless of whether it is sound in law or fact. But we cannot accept Bolden's further contention that as a matter of law two distinct crimes were committed; that the first crime (the robbery of and assault upon Bennett) was in pursuance of the conspiracy of the defendants but that the second crime (the murder of Bennett) was committed by Harper solely as an independent offense after the purpose of defendants' plan had been accomplished and the conspiracy had terminated.

[4] Such latter contention necessarily falls because, first, the evidence is ample to sustain a finding that the two defendants deliberately entered into a conspiracy to rob Bennett and kill him so that he could not make a "kick" or "squawk" and, second, an unbroken line of authorities in this state holds that upon proof of a conspiracy to commit a crime and proof of the commission of an act reasonably and naturally related to the crime, "whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury." (People v. Kauffman (1907), 152 Cal. 331, 335, 92 P. 861, 863; People v. Jones (1934), 136 Cal.App. 722, 727, 29 P.2d 902; People v. King (1938), 30 Cal.App.2d 185, 202, 85 P.2d 928; see Shepard's California Citations for additional cases.)

[5] From a review of the evidence there can be no question but that Harper and Bolden entered into a conspiracy to rob Bennett of his money. Likewise there can be no serious question but that the evidence fully supports the jury's implied finding that the conspiracy contemplated killing Bennett so that he could not "kick" or "squawk." The defendants took the iron pinch bar with them on the first trip to the scene of the crime; they did not need that weapon to perpetrate a mere robbery; they did not in fact use it until after the money was taken; they used it then in pursuance of their common design to kill Bennett and thought that they had killed him. Bolden's own testimony that Harper "was going back to see about the body" is ample proof of his belief in that regard. The jury may have reasoned that it did not seem likely that he would have used the term "body" if he had not thought that Bennett was dead and that, if he did entertain a doubt as to the fact, it was probable that he contemplated that Harper was going back to make sure of the killing, as, if the plan had been merely to render Bennett unconscious for a time sufficient to permit the defendants to get away from the locality, Harper should have been availing himself immediately of the opportunity to flee rather than returning to "see about the body." Bolden was not surprised later when he was told that Bennett was dead. In his statement to the district attorney which was read in evidence he described the actual taking of the money. After Harper (who is referred to by Bolden as "Mac") had demanded Bennett's money Bolden stated that "He [Bennett] handed Mac some small bills—I don't know how much it was. I never did see how much it was. He told Mac that's all he had. Mac said he knew better. He told Mac about the money belt—Mac knew he had a money belt on, and Mac snatched it off from him. Then he told Mac, he said, 'Mac, you'll get yourself in trouble.'" The statement continues:

"Q. What happened to the money belt? A. Mac taken it and handed it to me.

"Q. What did you do with it? A. I held it.

"Q. What did Mac do then? A. Mac walked around in front of the car and came

back with a crow bar which he got out of the back of the car.

"Q. You mean pinch bar, with a curve on the end? A. Yes.

"Q. What happened then? A. Mac hit him.

"Q. What next? A. He hit him twice altogether. He hit right between the ear. He hit him the second time. I said, 'Don't kill him, Mac.' He said, 'He's not dead. I'm not going to kill him.'

"Q. You were pretty sure he was dead at that time, weren't you? A. I don't know whether he was dead or not. * * *

"Q. Did you have any further conversation with Harper as to whether or not he was dead? A. I said, 'Mac, you've killed him.' He said, 'No.' He said, 'I'll be back to see about it.' * * *

"Q. After you came back to Salinas, did you wipe the fingerprints off the car? A. No, sir.

"Q. Harper was wearing gloves at all times, wasn't he? A. He sure was.

"Q. What conversation did you have in regard to fingerprints? A. He said, 'I don't want no fingerprints, so I am going to wipe the whole car down.' * * *

"Q. Did he [Harper] tell you about Bennett when you were with him in Imperial County? A. He told me about him in Los Angeles.

"Q. What did he tell you? A. He told me that he was dead, and they was looking for him.

"Q. Didn't he give you the details of how he came to his death? A. No, sir, he did not. He said he was dead and they were looking for him.

"Q. Didn't you know about the second trip out to this place? A. No, sir, I did not.

"Q. Didn't you tell him that you were under the impression that he hadn't been killed? A. I didn't ask him anything; that's what he told me. I didn't know."

When called as a witness in his own behalf Bolden gave a somewhat different account of the events at the time of the robbery and first assault. He said that Harper first pulled him (Bolden) and then Bennett from the automobile, demanded Bennett's money, received some, insisted that Bennett had more, "Then he [Harper] walks around in front of the car to the right hand side and got the pinch bar and Bennett and I were just standing there. * * * Then he snatched the money belt off Mr. Bennett. * * * It was in here somewhere and he had on coveralls and he unbuttoned them to a certain extent." It will be noted that the above quoted testimony indicates that the money belt was taken *after* Harper had procured the pinch bar from the car but on cross-examination the witness reverted to the version given in his earlier statement to the district attorney. The transcript shows the following:

"Q. Did he take the money before he went around the car to get the pinch bar? A. All of the money I've seen was taken before the licking.

"Mr. Brazil: All of the money you've seen? A. Yes.

"Q. Did that include the money belt? A. Yes, that includes the money belt.

"Q. So you had gotten the money belt and small bills before Harper went around the car to get the pinch bar? A. Yes."

Bolden apparently endeavored to portray himself to the jury as a disinterested and perhaps unwilling participant in the enterprise. As mentioned before he testified that Harper pulled him, as well as Bennett, from the automobile. And in regard to the money first taken from Bennett the record shows: "Q. What did Bennett do with that money? A. Handed it to Harper. Q. What did Harper do with it? A. I really don't know, I didn't pay any attention." He did admit, however, that of the two hundred dollars in the money belt he received one hundred as his share. The jury may not have found it easy to believe that Harper would have been so generous to Bolden if the former had actually been as dominant and the latter as subservient and disinterested as the above related testimony seems designed to indicate.

The jury may also have found unconvincing the testimony of Bolden relating to what occurred immediately after Harper demanded more money from Bennett and was walking around the car to procure the pinch bar and returning around the car with the weapon. He claimed that neither he nor Bennett did or said anything during that period. In particular the following quotation is illustrative of his story:

"Q. Well, what did he [Bennett] say? A. He didn't say anything.

"Q. Didn't he say anything? A. He didn't say anything, nor did I.

"Q. Just stood there like a lamb ready to be shorn, is that right? A. Yes.

"Q. Didn't try to get away? A. Just stood there. * * *

"Q. Did Bennett try to defend himself in any way? A. No, he never did.

"Q. Did he say anything? A. No, he didn't, not then.

"Q. When did he say anything? A. He said something before Harper walked around the car, he said, 'You'll get in trouble, Mac,' just like that."

Returning now to events which preceded the crime, Bolden was asked the following questions and answered as indicated:

"Q. [relative to conversation with Harper]. What did you say? A. I told him, I said, 'Mac, do you think he got any money?' He said, 'Yes,' and I said, *'How do you expect to get it?'* He said, *'There will be no kick,* you will have nothing to do, Blue [Blue is the name by which Harper referred to Bolden],' and we walked across into the doorway of the hotel. * * *

"Q. Did you have any conversation there? A. Yes, *he told me when I asked him over again, I said, 'What is going to be the outcome?' and he said, 'There will be no kick, you will have nothing to do,' and I said, 'I will do it.'"* (Italics added.)

In reference to the witness McGee, Bolden testified as follows: "Q. Did you ask him to help you out in this deal? A. Yes, I asked him * * * and he said, 'What is it Blue?' just like that, and I said, 'I am not talking' * * * I said, 'No, I am not talking here.'" Upon returning to Salinas after the robbery and assault Bolden again displayed his concern about avoiding detection for the crime. He testified that he asked Harper, "What will you do about the prints?" and that Harper replied, "I am going to rub the car down." It would seem that there was little occasion for Bolden to be concerned about detection through fingerprints unless he believed that Bennett was dead and hence unable to "kick" or "squawk," as he phrased it.

[6, 7] Since the jury were warranted in finding that the killing of Bennett was an element of the conspiracy it would not absolve Bolden from guilt of the murder even if we should assume, contrary to what the jury had a right to find, that Harper went back alone and, faithful to the common design, delivered the fatal blows in the absence of Bolden. It is well settled that after a conspiracy to commit an unlawful act is established, every act of each member of the conspiracy in pursuance of their original plan is in contemplation of law the act of all of them. (15 C.J.S., Conspiracy, 1105, § 74; People v. Stoddard (1941), 48 Cal.App.2d 86, 89, 119 P.2d 160.)

[8] It cannot seriously be disputed that the minimum design of the conspirators in this case was to rob Bennett and avoid detection. To avoid detection Harper wore gloves at all times concerned and promised Bolden that he would "rub down the car" to remove the latter's fingerprints. But the most important item of all in avoiding detection was the killing of Bennett. Both defendants were known to him. It seems but trite to have to point out that if Bennett were not killed he would, in all probability, be able to identify the defendants and testify against them. Why should Harper have worn gloves and why should Bolden have asked Harper for an extra pair (which he did not get) if they did not contemplate killing Bennett to avoid the certain hazard of his complaint and testimony? Obviously this question was one of fact which the jury must be presumed to have resolved against Bolden and their finding is conclusive upon us.

[9] It is also to be observed that in order to convict Bolden legally of the crime of murder the jury did not have to find that the killing was actually agreed upon by the conspirators either expressly or impliedly. The fact is indisputable, upon the record here, that the killing was in furtherance of the common design, even if we limit the common design to robbery and avoidance of detection. To avoid detection much more necessary and important than wearing gloves or removing fingerprints from the car was the killing of the victim. The rule is stated in People v. Creeks (1915), 170 Cal. 368, 374, 149 P. 821, 823, that "if several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine." And in People v. Kauffman (1907), supra, 152 Cal. 331, 334, 335, 92 P. 861, 862, it is declared that (quoting from 8 Cyc. 641): "'In contemplation of law the act of one [conspirator] is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences,

even though it was not intended as a part of the original design or common plan.' * * * But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury [citations]. And, if there be any evidence to support the finding of the jury on this question, its determination is conclusive." Certainly it cannot be argued in good faith by anyone familiar with criminal law that the killing of his victim by an armed robber at the time of or shortly following the robbery, is inherently an unreasonable result not naturally flowing from and not connected with the robbery. Nor can it be contended with reason that the killing of the victim by a robber unmasked and known to such victim would not further the design to rob and escape detection. And as to conspirators it has been said that "Of course, if in the consummation of an express and unlawful purpose of the conspiracy, one of the conspirators goes outside of such express purpose and kills, the other conspirators cannot escape responsibility where, as here, such killing is not an unreasonable result to be expected from the acts of sabotage and violence which were contemplated." (People v. Cowan (1940), 38 Cal. App.2d 231, 239, 101 P.2d 125, 130, 135; see, also, People v. Sutton (1936), 17 Cal. App.2d 561, 568, 62 P.2d 397.)

[10-12] This court has held repeatedly that "it is not necessary, in order to establish [the conspiracy] to prove that the parties met and actually agreed to jointly undertake such criminal action. From the secrecy with which unlawful undertakings are adopted, it would be generally impossible to make such proof by direct testimony. Evidence is indirect as well as direct, * * * and it is code law that upon the trial of a case evidence may be given of any facts from which the facts in issue are presumed or are logically inferable; and the jury by the exercise of their judgment or reason, warranted by a consideration of the usual propensities or passions of men, may make such deductions or draw such inferences from the facts proven as will establish the ultimate fact or facts in issue." (People v. Donnolly (1904), 143 Cal. 394, 398, 77 P. 177, 179; People v. Lawrence (1904), 143 Cal. 148, 153, 76 P. 893, 68 L.R.A. 193; People v. Moran (1904), 144 Cal. 48, 54, 55, 77 P. 777; People v. Eldridge (1905), 147 Cal. 782, 784, 82 P. 442.)

In People v. Holmes (1897), 118 Cal. 444, 450, 50 P. 675, 676, the express agreement proved was to "meet at Sixth and Market to-morrow morning at 8 o'clock, and appoint a committee to interview all non-union men." Defendants the next day went to interview deceased, who thereafter died as the result of a beating inflicted on him by some of the defendants immediately following the interview. Defendants contended (118 Cal. at page 456, 50 P. at page 679) "that there was no agreement to commit any battery upon the deceased, or do him any violence; that defendants were doing no unlawful act in asking deceased to quit work the next day, when they went in large numbers to the building where he was working; that the conduct of some of the defendants at that time cannot be said to be the ordinary and probable effect of the original intention of all the defendants," and that therefore those defendants who were not shown to have struck deceased were not guilty of homicide. In affirming a judgment of conviction of manslaughter, this court stated (118 Cal. at page 457, 50 P. at page 679): "How far the subsequent conduct of defendants went to establish a conspiracy, and to what extent they were involved in it * * *; whether the crime alleged was committed in pursuance of the conspiracy found to have been formed, or was the act of some of the persons present, done 'as a fresh and independent product of the mind of some of them, and outside of and foreign to the common design,'—were questions exclusively with the jury."

In People v. Kauffman (1907), supra, 152 Cal. 331, 92 P. 861, the evidence tended to show an agreement among the six defendants to rob a safe at a cemetery in San Mateo County. Defendants went from San Francisco to San Mateo County but when they found that the cemetery grounds were guarded they abandoned their plan, divided into two parties of three each, and returned to San Francisco. After they had reached San Francisco and while the group with which appellant was walking was in advance of the other three defendants, a shooting affray was commenced by the rear group with one Robinson, a policeman, and carried over into the group of which appellant was a member. Robinson was shot to death. Appellant took no part in the shoot-

ing. He contended (152 Cal. at page 335, 92 P. at page 862) that the "conspiracy embraced only the proposed burglary at the cemetery, and that, when this project was abandoned * * * the conspiracy or common design was at an end, and that any thing done thereafter was the individual act of the party doing it." In affirming a judgment of conviction of murder this court stated (152 Cal. at page 335, 92 P. at page 863): "If, as matter of law, it can be said that the criminal combination embraced no more than this contemplated burglary, and that the shooting of Robinson was not within the reasonable and probable consequences of the common unlawful design, it would follow that no case was made out against the appellant. But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury."

In the present case the jury were properly instructed in accord with the law of the above cited cases. (See, also, People v. Bringhurst (1923), 192 Cal. 748, 751, 221 P. 897.) They were warranted in finding that Bolden did not sever his connection with the criminal enterprise when he got out of the car in Salinas with his share of the proceeds of the robbery upon the first return from the scene of the crime, if they believed that he did then leave Harper. Upon the record it seems to be indisputable that they were justified in finding that the two crimes were not separate and distinct but that the killing of Bennett was a natural and probable consequence, if not an integral part, of the common design to rob him and escape detection.

Bolden does not suggest that he made any belated express effort to disassociate himself from the unlawful enterprise at the time he parted from Harper. From Bolden's testimony the jury could infer that at that time he was primarily interested in escaping detection. He was in possession of part of the ill-gotten gains of the crime. He apparently thought that the victim was already dead. He knew that Harper intended "to go back to see about the body," although he had "wiped off * * * places that he might have touched," he expressed concern about possible fingerprints on the car and at his request Harper stated that he was "going to rub the car down." Bolden then said he "was going to leave town. He [Harper] said that would be a good idea to leave town." From the testimony of both defendants, as previously noted, it appears that from the inception of the plan they, and particularly Bolden, were concerned with avoiding the possibility of what they termed a "squawk" or "kick."

As soon as the defendants reached Salinas, Harper returned to pick up his gasoline can because, he testified, it was "positive identification." This second trip to the scene of the crime was no part of the plan to which defendant testified; of course they did not plan to leave "positive identification" at the scene of the crime. Neither was the first beating of Bennett an essential part of the plan to which they directly testified; they actually accomplished their express purpose of robbery without the use of damaging force. But thereafter Harper struck Bennett with the pinch bar in order, he testified, that they might "leave him out there." It seems plain that this assault was a natural and probable consequence of the express plan to rob and avoid detection. It seems equally plain that the defendants then believed that they had probably killed their victim. It was likewise possible for the jury to infer that the trip to remove Harper's gasoline can from the scene of the robbery was a natural and probable consequence of the plan testified to, which expressly involved the use of that gasoline can. If the trip to remove the can in order to avoid detection, identification and apprehension was in natural and probable sequence of the plan to commit the robbery, then so also, it may be inferred, was the completion of the assault upon Bennett, by killing him in order to obviate the certain hazard of his identification of the defendants, in natural and probable sequence of the unholy plan. The only apparent motive for killing Bennett was to remove such hazard. In that motive Bolden was as much interested as was Harper. The jury could well infer that the murder of Bennett by Harper (if Harper, rather than Bolden, then wielded the pinch bar) was a natural and probable result of such plan, or its miscarriage; if Bennett persisted in crawling to the road (as he had done after the first assault and after he had been dragged out into a field and left for dead or to die) he would soon be discovered and prompt investigation would give defendants insufficient opportunity to escape. (The record discloses that, in fact,

after the first assault and prior to the second the ill-fortuned Bennett was observed by two persons, neither of whom, it is to be regretted, offered him succor or made prompt report to a proper agency.)

Bolden left Salinas about noon on November 21, went by cab to Moss Landing, took another cab to Watsonville, and there, at 2:45 in the afternoon, took a bus to Los Angeles. Harper left Salinas about 8:00 o'clock the evening of November 21, hitchhiked to Gonzales, and there took a bus to Los Angeles. Although each defendant testified that they had no plan to meet after the robbery, they did meet (only by chance, they claim) at the bus station in Los Angeles, a city of approximately 2,800,000 inhabitants, at about 11:30 o'clock Monday night, November 22, and went together to El Centro or Mexicali. After a few days they again parted.

In this state of the evidence, even if we eliminate from consideration as against Bolden all of Harper's assertedly uncorroborated testimony and assume further in favor of Bolden that the killing of Bennett was not actually contemplated in advance by the conspirators, the jury were, nevertheless, warranted in finding that the murder was a natural and probable consequence of the defendants' plan to rob him and to forestall any "kick" or "squawk" incident to such robbery, and that the conspirator Bolden is, in the eyes of the law, as guilty of the murder as if he had been present at the time the fatal blows were struck.

[13-18] But it must also be emphasized that the jury had a perfect right to believe Harper in preference to Bolden. The record discloses material circumstances, a number of which have been previously related, which tend to corroborate Harper in some of the particulars wherein his testimony differed from that of Bolden. The law requiring corroboration of an accomplice does not exact corroboration in every detail. It requires only that the testimony of the accomplice "be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." (Pen. Code, § 1111.) The record here abundantly connects Bolden with the commission of the offense. By his own testimony he was a party to the conspiracy to rob Bennett; in fact, he actively promoted it and, according to strong and convincing evidence, originated the plan to rob someone, asking Harper to help in selecting a victim who had money; he participated in the robbery; he received approximately one-half of the stolen money; he expressed concern repeatedly both before and after the robbery that the project be so carried out that there be no "kick" or "squawk" and no available identification of the perpetrators of the offense; he thought that Bennett had been killed by the first assault. Under these circumstances the jury were legally bound to consider the testimony of Harper that it was Bolden who finally struck the fatal blows and we have no right under the law to disregard the testimony of Harper or to hold that the jury could not believe it. It is the established law of this state that "While the jury may consider the circumstance that a witness is an accomplice, in passing upon his credibility as a witness [citation], his testimony is not to be rejected merely because he is an accomplice, and if there is other evidence which measures up to the requirement of the Code (supra), tending to connect the defendant with the commission of the crime charged, then such testimony of the accomplice is to be considered by the jury, as is any other testimony, and must be given the weight to which the jurors may conclude that it is entitled. [Citation.] The evidence tending to connect a defendant with the commission of the crime may be slight and, when standing by itself, entitled to but little consideration. [Citation.] The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. [Citations.] The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. [Citations.] It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged." (People v. Negra (1929), 208 Cal. 64, 69, 70, 280 P. 354, 356.)

[19] It is not overlooked that each defendant testified that he was solicited by the other to participate in the proposed crime. As appears from the majority and

dissenting opinions in People v. Clapp (1944), 24 Cal.2d 835, 151 P.2d 237, and People v. Wilson (1944), 25 Cal.2d —, 153 P.2d 720, we were not in accord on the question as to whether section 653f of the Penal Code (solicitation to commit robbery, murder, etc.) is, in respect to robbery and murder, the substantial counterpart of section 275 (solicitation for, or submission to, abortion) in respect to abortion, but we are in accord that the solicitor of a crime of murder or robbery is, when the solicited offense is actually committed, for such solicitation punishable under section 31 of the Penal Code as a principal in the crime of murder or robbery.

For the reasons hereinabove stated the judgments against each defendant and the order denying defendant Bolden's motion for a new trial are affirmed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concurred.

CARTER, Justice (concurring).

I concur in the conclusion reached, but as I read the main opinion it purports to place the onus of the crimes on Bolden. In this respect I do not believe it fairly depicts the true factual situation as disclosed by the record. It is true that the two defendants undoubtedly entered into an agreement to "roll" Bennett and rob him of his money. Harper says the plan to "roll" "someone and get a piece of money" was first suggested by Bolden. On the other hand, Bolden testified that he knew nothing about any plan to rob anyone until the morning of the crime, and that he was then told by Harper that he (Harper) had their victim ready and asked Bolden to go along; that the latter would have nothing to do and that there would be no "kick." Whether Harper or Bolden was the originator of the plan, it is evident from the admitted facts in this case that Harper, unknown to Bolden, made all arrangements for the robbery and had the victim ready for the fatal trip before he informed Bolden of his plan.

Harper was a man thirty-one years of age and an ex-convict, having previously been convicted of a felony. Bolden was but twenty-six years of age and had never been in trouble before. Bolden had never seen Bennett, their victim, before the morning of the day when the crime was committed. Harper was not only well acquainted with Bennett but they worked together as truck drivers on the Church ranch. Harper persuaded Bennett to take the latter's car and make the trip to the Cole ranch. Harper conceived the ruse of the stalled car and the need of its owner for some gasoline. Harper procured the can of gasoline and put it in Bennett's car. He also secured the iron pinch bar and placed it in the rear of Bennett's car. He concocted the scheme of offering to sell Bennett a watch in order to ascertain whether Bennett had any money. With this plan all worked out, with the deadly equipment safely secreted in the rear of the car, and sitting alongside of his innocent victim, Harper directed Bennett to drive to Bolden's place of business. Whether they went there by reason of a previous plan agreed to by Bolden, as Harper says, or to inveigle Bolden to go with them and help carry out the plan, as Bolden says, is one of the disputed facts in this case. It is the word of a hardened criminal, an ex-convict, against the word of a young man who had never been in trouble before. This background of the two persons who are charged with the murder of Bennett will help to explain some further facts to be later discussed. Whether Bolden seduced the ex-convict Harper into the commission of the crime with which they are charged, or whether Bolden was beguiled by Harper, an older man and hardened criminal, to go along, Bolden did become a party to the plan to rob and murder Bennett and he is responsible for every act that was committed by either of them in furtherance of that plan. After the two returned from the first trip, Bolden says he left Harper at Salinas, took a taxicab to Moss Landing and there changed to a second taxicab for Watsonville, where he caught a bus to Los Angeles. Afterwards, Harper returned to the scene of the crime and found Bennett alive. Harper again assaulted Bennett, beat him over the head with the iron pinch bar and killed him. There is not one word of evidence or a single circumstance in this whole case which tends to show that Bolden was with Harper on this second trip, except the uncorroborated word of Harper, an accomplice and a witness impeached by the fact that he had previously suffered conviction of a felony.

In my opinion the evidence was sufficient to justify the jury in drawing an inference that Harper and Bolden entered into a conspiracy to rob Bennett and then murder him, or vice versa, so that he would not be

available to furnish information and evidence which would lead to their arrest and conviction. It is clear that the evidence of a prearranged conspiracy to murder Bennett is wholly circumstantial, but there were sufficient facts adduced by competent evidence from which the jury might conclude that such prearranged conspiracy existed. The fact that Bolden assured the witness McGee that there would be no "kick" or "squawk"; that the lethal weapon used was an iron pinch bar; that Bennett was directed to transport Harper and Bolden to a somewhat secluded place before he was assaulted and robbed; and that Bolden talked about Harper going back "to see about the body," are facts from which a reasonable inference may be drawn that it was the intention of both Harper and Bolden to kill Bennett as well as rob him. Such being the case, it is immaterial what Bolden's conduct was after he and Harper separated in Salinas after they had robbed Bennett and left him presumably dead. In my opinion the testimony of Harper that Bolden returned to the scene of the crime with him and struck the blows which resulted in Bennett's death is wholly insufficient to establish the fact that Bolden did the things testified to by Harper for the reason that Harper was an accomplice and his testimony was uncorroborated. See Pen. Code, § 1111. However, I am of the opinion that the jury were justified in drawing the inference that if Harper returned to the place where Bennett was first assaulted and administered the blows which resulted in his death, after Bolden had left for Los Angeles, the consummation of the murder was within the contemplation of the conspirators and Bolden was equally guilty with Harper of the murder of Bennett. 15 C.J.S., Conspiracy, § 74, p. 1105.

I must confess that the competent evidence connecting Bolden with the crime is not very strong, but in my opinion it was for the jury to say whether or not it was sufficient to satisfy their minds to a moral certainty and beyond a reasonable doubt that Bolden did conspire with Harper to murder Bennett as well as rob him, and, as above stated, there is evidentiary basis for an inference that such was the plan. It is not our province to weigh the evidence, but only to determine whether there is any substantial evidence, direct or circumstantial, to support the verdict. If there is such evidence, the weight to be given to it is solely a matter for the determination of the jury.

As I understand the next to the last paragraph of the main opinion, it purports to say that a different rule should be laid down with respect to abortion cases than in cases of murder and robbery where the element of solicitation is involved. I do not agree with such purported distinction, and, in my opinion, the cases of People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, and People v. Wilson, 25 Cal.2d 341, 153 P.2d 720, should be overruled and thus eliminate the confusion which they have added to the law of this state.



BLISS et al. v. CALIFORNIA COOPERATIVE PRODUCERS et al.

Civ. 7029.

District Court of Appeal, Third District, California.

Feb. 9, 1945.

Hearing Granted April 9, 1945.

1. Bills and notes ⇐348

An installment note, acquired for valuable consideration, without notice of previous infirmity, when no installment of principal or interest is unpaid, is "held in due course" by purchaser, though purchased after date for payment of first installment. Civ.Code, §§ 3133, 3164.

See Words and Phrases, Permanent Edition, for all other definitions of "Held in Due Course".

2. Bills and notes ⇐348

Installment notes, purchased shortly after dates for payment of first installments, previously paid from funds in hands of corporation bound by written contracts, of which purchasers knew, to satisfy installments when due, were "held in due course" by purchasers. Civ.Code, §§ 3133, 3164.

3. Bills and notes ⇐348

The word "overdue", as used in statute defining "holder in due course", means, with respect to installment notes, that they

must be acquired by holder before any installment is due and unpaid. Civ.Code, § 3133.

See Words and Phrases, Permanent Edition, for all other definitions of "Overdue".

4. Bills and notes ⇐497(1)

Every holder of note is deemed prima facie to be holder in due course. Civ. Code, § 3140.

5. Bills and notes ⇐348

A transferee of note, principal of which is payable in installments, of which none are overdue and unpaid at time of transfer, is "holder in due course". Civ. Code, §§ 3133, 3164.

See Words and Phrases, Permanent Edition, for all other definitions of "Holder in Due Course".

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

On petition for rehearing.

Original opinion, 154 P.2d 929, modified, and petition denied.

B. J. Galbreath, of Marysville, and Muldary & Elkington, of San Francisco, for appellant.

Chas. A. Bliss, and Irvin C. Ford, both of Sacramento, for respondent.

PER CURIAM.

On petition for rehearing it is ordered that the opinion which appears in 154 P.2d 929 be modified as follows:

On page 930, 1st Col., line 4 of opinion, after the word "plaintiffs" add an apostrophe and the word "assignor."

On page 930, Col. 2, line 10 from the top, after the word "plaintiffs" add an apostrophe and the word "assignor."

On page 933, Col. 2, last line, strike out the sentence "The judgment is affirmed" and insert in lieu thereof the following: "The judgment is modified by striking out the language, 'Helen A. Winchester, $6,253.31, together with interest on the sum of $3,750. from the 18th day of March, 1942, at the rate of 7% per annum, until the date of entry of this judgment;' and inserting, 'Helen A. Winchester, $5,877.56, which includes the balance of principal and interest thereon to date of entry of judgment;'. As so modified the judgment is affirmed."

[1-4] In response to the chief contention of petitioners that a note payable in installments, which is acquired after the date when the first installment is payable, is not held "in due course" even though that payment was actually made on or before it became due, we have concluded that the instrument was so held because no installment was "overdue", Sec. 3133, Civil Code, and it was not then subject to dishonor. That section determines that it is held in due course if it is acquired "before it was overdue, and without notice that it had been previously dishonored, if such was the fact." Section 3164 of the same code provides that an instrument may be dishonored only for nonpayment when payment is refused on presentment, or when it is "overdue and unpaid." It seems clear that if an installment note is acquired for a valuable consideration without notice of previous infirmity when no installment of principal or interest is unpaid and the note is therefore not subject to dishonor it is held in due course even though it is purchased after the date when the first installment was payable. In this case, while the notes were acquired shortly after the dates when the first installments were payable, they were neither overdue nor subject to dishonor since those installments had been previously paid in full from funds in the hands of the corporation which, by the terms of written contracts of which the purchasers had knowledge, was bound to satisfy the installments when they became due on January 2, 1928. We assume the word "overdue", as it is used in Section 3133 of the Civil Code defining the term "holder in due course", means with respect to installment notes, that they must be acquired before any installment is due and unpaid. The word overdue is defined in Webster's New International Dictionary, 2d Ed., page 1739, as "Due and more than due; delayed or unpaid." Every holder is deemed prima facie to be a holder in due course. Sec. 3140, Civil Code.

[5] The foregoing construction of the meaning of the term overdue with reference to what constitutes a holder in due course appears to have been adopted by the text-writers and authorities. Hall v. E. W. Wells & Son, 24 Cal.App. 238, 248, 141 P. 53; Archibald Hardware Co. v. Gifford, 44 Ga.App. 837, 163 S.E. 254; 1 Daniel on Negotiable Inst., 5th Ed., p. 781, sec. 787; 10 C.J.S., Bills and Notes, p. 800, § 313; 8 Am.Jur. 178, sec. 432. In the Hall case,

supra, the court quotes with approval from Daniels on Negotiable Instruments, as follows [24 Cal.App. 238, 141 P. 57]: " 'If the note be payable by installments, it is dishonored when the first installment becomes overdue and unpaid.' " In 10 Corpus Juris Secundum, supra, at page 800 it is likewise said, "Where the principal of a note is payable in installments and one installment is overdue and unpaid at the time of transfer of the note, the transferee is not a holder before maturity." The converse of that language would necessarily be true. When the principal of a note is payable in installments and no installment is overdue and unpaid at the time of the transfer, the transferee is a holder in due course. It is inconsistent to say that an installment of a note is either due or overdue, when in fact it has been actually paid, particularly when payment is made before the date of maturity of the installment.

With the modifications of the opinion heretofore mentioned, the petition for rehearing is denied.



68 Cal.App.2d 197

KEEGAN et al. v. KAUFMAN BROS. et al.

Civ. 7076.

District Court of Appeal, Third District, California.

Feb. 26, 1945.

1. Appeal and error ⇐1008(1)

In action for market value of lambs, purchased by defendants from one who purchased them from plaintiffs' defaulting vendee, whether plaintiffs or defendants were negligent, whether plaintiffs clothed their vendee with such indicia of title to lambs as to estop plaintiffs from asserting title thereto against defendants, and whether statute, protecting bona fide purchasers for value from one clothed with full indicia of ownership of property sold through true owner's negligence, applied, were fact questions for trial court. Civ.Code, § 3543.

2. Appeal and error ⇐989

On appeal from judgment on trial court's fact findings, only question is whether evidence as whole, viewed in light most favorable to prevailing party, was sufficient to warrant trial court's conclusion, and appellate court may determine only whether there was any substantial evidence, whether contradicted or not, to support such conclusion.

3. Appeal and error ⇐931(1)

On appeal from judgment on trial court's fact findings, reviewing court will accept as true all evidence tending to establish correctness of such findings and judgment and resolve every substantial conflict in evidence as favorably as possible in support of judgment.

4. Appeal and error ⇐1008(1)

In action for market value of lambs, purchased by defendants from one who purchased them from plaintiffs' defaulting vendee, whether plaintiffs heard second purchaser's remark to such vendee that he desired to re-sort lambs, which were being run out to be weighed before loading them on railroad cars for shipment, during which defendants purchased them, was fact question for trial court.

5. Estoppel ⇐118

In action for market value of lambs, purchased by defendants from one to whom plaintiffs' defaulting vendee thereof sold them, evidence warranted trial court's fact findings and conclusions therefrom that plaintiffs were estopped from asserting title to lambs as against defendants or their vendor and that he and defendants were bona fide purchasers of lambs for value from one clothed with full indicia of ownership thereof through plaintiffs' negligence, so as to bar recovery by plaintiffs. Civ.Code, § 3543.

6. Appeal and error ⇐1071(5)

Where judgment appealed from is amply supported by unobjectionable fact findings of trial court, objectionable findings on other issues are immaterial.

7. Estoppel ⇐72
Sales ⇐234(8)

Where persons selling lambs to one whose purchase-money checks were dishonored failed to rescind sale and avoid purchaser's title to lambs before his sale thereof to another, second purchaser and persons to whom he subsequently sold lambs acquired good title thereto as purchasers in good faith for value without notice of any defect in original sellers' title. Civ.Code, §§ 1744, 3543.

8. Estoppel ⇐94(1)

One standing by while his property is sold to another is estopped from setting up title thereto against purchaser.

9. Courts ⇐95(1)

An opinion of Oregon Supreme Court need not be followed, under rules of comity, by California Court arising out of an analogous transaction, where facts in Oregon case were essentially different from those stipulated in California case.

10. Appeal and error ⇐1010(1)

Where trial court's findings are supported by substantial evidence, appellate court will not adopt appellants' proposed findings superseding those of trial court. Rules on Appeal, rule 23(a).

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Action by Charles Keegan and another, as partners, against Kaufman Brothers, a copartnership, and the members thereof, for replevin of certain lambs, conversion thereof, and recovery of the market value thereof under a count of complaint for money had and received. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Single, Bryant, Cook and Herrington, of San Francisco, for appellants.

Bush & Ackley, of Oakdale, for respondents.

PEEK, Justice.

Plaintiffs, as partners, brought this action to recover from defendants, also a partnership, the market value of 272 heavy wether lambs. The complaint is in three counts—the first count sought replevin of the lambs; the second count was for conversion thereof, and the third count was for money had and received. Defendants' answer controverted most of the allegations of the complaint, and as a separate defense alleged the lambs had been purchased in good faith for cash and without any notice or knowledge that any one other than their vendor claimed any interest therein. The trial court found in favor of defendants, and plaintiffs have appealed.

Prior to the trial and for the purposes thereof, the parties stipulated in writing to certain facts, all of which the trial court found to be true. Said stipulation appears in the record as plaintiffs' Exhibit I, and states in part that plaintiffs, who are residents of the state of Oregon, together with one Patrick Charles, on May 15, 1940, agreed with one Boylen, who was well and favorably known to them, to sell to him their lamb crops, delivery to be made F.O.B. railroad cars at the Umli, Oregon stock yards between September 10th and 20th. On September 20th Boylen took delivery of the lambs, and through his agent R. E. McGreer delivered to plaintiffs and Charles separate checks for the balance of the purchase price due them. The lambs delivered to Boylen were segregated and placed in different corrals. On the same day the lambs in question were purchased from Boylen by one W. J. Horan, who paid Boylen in full. The lambs so purchased by Horan were weighed, segregated and loaded on cars, and, in accordance with arrangements made that same day by Horan, were shipped to Oakdale, California. Charles and Horan were present at all times and actively assisted in such operations. Plaintiff Charles Keegan assisted only until noon of that day. None of those present expected the sheep to be held at Umli in corrals or in cars for the reason of the lack of proper facilities for handling and the resulting shrinkage which would follow. The uniform stock certificate shipping contract made out by the Southern Pacific Company designated Horan as shipper and one J. J. Sawyer as consignee. Sawyer was unable to take the sheep, and before arrival in Oakdale they were sold to defendants, who took delivery on September 23rd and paid Horan in full. The shipping charges were paid by respondents. On September 25th and 26th the checks given by Boylen to Keegan and Charles were dishonored, and plaintiffs immediately instituted inquiry concerning the whereabouts of the sheep. On October 4th they were found in the possession of defendants at Oakdale. Prior to the filing of the present action Charles assigned all of his interest therein to plaintiffs.

In addition to the foregoing agreed facts, which the trial court found to be true, further evidence was adduced in support of the findings of said court that Horan purchased the lambs from Boylen in good faith for value and without notice or knowledge that either plaintiffs or Charles had or claimed to have any right, title or interest in the lambs; that defendant purchased the lambs from Horan at Oakdale,

California, on September 23, 1940, at which time neither Horan nor the defendants had any notice or knowledge that either plaintiff or Charles claimed to have any right, title or interest in the lambs, and that defendants bought the lambs in good faith and for value; that plaintiffs and said Charles were present at the time and place of the sale and delivery of the lambs from Boylen to Horan and they then and there knew the lambs were being sold and they then and there acquiesced in the sale and actively assisted in the physical operations attending the sale and delivery of the lambs from Boylen to Horan; that plaintiffs and said Charles by their acts and conduct at the time of the sale from Boylen to Horan had clothed Boylen with indicia of title to the lambs and the power to dispose of them to innocent third purchasers; that Horan and defendants are innocent third party purchasers and that plaintiffs and Charles are estopped from asserting any right, title or interest in the lambs as against Horan or defendants.

From the facts so found the trial court concluded:

(1) That plaintiffs and said Charles are estopped from asserting any right, title or interest in the lambs as against the defendants or Horan; (2) that defendants are protected by Section 3543 of the Civil Code—both Horan and defendants being bona fide purchasers for value from one who, at the time of said purchase, was, through the negligence of plaintiffs, clothed with full indicia of ownership of the lambs. Judgment was entered accordingly.

Appellants contend that the trial court erred in concluding (1) that they and Charles were negligent; (2) that appellants and Charles clothed Boylen with indicia of title to the lambs and were therefore estopped to assert their title; (3) that section 3543 of the Civil Code is applicable, and (4) as a final contention, appellants charge that respondents were negligent and therefore were not entitled to a judgment.

[1] Whether or not plaintiffs or defendants were negligent, whether or not plaintiffs clothed Boylen with such indicia of title as to estop them from asserting their title as against defendants, and whether or not Section 3543 of the Civil Code is applicable, are all questions of fact.

[2, 3] Under such circumstances a reviewing court is concerned only with one question i.e., is the evidence as a whole when viewed in the light most favorable to the prevailing party, sufficient to warrant the conclusion reached by the trial court? The power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicated or uncontradicated, which will support the conclusion reached by the trial court. It will accept as true all evidence tending to establish the correctness of the findings and judgment, and where, as here, the evidence is conflicting in many details it will construe and resolve every substantial conflict as favorably as possible in support of the judgment. Estate of Bristol, 1943, 23 Cal. 2d 221, 143 P.2d 689.

[4] We have previously referred to some of the facts appearing in the stipulation. In addition thereto Horan testified at the hearing that Charles put the lambs on at one end of the scales, that he (Horan) was at the other end, a distance of 10 or 12 feet away, and counted the lambs as they came off the scales; that Keegan stood at the center of the scales taking down the weights of the sheep as they were called off by an agent of the railroad company; that when lambs were run out to be weighed he (Horan) stated to Boylen that he desired to re-sort them; that when he so addressed Boylen, Keegan and Boylen were standing together at the center of the scales; that both Keegan and Charles assisted with the re-sorting; that these operations were made under his (Horan's) directions and instructions, and that when the lambs were loaded on the cars the loading likewise was done in accordance with his instructions. He further testified that he took no bill of sale from Boylen and that it was not customary to do so in buying or selling sheep.

Keegan, when called as a witness in his own defense, testified in response to a question by the court that he neither saw nor heard anything on the day the lambs were shipped nor did he have any knowledge that Horan was buying the lambs. Charles was also called as a witness for plaintiff and testified in response to questions asked by the court that he noticed no deals between Boylen and Horan with regard to the lambs nor did he observe or hear any conversation between Boylen or his agent and Horan regarding the latter's purchase of the sheep. Whether or not plaintiffs heard the remark of Horan was likewise a question of fact for the

trial court. People v. Douglas, 1935, 9 Cal.App.2d 63, 65, 48 P.2d 725.

[5] Applying the rule previously announced in Estate of Bristol, supra, we find no occasion to warrant interference with the findings and conclusions of the trial court. See People v. Douglas, supra.

[6] Even though it could be said that certain findings of the trial court are objectionable, nevertheless, if the judgment is amply supported by findings which are not objectionable, findings upon other issues become immaterial. 2 Cal.Jur. 1028 and cases cited; see also Owen v. Cohen, 1941, 19 Cal.2d 147, 151, 119 P.2d 713.

[7] Furthermore it is evident from the agreed facts and the provisions of Section 1744 of the Civil Code, that plaintiffs and their assignor had only a right to rescind the sale to Boylen since his title to the lambs was merely voidable. However, as his title was not voided by plaintiffs prior to the sale to Horan the latter acquired good title, which the court found, upon sufficient evidence, he had purchased in good faith for value and without notice of any defect in Boylen's title, and that respondents likewise so purchased the property from Horan.

[8] In the very similar case of Meadows v. Hampton Live Stock Comm. Co., 1942, 55 Cal.App.2d 634, 131 P.2d 591, the plaintiff therein sold cattle to a livestock commission company whom the plaintiff knew to be so engaged and who would offer the stock for re-sale. In payment thereof he accepted drafts, stating he would not give a bill of sale until he had the money. The plaintiff was present while the cattle were being unloaded and weighed. The cattle were then sold to third persons in the usual course of the commission company's business. When the plaintiff presented the drafts for payment they were dishonored. On appeal the judgment of the trial court for the plaintiff was reversed. The reviewing court held that the defendants purchased the stock in good faith; that plaintiff by his acts "unquestionably entrusted the Hampton Company with the indicia of ownership", and concluded that "the owner of property who clothes another with the apparent title to it, or the power of disposition of it, is estopped from afterwards asserting his title against an innocent third party who has thereby been induced to deal with the apparent owner in reference thereto. Wendling Lbr. Co. v. Glenwood Lbr. Co., 54 Cal. App. 691, 202 P. 929; Pacific Finance Corp. v. Hendley, 103 Cal.App. 335, 284 P. 736, [285 P. 1048]. One who stands by while property to which he has title is sold is estopped from setting up title against the purchaser. Snodgrass v. Ricketts, 13 Cal. 359."

The third contention raised by appellants regarding the applicability of section 3543 of the Civil Code was likewise considered by the reviewing court in the Meadows case [55 Cal.App.2d 634, 131 P.2d 592], wherein it was stated that said section "has been applied to bona fide purchasers for value from those who have been clothed with the indicia of ownership. It has been held that although the true owner is guilty of no more than misplaced confidence, such misplaced confidence is negligence within the meaning of section 3543. Phelps v. American Mortgage Co., 40 Cal.App.2d 361, 366, 104 P.2d 880; Camerer v. California Sav., etc., Bank, 4 Cal.2d 159, 172, 48 P. 2d 239, 100 A.L.R. 667."

[9] Appellants strongly rely upon the case of Keegan & Donnelly v. Lenzie, 171 Or. 194, 135 P.2d 717, which was an outgrowth of the same sale by plaintiffs herein and Charles to Boylen. In that case the sheep were sold by Boylen by telephone directly to one Lenzie, a resident of the State of Washington. The Oregon courts found for plaintiffs, and it is urged by plaintiffs herein that under the rules of comity the determination of the highest court of a sister state should be followed by the courts of this state "particularly when the same set of facts are involved in both instances."

An examination of the opinion in the Lenzie case shows the facts therein set forth to be essentially different from those presented to the trial court herein. As in the present case, the parties therein stipulated to certain facts, which, among other things, disclose that Lenzie was not present at Umli nor did he participate in the weighing, segregating or loading, nor did he have any conversations regarding the sheep as did Horan in the instant case. His sole activity in relation to his purchase of the sheep was an acceptance of Boylen's offer by telephone to sell the same to him. The trial court therein concluded that plaintiffs in no way acted so as to clothe Boylen with indicia of title; that the conduct of plaintiffs was not such as to estop them to assert their title; that it was not the intention of the parties that title

should pass but that it was reserved in plaintiffs until Boylen's drafts had been honored. The effect of the opinion in that case (page 772 of 135 P.2d) was the same as the conclusion we have reached herein, namely, that there was sufficient evidence to support the findings of the trial court.

[10] As we have previously concluded that the findings of the trial court are supported by substantial evidence, we find no merit in appellants' request to this court, under Rule Number 23 (a) of the Rules on Appeal, to adopt certain proposed findings superseding those made by the trial court.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



68 Cal.App.2d 184

COCKRILL et al. v. STAMOULES et al.

Civ. 3143.

District Court of Appeal, Fourth District, California.

Feb. 23, 1945.

1. Arbitration and award ⇐6

Where plaintiffs were proceeding to foreclose deeds of trust covering defendant corporation's land and would have procured a receiver to take possession of land and crops thereon had a settlement not been reached with individual defendant who as a trespasser entered upon land and planted crops, plaintiffs' agreement with individual defendant to arbitrate the reasonable amount which such defendant should pay for use of land was supported by a sufficient consideration.

2. Arbitration and award ⇐1

The Code sections pertaining to arbitration apply only to written arbitration agreements. Code Civ.Proc. §§ 1280, 1281.

3. Arbitration and award ⇐6

Where defendant, with full knowledge of situation, agreed to pay to plaintiffs for use of land whatever was proper as fixed by a third person whom defendant himself selected and agreed to abide by award, award was valid and binding upon defendant, though transaction was not strictly an arbitration.

4. Appeal and error ⇐1056(1)
Arbitration and award ⇐85(3)

In action to recover upon an award in the nature of an arbitration award for defendant's use, as a trespasser, of land which was subject to trust deeds which plaintiffs were foreclosing, exclusion of evidence that about four months after action was filed defendant offered to pay full amount due on trust deeds together with costs in return for an assignment of trust deeds to defendant, under circumstances was neither erroneous nor prejudicial to defendant.

5. Interest ⇐66

Where plaintiffs obtained an award in the nature of an arbitration award for two-thirds of proceeds of crops planted by trespassing defendant after payment of expense, and thereafter defendant harvested and sold crops and exact figures were unknown to plaintiffs and complaint alleged on information and belief that crops produced a specified amount after payment of expenses and prayed for judgment for two-thirds of such amount, interest was properly allowable on correct amount, even though less than amount demanded, from date when correct amount should have been paid under award.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by Robert D. Cockrill and others against S. Stamoules and others to recover for the use of certain land. Judgment for plaintiffs, and named defendant appeals. Upon named defendant's death, K. G. Murphis, as executor of the last will and testament of named defendant, was substituted as a defendant.

Affirmed.

L. M. Linneman, of Dos Palos, for appellant.

Lawrence W. Young, of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action to recover for the use of certain land during the crop year 1941-1942. The real plaintiffs, the Cockrills, will be referred to as the plaintiffs, and the

original defendant, S. Stamoules, will be referred to as the defendant, although he died after judgment and his executor has been substituted.

This action involves a crop of barley raised on a certain 150 acres of land. In 1934, a corporation which owned the land executed and delivered to the plaintiffs a note for $1,962.50, secured by a deed of trust on 80 acres thereof. At the same time, it executed another note for the same amount secured by a deed of trust on the other 70 acres in favor of a Mr. and Mrs. Ritter, whose rights were assigned to the plaintiffs insofar as this action is concerned. These notes were due and payable on January 1, 1942, and were not paid. The powers of this corporation had been suspended in 1937 for failure to pay the state corporation tax and a number of liens for taxes, state and federal, appeared against the property.

In the fall of 1941, the defendant, without the permission of anyone and as a trespasser, entered upon said land and planted a crop of barley thereon. Early in May, 1942, as this crop was rapidly maturing, the plaintiffs employed Mr. Savage, an attorney, to obtain a settlement from the defendant and to foreclose the deeds of trust and to protect their interests either by taking possession of the land and crops or by instituting receivership proceedings. After several conferences an agreement was reached to the effect that the defendant would pay whatever was right for the use of the land and that it should be left to one Pucheu, as sole arbiter, to determine what was right under the circumstances. Pucheu met with both parties, who gave him the facts, with a list of the expenses incurred and estimated to be incurred in producing and harvesting the crops. Pucheu later made an "award" in writing which was that the crop should be harvested, that all expenses of producing the crop should first be deducted and paid to the defendant, that one-third of the balance should be paid to the defendant and two-thirds to Mr. Savage for the owners of the trust deeds, and that the harvesting and sale of the crop should be carried on by the defendants in consultation with Mr. Savage. The defendant hurriedly harvested the crop and kept the proceeds, and this action followed.

The complaint alleged the general facts and, among other things, alleged that the corporation mentioned had become insolvent and lost its corporate charter; that the value of the land was inadequate to pay the amounts due on the deeds of trust; that the defendant, when contacted by Savage, stated that he was willing to pay the plaintiffs a reasonable amount for the use of the land and suggested that what was fair and reasonable be submitted to a single arbiter; that the parties agreed on Pucheu as sole arbiter and that an award was made on June 1, 1942; and that the defendant had refused to comply with the award. It was further alleged on information and belief that the net amount received for the crops after deducting expenses was $3,690 and the prayer was for judgment against the defendant for $2,460, with interest from June 15, 1942. During the trial, and on order of the court, the complaint was amended to bring in the corporation that owned the legal title and its directors as parties to the action. This was done, these parties were served but failed to appear, and their default was entered. The court found in all respects in favor of the plaintiffs and, in accordance with the evidence as to the net amount received from the crops in question, entered judgment in favor of the plaintiffs for $955.13, with interest thereon from June 15, 1942, and this appeal followed.

The appellant's main contention is that the evidence fails to show any agreement for a real submission to an arbitration, that what occurred was merely an appraisal of the rental value of this property, and that it follows that there was no valid award which could serve as a basis for the judgment. In this connection it is argued that the plaintiffs, as beneficiaries under the deeds of trust, were not entitled to the rents, issues and profits of the incumbered property; that the question of liability of the defendant to the plaintiffs was not submitted to or passed upon by the so-called arbitrator; and that no liability on the part of the defendant could be or was established by the appraisal or award which was made.

[1] It may first be observed that this was something more than a mere appraisal of the rental value of the property in the ordinary sense. The defendant was a trespasser who had entered the property without right and who had produced a crop which was nearly ready to harvest. The plaintiffs had given notice under the deeds of trust and were proceeding to foreclose the same. As alleged in the complaint, and found by the court, plaintiffs' security was

inadequate to pay the full amount due on the deeds of trust and the plaintiffs could and would have procured a receiver to take possession of the land and crops had a settlement not been reached with the defendant. Under these circumstances the agreement with the defendant was made and a sufficient consideration therefor appears. When called in the defendant said: "I want to pay. I knew I would have to pay somebody. I want to do what is right." When both parties were talking the matter over with Pucheu the defendant told Pucheu that he wanted him to arbitrate the matter and "do what was fair" with reference to the barley crop. Pucheu said he would do this and both of the interested parties agreed "to abide by his award". In his written award Pucheu said: "You have both submitted to me as arbiter the question as to what is fair with reference to the one hundred and fifty-acre barley crop planted by Mr. Stamoules near Mendota. I have given the matter careful consideration and as arbiter now make the following award. (Here follows the award as above referred to.)"

[2, 3] There is no question that this was not a statutory arbitration as the statutes apply only to written arbitration agreements. Sections 1280 and 1281, Code Civ. Proc. It may also be conceded that some of the elements of a common law arbitration are here absent, but it does not follow that the plaintiffs were not entitled to a judgment. Taking the evidence most favorable to the plaintiffs, the defendant, with full knowledge of the situation and position of the plaintiffs, agreed to do the right thing under the circumstances and to pay to them, for the use of the land, whatever was right and proper under the existing circumstances, as fixed by a third person whom the defendant himself selected, and agreed to abide by the award that should thus be made. There was a sufficient agreement of the parties and while the matter was not strictly an arbitration it constituted a method devised and agreed upon by the parties for determining what should be paid to the plaintiffs for the use of this land under the unusual circumstances then existing. Under such circumstances it makes no difference whether or not this was technically an arbitration and, in any event, the award made was valid and binding upon the defendant. Rives-Strong Bldg. v. Bank of America Nat. Trust & Savings Ass'n, 50 Cal.App.2d 810, 123 P.2d 942. The award was based upon an agreement of the parties made upon sufficient consideration, the defendant had agreed to pay the amount involved as soon as it was determined, and no reason appears why he should not be bound by his agreement. There is nothing in the defendant's claim that he is not protected from being forced to again pay the owner of the legal title to the land, since this owner was made a party to this action and the judgment includes a provision that it was entitled to nothing for the use of the land for this year.

[4] The defendant further contends that the court erred in refusing to admit evidence to show that about four months after this suit was filed he offered to pay the full amount due on the trust deeds, with any costs incurred, to the plaintiffs, upon their assigning to him the deeds of trust. It is argued that this evidence was admissible as bearing on the question of the insufficiency of the plaintiffs' security. Aside from any other consideration, the purported offer was not made until several months after the action was filed and such evidence could not affect or alter the situation which existed at the time the agreement was made in May, 1942. While the offer itself was not admitted, the matter was gone into at considerable length and there is testimony that while the plaintiffs desired to accept the offer they were unable to do so because of intervening circumstances which made this impossible. Neither error nor prejudice appears in this connection.

[5] The only other point raised is that the court erred in allowing interest to the plaintiffs from June 15, 1942, to the date of the judgment. It is argued that this was not allowable since the judgment was for an amount less than that sued for and no demand had been made for any lesser sum. The complaint alleged, on information and belief, that the crops produced a certain amount after the payment of expenses, and judgment was asked for two-thirds of that amount. The defendant had harvested and sold the crops and the exact figures were unknown to the plaintiffs, and no reason appears why interest should not have been allowed on the correct amount from the date when it should have been paid.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

In re PHILLIPS' GUARDIANSHIP.

PHILLIPS et al. v. PHILLIPS.*

Civ. 12750.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1945.

Hearing Granted April 26, 1945.

1. Judgment ⇐102

Where complaint is amended in a material particular after a defendant has defaulted, judgment cannot be taken against such defendant without serving amended complaint on him and giving him an opportunity to appear and answer the new matter.

2. Guardian and ward ⇐13(3)

Probate court in which petition for appointment of guardian of person and estate of a minor has been filed has inherent power to allow the filing of amended petition or amendments to petition already on file. Probate Code, § 1440.

3. Guardian and ward ⇐13(3)

Where petition for mother's appointment as guardian of minor daughter allegedly without estate was contested by minor's father and paternal grandmother and, after its submission on the merits, mother procured order setting it for further hearing of which father and grandmother were given notice but at which they failed to appear, probate court abused its discretion in permitting filing of amended petition at such further hearing, materially enlarging the issues without giving father and grandmother notice thereof and opportunity to be heard on new issue of appointment. Probate Code, §§ 1440, 1441.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the guardianship of the person and estate of Deanne Phillips, a minor, wherein Bertrice Marie Phillips, mother of the minor, filed a petition for her appointment as guardian, to which Donald E. Phillips and Mary Phillips, father and paternal grandmother, respectively, of the minor, objected. From an order appointing petitioner guardian of the person and estate of the minor, the objectors appeal.

Order reversed.

Dorris & Fleharty, of Bakersfield, for appellant.

Fabian D. Brown, of San Francisco, for respondent.

DOOLING, Justice pro tem.

Appellants appeal from an order appointing respondent guardian of the person and estate of the minor daughter of respondent and of appellant, Donald Phillips. A previous order in this matter was reversed by this court in Guardianship of Phillips, 60 Cal.App.2d 832, 141 P.2d 773. As stated in that opinion Bertrice Phillips, the mother of Deanne Phillips, a minor, filed a petition for her appointment as guardian of said minor in the Superior Court in San Francisco. Appellants herein, who are the father and paternal grandmother of the minor, pursuant to a notice of hearing of said petition served upon them, appeared to contest the granting of respondent's petition. They made a motion to transfer the proceeding to Kern County and that motion was submitted. The court without first acting on the motion to transfer proceeded to hear the testimony on the merits of the petition for guardianship and that matter was also submitted. Thereafter the court granted the motion to transfer and the order granting that motion was reversed by this court on the prior appeal. In our opinion in that case we said (60 Cal.App.2d 836, 141 P.2d 775):

"We do not wish to be understood as expressing any opinion as to whether the petition should be granted or denied but as the superior court in San Francisco must pass upon the petition upon the merits, we believe it appropriate to make certain observations. The petition alleged 'that said minor has no estate.' It therefore appears that appellant sought to invoke the jurisdiction of the superior court in the county in which the minor was 'temporarily domiciled' for the purpose of obtaining an order appointing appellant as guardian of the minor's person. It also appears that, in the divorce proceeding in the superior court in Kern County, the interlocutory decree contained provisions for the custody of the minor, which provisions may be changed by that court at any time upon a proper showing. In passing upon the petition upon the merits in the present proceed-

* Subsequent opinion 164 P.2d 481.

ing, it will be appropriate for the superior court in San Francisco, in the exercise of its jurisdiction, to determine among other things whether under all the circumstances 'it appears necessary or convenient' to appoint a guardian of the person of said minor. Probate Code, sec. 1440.

"The order appealed from is reversed with directions to the trial court to pass upon the petition upon the merits."

Since the parties had already had a full hearing on the merits, under the order of reversal of this court the probate judge to whom the matter had already been submitted might have decided it without taking further evidence. However counsel for the petitioner Bertrice Phillips procured an order from the court setting the petition for further hearing on the merits and served notice of the time and place of such further hearing on counsel for the father and grandmother, appellants herein. Whatever their reason for such action the appellants failed to appear at this hearing.

When the matter was called for further hearing counsel for the petitioner asked and obtained leave to file an amended petition. The amendment consisted in the addition of the italicized words to the allegations of paragraph III of the original petition:

"it is *both* necessary *and convenient* that a guardian be appointed to properly care for said minor *and her estate*" and in substituting for the allegation of paragraph IV of the original petition, "That said minor has no estate", the following:

"That said minor will have estate consisting of Five Thousand Dollars ($5000.00), conditioned exclusively upon the appointment of your petitioner as the guardian of her person and estate."

In support of these new allegations the maternal grandmother was placed on the stand and testified that she had executed an agreement with petitioner Bertrice Phillips whereby she agreed to pay $5000 to the minor, $500 upon the signing of the agreement and the balance at the rate of not less than $500 per year "conditioned upon the appointment of Bertrice Phillips as the guardian of the person and estate of Deanne Phillips." This agreement was introduced into evidence together with a cashier's check for $500 representing the initial payment under it. In answer to a question of the probate judge as to the purpose of this showing counsel for petitioner stated:

"I feel we are entitled to make a showing of necessity and convenience. It certainly is convenient to have a guardian appointed if an estate of $5000 can be built up by the appointment of the guardian. I think it is a definite convenience and also the question of necessity. The minor would not have any estate if it were not for the appointment, and it will have an estate of $5000, and none of it will be used for maintenance or for the expenses of this proceeding, and I think that it is an important thing in the matter of convenience."

We express no opinion on the enforceability of this apparently novel agreement or on the weight, if any, to be given to it by the probate court, particularly in view of its being conditioned on that court's deciding a contested proceeding before it in a particular way, because those questions have not been argued. It does appear, however, that counsel for respondent argued in the probate court that the existence of the agreement, including the fact of its being conditioned on the court's appointing the respondent, should be given considerable weight; and appellants were not present to meet this new issue or to argue its weight or materiality. These facts lend force to the point which appellants do make on this appeal.

[1] That point is that it was a prejudicial abuse of the court's discretion to permit the amendment of the petition in a material particular and to receive evidence in support of the new material allegations without any notice to them that such new issues were to be tendered and considered by the court. Appellants cite Cole v. Roebling Const. Co., 156 Cal. 443, 105 P. 255; Tappendorff v. Moranda, 134 Cal. 419, 66 P. 491; Linott v. Rowland, 119 Cal. 452, 51 P. 687; Reinhart v. Lugo, 86 Cal. 395, 24 P. 1089, 21 Am.St.Rep. 52; and Zierath v. Superior Court, 35 Cal.App. 788, 171 P. 112. These cases all announce the familiar rule that where a complaint is amended in a material particular after the default of a defendant a judgment cannot be taken against such defendant without serving the amended complaint on him and giving him an opportunity to appear and answer the new matter.

[2] Respondent replies that under Probate Code, secs. 1440, 1441, there is no re-

quirement that the petition for appointment, either original or amended, be served on any party, the only service required being of a notice as provided in sec. 1441. It may be remarked that no provision for filing an amended petition is expressly made in these code sections. The procedure outlined requires the filing of a petition (sec. 1440) and "Before making the appointment, such notice as the court or a judge thereof deems reasonable must be given * * *" (sec. 1441). We have no doubt of the inherent power of the court to allow the filing of an amended petition or amendments to a petition already on file. But where the petition as amended alleges additional material facts it would seem logical to regard it as a new petition filed under sec. 1440 which would require a new notice under sec. 1441. The service of notice puts the party served on notice that a petition has been filed. He may examine the files and inform himself of the allegations of the petition, and having so informed himself he can determine the course which he wishes to take in the face of the allegations of the particular petition. In this respect he is in no different position than a defendant served with a complaint in a civil action. However we need not attempt to lay down any broader rule in this opinion than is necessary to decide the particular case before us.

[3] In this case the proceeding had already become an adversary one between the parties by the appellants' appearance before the probate court on the original hearing in response to the original notice. The issues as made by the original petition were known to appellants and they had introduced their evidence in opposition to that petition. On the reversal of the order transferring the proceeding to Kern County this court directed the probate court "to pass upon the petition upon the merits." When notice of a further hearing of the matter was served on appellants' counsel they were entitled to believe that no new issues would be inquired into, and we must assume that they were satisfied to rest their case on the issues already made upon the testimony that they had produced on the first hearing. They took their chances on not being present to rebut any new evidence addressed to those issues, but they had no notice that additional issues of a material character would be raised upon the "further hearing." We believe, under the circumstances of this case, that it was an abuse of the sound discretion of the court to permit the issues to be enlarged in the material fashion in which they were without giving appellants notice of the filing of the amended petition and an opportunity to be heard in opposition to the new issues introduced.

While we have found no authority directly in point, the situation in United States Fidelity & Guaranty Co. v. Nash, 20 Wyo. 65, 124 P. 269, 270, is quite analogous. There a defendant withdrew from the trial of an action. After his withdrawal the complaint was amended in a material particular and judgment was entered against the withdrawing defendant on this amended complaint. The Supreme Court of Wyoming said in that case:

"The refusal to take further part in the proceedings had reference to the issues then on trial. It will be presumed that the amendment of the amount sought to be recovered was made by permission of the court first had and obtained. * * * Assuming this to be so, the defendant withdrew leaving the issues just as they stood at the time.

"If the amendment affected and changed the theory of plaintiff's right to recover * * * and we think it did—then notice ought to have been given to the defendant."

Even more closely in point is In re Wiggins, 118 App.Div. 488, 103 N.Y.S. 518, 519. In that case after citation had been issued on a petition for letters of administration with the will annexed a second petition was filed by the same petitioner adding new material allegations and no citation was issued thereon. In reversing a surrogate's decree appointing an administrator the court said:

"No citation was issued on this latter petition, nor does it appear that the appellant had any notice thereof. It is clear that this latter petition, improperly described as an 'amended petition,' has no proper place in the proceedings, and must be disregarded."

The order appointing respondent guardian is reversed.

NOURSE, P. J., and GOODELL, J., concur.

TRANSPORTATION GUARANTEE CO., Limited, v. JELLINS.*

Civ. 12695.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1945.

Rehearing Denied March 28, 1945.

Hearing Granted April 26, 1945.

1. Insurance ⇐2

"Insurance" is an agreement by which one person for a consideration promises to pay money or its equivalent, or to perform some act of value, to another on the destruction, death, loss, or injury of someone or something by specified perils.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurance".

2. Insurance ⇐2

The primary requisite essential to a contract of insurance is the assumption of a risk of loss and undertaking to indemnify insured against such loss.

3. Insurance ⇐2

A contract, whereby plaintiff agreed in consideration of flat monthly payment plus fixed rate per mile of travel to furnish all gasoline, oil, tires, and batteries and to make necessary mechanical repairs of defendant's motortruck and to insure defendant's vehicle in an authorized insurance company to make good any damage done to vehicle by collision, was a contract of "insurance" and was void upon showing failure to comply with terms of insurance code. St.1935, pp. 498, 502, §§ 22, 116, 120.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Transportation Guarantee Company, Limited, against Harold Jellins, doing business as Jellins Drayage Company, to recover anticipated damages for breach of two contracts. From a judgment for plaintiff, the defendant appeals.

Reversed.

H. W. Glensor and Hilary H. Crawford, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and T. A. Westphal, Jr., Deputy Atty. Gen., for Maynard C. Garrison, Insurance Commissioner, amicus curiae.

Charles S. Wheeler, Jr., of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover anticipated damages for the breach of two contracts which defendant repudiated in April 1940. The execution of the contracts—one in 1930 and one in 1932—was admitted. The defense raised was that the contracts were void because they provided a method of insurance and did not comply with the terms of the Insurance Code. Judgment went for plaintiff on the basis of the damages anticipated by defendant's breach and his refusal to comply with the contracts until the end of their respective terms. The appeal is taken on the judgment roll.

The facts are undisputed. The contracts involved two separate motor trucks. Both called for a flat monthly payment plus a fixed rate per mile of travel. In consideration the plaintiff agreed to provide full mechanical maintenance and repair of the trucks, their bodies, batteries and electrical equipment, to insure the vehicle for the owner (defendant) in an authorized insurance company, "to make good any damage done to owner's motor vehicle by collision" with the qualification that plaintiff should have the option to repair the vehicle "or to pay the owner the value of said motor vehicle, to the extent of its book value at the time of damage", to wash and paint the vehicle, and furnish free of cost to owner, all gas, oil, tires and batteries, and to "supply" the owner with the designated motor vehicle "or a substitute therefor, for 365 days each year during the term of the contract".

On the appeal from the judgment the appellant urges that such a contract is a contract of insurance and not a simple contract for services. If this position is sound it is conceded that neither contract can be enforced and that its invalidity can be raised at any time, notwithstanding its mutual acceptance for the greater portion of its term.

The question whether the contracts are within the scope of the Insurance Code is well presented in the brief of the Attorney General appearing as amicus curiae for the Insurance Commissioner. Reference to certain sections of the Code indicate a legislative intention to embrace such activities within the area of business sub-

* Subsequent opinion 174 P.2d 625.

ject to the restrictions and limitations of the Code. Section 22 provides: "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." Section 116 provides: "Automobile insurance includes insurance of automobile owners, users, dealers, or others having insurable interests therein, against hazards incident to ownership, maintenance, operation and use of automobiles, other than loss resulting from accident or physical injury, fatal or nonfatal, to, or death of, any natural person." Section 120 provides: "Miscellaneous insurance includes insurance against loss from damage done, directly or indirectly by lightning, windstorm, tornado, or earthquake; and any insurance not included in any of the foregoing classes, and which is a proper subject of insurance."

[1] "Insurance" is defined in 29 Am. Jur. p. 47, as "an agreement by which one person for a consideration promises to pay money or its equivalent, or to perform some act of value, to another on the destruction, death, loss, or injury of someone or something by specified perils."

[2] The primary requisite essential to a contract of insurance is the assumption of a risk of loss and the undertaking to indemnify the insured against such loss. Contracts to provide personal services only, as distinguished from contracts to indemnify against risk of loss were considered by us in the recent case of California Physcians' Service v. Garrison, 155 P.2d 885. Here the contracts involve both features of service and indemnity. Hence if they merely called for the performance of necessary mechanical repairs they could be treated as contracts for services only. But they go far beyond these limitations. In agreeing to make good any damage done to the owner's motor vehicle caused by collision, and to furnish at its sole cost all tires, mechanical repairs, batteries, electrical equipment and accessories, the contract becomes one to indemnify the owner against all hazards regardless of the cause of damage. As such they come squarely within the rule of the plate glass cases—People v. Roschli, 275 N.Y. 26, 9 N.E.2d 763; People v. Standard Plate Glass & Salvage Co., 174 App.Div. 501, 156 N.Y.S. 1012. It will be said that these cases are not uniformly followed. Moresh v. O'Regan, 120 N.J. Eq. 534, 187 A. 619, disagreed with the rule of the Standard Plate Glass case, but was reversed on other grounds. The rule of the Moresh case that a contract which undertakes to do anything else than pay a sum of money upon a certain contingency is not insurance has been rejected in the better reasoned cases. Commissioner of Banking and Insurance v. Community Health Service, 129 N.J.L. 427, 30 A.2d 44; State v. Universal Service Agency, 87 Wash. 413, 151 P. 768, Ann.Cas.1916C, 1017; National Auto Service Corporation v. State, Tex.Civ.App., 55 S.W.2d 209. The rule of the Roschli case was expressly affirmed in Ollendorff Watch Co. v. Pink, 279 N.Y. 32, 17 N.E.2d 676, where the New York court held that the contract of a watchmaker agreeing with the purchaser of a watch to replace the watch if lost within the year was a contract of insurance. The rule of these cases is in harmony with the broader definition of a promise "to pay money or its equivalent, or to perform some act of value" found in the above quotation from 29 Am.Jur. p. 47.

We refrain from comment on the apparently irreconcilable decisions covering "burial expenses" and "physicians' defense" cases. See annotations in 63 A.L.R. 766, and 100 A.L.R. 1455. For a full discussion of the problem of what constitutes insurance in connection with the rendition of services see Jordan v. Group Health Ass'n, 71 App.D.C. 38, 107 F.2d 239, and recent authorities in 119 A.L.R. 1241.

Another case in point is State v. Western Auto Supply Co., 134 Ohio St. 163, 16 N.E. 2d 256, 119 A.L.R. 1236, which involved a contract of warranty of automobile tires, but further undertook to "indemnify" the owner of such tires against all road hazards including damage from blow-outs, cuts and bruises caused by defects or by collisions, whether resulting from negligence of the owner or another. The Ohio court held that the contract was one of insurance since it undertook to indemnify against loss or damage resulting from every hazard of travel.

[3] In State v. Standard Oil Co., 138 Ohio St. 376, 35 N.E.2d 437, the same court distinguished between such a contract and one which guaranteed tires against defects in material and workmanship only. Such contracts of warranty and contracts of nonprofit associations of the fraternal and consumer-cooperative type differ from the contracts of indemnity against an anticipatory hazard such as we have here and the distinction is clearly explained in the com-

prehensive opinion of the Circuit Court of Appeals in Jordan v. Group Health Ass'n, supra. Commonwealth v. Provident Bicycle Ass'n, 178 Pa. 636, 36 A. 197, 36 L.R.A. 589, was not decided on the ground of the consumer-cooperative relation of the parties, but on the theory that the contract to perform service in the repair of vehicles was not insurance because it did not call for the payment of money. We have seen that this narrow definition has been rejected in the later cases. It is wholly inconsistent with the definition of automobile insurance found in section 116 of the Insurance Code as covering owners of automobiles, and others, "against hazards incident to ownership, maintenance, operation and use of automobiles." The contracts here in question are not warranties against defects in materials or faulty construction, or agreements to "service" the vehicles only. They are contracts to pay in money or kind for damage to the vehicles or parts caused by the hazards arising from operation.

The judgment is reversed.

GOODELL, J., and DOOLING, Justice pro tem., concur.



68 Cal.App.2d 120

MacDONALD v. BUTLER.

Civ. 14639.

District Court of Appeal, Second District, Division 2, California.

Feb. 19, 1945.

Divorce ⇐332

A Michigan divorce decree requiring husband to pay alimony to wife to support his children could not be enforced as a foreign judgment under full faith and credit clause of the Federal Constitution, since such decree was not final under Michigan law because it was subject to modification by court which rendered it. Comp. Laws Mich. 1929, § 12748; U.S.C.A.Const. art. 4, § 1.

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Ellen Butler MacDonald, formerly known as Ellen W. Butler, against Milton L. Butler to establish a decree rendered in a Michigan divorce action requiring defendant to support his minor children, as a foreign judgment and to enforce such decree. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Donald S. McMillan and Fred W. Chase, both of Glendale, for appellant.

Glenn Whitney, of Glendale, for respondent.

W. J. WOOD, Justice.

In this action plaintiff sought to have a judgment entered by the superior court of Los Angeles county for a sum ordered paid to her for the support of minor children by the Circuit Court of St. Clair County, Michigan, in a divorce action. She alleged that the sum of $6,680 had accrued under the order of the Michigan court. Defendant's demurrer was sustained without leave to amend and plaintiff has appealed from the resulting judgment of dismissal.

The decree of the Michigan court provides in part as follows: "That said defendant, Milton L. Butler pay to the Clerk of this Court for the support, maintenance and education of the said minor children of the parties hereto, the sum of fifteen ($15.00) dollars per week hereafter until further order of this Court, the first of such payments to be due and payable on the date hereof." Plaintiff has attached to her complaint a copy of the Michigan decree and asks that "the said judgment and decree so rendered by the Circuit Court for the County of St. Clair, State of Michigan, on the 4th day of June, 1934, be established as a foreign judgment and that the same be enforced in this action in the manner provided by law; that it be adjudged and decreed that there is now due and owing to the plaintiff from the defendant the sum of six thousand, six hundred eighty ($6,680.00) dollars; that said foreign judgment and decree be established as to the future and unaccrued payments as provided therein."

Plaintiff contends that the full faith and credit clause of the Constitution of the United States, Article IV, section 1, is applicable. Defendant relies upon the rule

that the constitutional provision in question is applicable only to cases in which a final judgment has been rendered in a sister state and asserts that the Michigan decree which plaintiff seeks to enforce is not a final judgment.

In the Michigan statute it is provided: "After a decree for alimony or other allowance, for the wife and children, or either of them * * * the court may, from time to time, on the petition of either of the parties, revise and alter such decree, respecting the amount of such alimony or allowance and the payment thereof, * * * and may make any decree respecting any of the said matters which such court might have made in the original suit." Michigan Compiled Laws, 1929, § 12748, 18 Mich. Stat. Ann. Chap. 245, § 25.106. In interpreting this statutory provision the Michigan courts have held that the trial court reserves jurisdiction to modify an award for support money and that the right of modification extends to accrued payments. Nixon v. Wright, 146 Mich. 231, 109 N.W. 274, 10 Ann.Cas. 547; Loomis v. Loomis, 273 Mich. 7, 262 N.W. 331; Toth v. Toth, 242 Mich. 23, 217 N.W. 913, 56 A.L.R. 839; Wellman v. Wellman, 305 Mich. 365, 9 N.W.2d 579. In the Nixon case, an action at law was brought on a divorce decree and the Supreme Court of Michigan held that the plaintiff could not proceed to judgment because the decree was "subject to modification by the court which made it, at any time. * * * A decree for alimony is not such an unalterable, definite, and fixed judgment for money * * *." In Biewend v. Biewend, 17 Cal.2d 108, 109 P.2d 701, 132 A.L.R. 1264, our Supreme Court followed the rule of Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905, 28 L.R.A.,N.S., 1068, 20 Ann.Cas. 1061, and, while holding that a divorce decree providing for support money rendered in the state of Missouri was a final judgment that could be enforced in California, expressly stated that "only if such accrued payments are still subject to modification may recovery be denied." [17 Cal.2d 108, 109 P.2d 703] The court also held that the full faith and credit clause "does not obligate the courts of one state to enforce an alimony decree rendered in another state with regard to future payments, particularly when such future installments are subject to modification by the court of original jurisdiction."

Since the judgment of the Michigan court was not final, the trial court ruled correctly in sustaining the demurrer.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



68 Cal.App.2d 173

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. SACRAMENTO VALLEY WALNUT GROWERS ASS'N.

Civ. 7021; Sac. 5635.

District Court of Appeal, Third District, California.

Feb. 23, 1945.

1. Taxation ⇐219

A local co-operative growers association member and director, representing association at central co-operative association's meetings, was not engaged in "agricultural labor" within provision of Employment Insurance Act exempting employers of such laborers from contributions thereunder. Gen.Laws 1937, Act 8780d; Civ.Code, § 653aa et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

2. Taxation ⇐593(3)

Evidence supported findings that local co-operative growers association member and director, representing association at central co-operative association's meetings for specified compensation per diem, was local association's employee and that his remuneration constituted wages, so as to render such association liable for contributions under Employment Insurance Act, though without him it did not have enough employees to render it subject to such Act. Gen.Laws 1937, Act 8780d, § 6.5; Civ.Code, § 653aa et seq.

3. Appeal and error ⇐931(1)

On appeal, all reasonable presumptions must be indulged in support of trial court's fact findings.

4. Master and servant ⇐78

The provisions of Employment Insurance Act must be liberally construed to accomplish social and economic purposes for which they were enacted. Gen.Laws 1937, Act 8780d.

Appeal from Superior Court, Sutter County; Warren Steel, Judge.

Action by the California Employment Stabilization Commission, successor to the California Employment Commission, formerly the Unemployment Reserves Commission, against the Sacramento Valley Walnut Growers Association, a corporation, to recover contributions under the Employment Insurance Act. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles A. Wetmore, Jr., of Marysville, for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Forrest M. Hill, Ralph R. Planteen, and Doris H. Maier, Deputy Attys. Gen., for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action to recover from defendant contributions under the California Employment Insurance Act, Stats.1935, p. 1226, as amended, Deering's Gen.Laws 1937, Act 8780d, together with interest and penalties, upon the basis of wages paid by the association to certain employees during the period from January 1, 1938, to June 30, 1939. At the trial of the case it was agreed by counsel for the parties that the only issue for determination was whether one N. F. Todd was an employee of defendant during such period, it being conceded that defendant corporation did not otherwise have a sufficient number of employees to become subject to the act. The trial court found that Todd was an employee of defendant, and rendered judgment for plaintiff.

Defendant and appellant is an association of walnut growers, incorporated under the provisions of the Cooperative Marketing Act, Civ.Code, § 653aa et seq., its membership being limited to growers. It is a component part of the California Walnut Growers Association referred to as the Central, the latter being, however, a separate corporation whose membership is made up of representatives of various local growers' associations throughout the state, each of which designates one of its members to represent it as a member of the Central.

During the period for which contributions are claimed in this action, Todd was a member and a director of the defendant Local, and was designated by it to be its representative at meetings of the Central, and a member of Central's board of directors. During this period Todd made five trips to Los Angeles to attend meetings of the Central. In connection with these trips certain moneys were paid to him by defendant, and the question presented in this case is whether he was an employee of defendant within the meaning of the applicable statute.

[1] While the point was not raised in the trial court, appellant, in its opening brief on this appeal, contends that if Todd were held to be an employee of the Local, nevertheless the corporation would not be liable for contributions under the Employment Insurance Act because Todd was engaged in agricultural labor, and therefore exempt. This contention has been decided against appellant by the recent decision of the Supreme Court in California Employment Commission v. Butte County Rice Growers Association, 154 P.2d 892, and need be given no further consideration on this appeal.

The sole question then is whether there is sufficient evidence in the record to sustain the finding of the trial court that Todd was an employee of defendant during the period under consideration. As the record is short, a summary of the testimony presented may be set forth without unduly prolonging this opinion. Plaintiff called Mr. Hogan, secretary and manager of defendant corporation, who testified that during 1938 Todd was the representative of defendant who attended the meetings of the Central; that during said time Todd was one of the directors of defendant; that Todd was selected as the member of the Local to be its representative on the board of the Central, and that he went to its meetings; that Todd was never on the payroll of the Local and never received any compensation; that moneys were, however, paid to him by defendant; that he had served as a director of the Central for several years, but finally became financially embarrassed and could not afford to go to its meetings, so defendant agreed to pay him ten dollars a day, or twenty dollars a trip, to cover his expenses, or part of them;

that Todd made about five trips in 1938; that payments to Todd were not set forth in any of defendant's accounts as wages, but the amounts paid were charged to an account entitled "Other expense and Loss"; that no compensation insurance was carried on Todd; that money was furnished to Todd by the Central for expenses in addition to the amount given him by defendant, but it was not sufficient to cover his expenses; that Todd never received any remuneration for soliciting members for defendant but on some occasions was given mileage. An auditor of the California Department of Employment, who examined books and records of defendant, testified that they showed that money was paid to Todd to cover five different trips to Los Angeles in 1938, at $20 each; that he had examined the minutes of defendant for January 12, 1935, which recited that it was moved and seconded and carried that Todd "be paid ten dollars per diem for his services in attending meetings of the board of directors of the central association." The Articles of Incorporation and the Bylaws of the Central, and those of defendant, together with the agreement between defendant and the Central, were introduced, but no other evidence adduced.

Appellant argues that this evidence does not support a conclusion that Todd was its employee; that it shows that he was not on its payroll and never received any compensation, that no compensation insurance was carried on him nor was any money paid to him taken into consideration in the annual payroll statement made to its compensation insurance carrier; that Todd was not employed to represent defendant before the Central, but became a member of its board of directors, and, as such, presumably voted at the meetings and used his own judgment; that it cannot be said that while he was acting as such director (of the Central) he was an employee of defendant subject to its control or supervision; that there is no evidence that any supervision or control was exercised over him by anyone connected with defendant, and that defendant did not retain the right to direct the manner in which the business of the Central should be done, nor the results to be accomplished, and that such right is the principal test whether Todd was or was not an employee.

Respondent on the other hand argues that the record shows that Todd was "hired" to go to Los Angeles to represent defendant at the meetings of the Central; that the fact that the nature of his work gave him a certain amount of freedom from supervision did not take him out of the classification of an employee, as the right to control and not its actual exercise determines whether or not the relationship exists; that the evidence shows that Todd was performing services for defendant and this raises a presumption that he was an employee which defendant has not overcome.

The only authorities cited by appellant are Deecy Products Co. v. Welch, 1 Cir., 124 F.2d 592, 598, 139 A.L.R. 916, and 39 C.J. at pages 33 and 35 defining master and servant.

In Deecy Products Co. v. Welch, supra, one Wilson was the statutory clerk of the plaintiff corporation during the period in controversy, kept the minutes of such meetings as were called during the year, and made no charge for his services as clerk, same being incidental to his duties as attorney for the corporation. The evidence showed that during the period in question there was but one meeting of the stockholders which required about one-half hour of Wilson's time, in addition to which he spent about five minutes dictating the minutes. These activities constituted his total services and duties as clerk during the year. The state statute required each corporation to have a clerk, and his duties were defined by the by-laws of the corporation. The court said that an employee is one who meets the tests of the more or less established concept of "the legal relationship of employer and employee," and that one who does not meet these tests is not an employee within the meaning of the Social Security Act § 1101(a) (6), 42 U.S.C.A. § 1301(a) (6), and this is the portion of the opinion upon which defendant relies. But the court held, nevertheless, that as clerk of the corporation Wilson was an employee, though he received no compensation for his services as clerk, but did the work of clerk as incidental to his duties as attorney for the corporation; that the clerk was subject to the board of directors which could direct him in the performance of the duties of his office though it did not actually do so; that it could not be said that he had no superiors in the corporation who could give him orders, and that the powers of the board were not nullified by the fact that Wilson was the only one familiar with the legal procedure involved; that he was subject to control.

In 39 C.J., pp. 33 and 35, cited by appellant, it is said that the relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; that he is deemed to be a master who has the superior choice and direction of the servant and whose will the servant represents not merely in the ultimate results of the work, but in the details.

From the foregoing appellant argues that as the right to direct the manner in which the business shall be done as well as the result to be accomplished is the test to be applied in determining whether Todd was an employee of defendant, that here there is no evidence that any such right was retained or exercised, and that it necessarily follows that Todd cannot be held to be its employee.

[2-4] The act here under consideration provides in section 6.5 that "employment", subject to the other provisions thereof, "means service * * * performed for wages or under any contract of hire, written or oral, express or implied." Section 7 of said act excludes certain kinds of labor from the term "employment", but is not pertinent here. The trial court in the case before us found that Todd was the representative of defendant for the purpose of representing it at the meetings of the Central; that as such representative he rendered services for defendant for which services he was paid $10 per diem; that in performing such services Todd was subject to the direction and control of defendant, not only as to the results to be achieved, but also as to the means and methods to be used in attaining such results; and that defendant had the right to discharge Todd at any time. From these facts it concluded that Todd was an employee of defendant, and that the remuneration received by him was wages. It thus appears that the trial court accepted appellant's contention as to what elements must appear in order to establish the relationship of employer and employee, but found that such elements appeared.

However, in B. P. Schulberg Productions v. California Emp. Comm., Cal.App., 153 P.2d 404, 406, it was held that the legislature did not intend to incorporate into the Unemployment Insurance Act the common law concept of master and servant, and that the words used in the act are not to be considered in their rigid, precise or dictionary meanings, but rather as defined by the act itself which evidences a legislative intent to give the words a broad and liberal construction rather than to apply any narrow, technical or even previously established legal definitions.

Giving the language of section 6.5 of the act such liberal construction the evidence in the case seems ample to establish that Todd performed services for defendant under a contract of hire, either express or implied; also that the compensation received by him was wages. But even applying the rule contended for by appellant, we think it cannot be said that there is not sufficient evidence in the record, together with reasonable inferences therefrom, to support the foregoing findings, bearing in mind that all reasonable presumptions are to be indulged in support of such findings (City of Los Angeles v. Knapp, 7 Cal.2d 168, 172, 173, 60 P.2d 127), and that the provisions of the California Employment Insurance Act are to be liberally construed to accomplish the social and economic purposes for which they were enacted (California Employment Commission v. Butte County, etc., Ass'n, supra, 154 P.2d at page 894).

While appellant argues that moneys paid to Todd were merely for his expenses and not for his services, the Articles of Incorporation and By-laws of the Central were in evidence, and it appears therefrom that the Central itself paid the expenses of the directors. Art. VI of those By-laws provides: "The Directors shall receive such compensation and expenses as may be determined by the members"; and Mr. Hogan testified that money was furnished Todd by the Central to cover his expenses, though he stated that it was not enough. Also the minutes of the defendant association recite that Todd was to be paid $10 per diem for his services in attending meetings of the board of directors of central association; and we think that from the foregoing the trial court was fully justified in concluding that Todd was paid the $10 per day for services rendered by him to defendant.

As to whether in performing his duties as the representative of defendant at meetings of the Central Todd was subject to the direction and control of defendant's board of directors, while there is no direct evidence that such board actually did direct him, there is no evidence that it did

not, or that it did not retain the right to do so. Obviously, when Todd attended meetings of the Central he acted not for himself alone, but for the entire membership of defendant Local, and there is ample room for an inference that in representing the Local his actions and conduct were subject to direction by the directors of the Local, who designated him as such representative; at least that the directors had the right to direct him as to how he should vote on matters coming up before the Central for determination. In Social Security Board v. Warren, 8 Cir., 142 F. 2d 974, the members of an executive committee of a corporation, of which committee Warren was a member, held weekly meetings at 8:30 a.m. for which services they were paid $5 per meeting. They determined matters of policy requiring action prior to the next monthly meeting of the board of directors, approved loans already made, established credit for borrowers, and passed upon bills for expenses. There was no evidence that the directors had ever given any instructions to the members of the committee as to what should be done by them, but the court said that they had a right so to do; and it was held that the payments to Warren constituted wages as found by the Social Security Board. Also see McKesson-Fuller-Morrison Co. v. Industrial Commission, 212 Wis. 507, 250 N. W. 396.

From the fact that defendant's board of directors had the power to select its representative and fix his compensation for services, some right to control or direct his conduct is inferable; and the board apparently had the right to discontinue him as such representative at any time, which right is one of the elements of control. Hillen v. Industrial Acc.Comm., 199 Cal. 577, 581, 582, 250 P. 570; Press Pub. Co. v. Industrial Acc.Comm., 190 Cal. 114, 120, 210 P. 820.

The very nature of the duties and powers given to the Central of whose board of directors Todd, by virtue of his representation of defendant, was a member, indicates that defendant's board of directors would naturally give directions to and exercise some control over the conduct of their representative, since, under the agreement entered into between the Locals and Central the latter is the sole selling agency for defendant's walnuts, and, also, by said agreement is given power "to prescribe and enforce such rules, regulations and/or practices as in its sole judgment it believes proper to govern and control the methods, manner and means used, permitted or employed by Local in receiving, handling, processing, or packing walnuts. * * *"

It is said in the very case relied upon by appellant, Deecy Products Co. v. Welch, supra, that "No general rule can be stated defining the control required to bring one within the scope of the legislative intent. The only thing that can be done is to examine the facts of each case and then determine whether there is present sufficient control and supervision to make one an employee."

As we cannot say that there was not sufficient evidence before the trial court, together with proper inferences to be drawn therefrom, to sustain its findings and judgment, its judgment should be and is affirmed.

PEEK and THOMPSON, JJ., concur.

26 Cal.2d 83

LASHLEY v. KOERBER, M. D.

S. F. 17080.

Supreme Court of California.

Feb. 20, 1945.

1. Appeal and error ⇐927(3)

Supreme Court must, in considering whether judgment of nonsuit was proper, resolve every conflict in testimonies in favor of plaintiff, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff, and accept as true all evidence adduced, direct and indirect, which tends to sustain plaintiff's case.

2. Physicians and surgeons ⇐14(4)

A physician or surgeon is not liable for every untoward result occurring in his medical practice, but is required only to have degree of learning and skill ordinarily possessed by physicians of good standing practicing in same locality and to use ordinary care and diligence in applying such learning and skill in the treatment of patients.

3. Physicians and surgeons ⇐18(8)

Whether physicians or surgeons use ordinary care and diligence in applying degree of learning and skill ordinarily possessed by physician of good standing in same locality to treatment of patients can be established only by experts' testimony.

4. Physicians and surgeons ⇐18(6)

Negligence of physician or surgeon treating patient will not be presumed, but must be affirmatively proved.

5. Physicians and surgeons ⇐14(4), 18(8)

Whether reduction and treatment of a fractured limb without use of an X-ray machine constitutes negligence of physician depends upon what an ordinarily skilled physician practicing in same locality in exercise of due care and professional judgment would do under like circumstances, and determination of the question depends upon expert testimony.

6. Physicians and surgeons ⇐18(8)

The expert testimony which establishes plaintiff's prima facie case in malpractice action may be that of defendant.

7. Appeal and error ⇐927(1)

Supreme Court will presume that defendant in malpractice action when testifying will state his case as favorably to himself as possible.

8. Physicians and surgeons ⇐18(8)

Extrajudicial admissions of defendant have same legal competency as direct expert testimony to establish critical averments of complaint in malpractice action.

9. Physicians and surgeons ⇐18(8)

An extrajudicial statement by physician amounting to no more than an admission of bona fide mistake of judgment or untoward result of treatment is not alone sufficient to permit inference of breach of duty, and statement must be an admission of negligence or lack of the skill ordinarily required for performance of work undertaken in order to establish prima facie case in malpractice action.

10. Appeal and error ⇐927(3)

In reviewing judgment of nonsuit in malpractice action, where defendant's statements or inferences drawn therefrom conflicted and statements were reasonably susceptible of more than one meaning, the conflict would be resolved in favor of plaintiff and a meaning would be placed on them which was favorable to plaintiff.

11. Physicians and surgeons ⇐18(8)

In action against physician for malpractice in treating broken finger, where piece of bone was markedly displaced from larger bone from which it had been detached, testimony of an expert was not required to support conclusion that bone was not in proper healing position.

12. Physicians and surgeons ⇐18(9)

In action against physician for malpractice in treating broken finger, testimony of plaintiff and her husband as to defendant's admission in conversation with them some time after termination of his services that he "should" have had X-ray taken at beginning of treatment and that it was his "fault" in that regard was sufficient to take to jury question of defendant's negligence.

In Bank.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Thelma L. Lashley against George E. Koerber, M. D., for malpractice. From a judgment of nonsuit, the plaintiff appeals.

Reversed.

Prior opinion, 150 P.2d 272.

Charles Reagh, of San Francisco, for appellant.

Appelbaum & Mitchell and John Jewett Earle, all of Oakland, for respondent.

SCHAUER, Justice.

This is an appeal from a judgment of nonsuit in a malpractice action. The complaint alleges negligent diagnosis and treatment by defendant physician (by virtue of his failure to have X-ray pictures taken) of a fractured terminal phalanx of one of plaintiff's fingers, and proximately ensuing damage. We have concluded that the evidence is not as a matter of law insufficient to support the essential averments of the complaint.

[1] Plaintiff, her husband, and the defendant were the only testifying witnesses. Under well-established rules we must, in considering whether the judgment of nonsuit was proper, resolve every conflict in their testimonies in favor of plaintiff, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff, and accept as true all evidence adduced direct and indirect which tends to sustain plaintiff's case. The circumstances of plaintiff's treatment were as follows:

Plaintiff testified that on Saturday, August 30, 1941, her right ring finger was caught and crushed in a folding bed. She bathed the finger in hot salt water and the following day attempted to consult defendant doctor but was unable to reach him. On Tuesday, September 2d, the first day plaintiff was able to get in touch with defendant, she went to his office and told him she thought her finger was broken; "he looked at it and said he thought it was too, and I asked him if he didn't want me to have an X-ray taken and he said no, it would not be necessary." Plaintiff's hand was so swollen and painful that defendant could not put splints on the finger until two days later. On Thursday, September 4, when defendant first splinted the finger it was "so swollen still and so crooked that he could not manipulate the finger even yet, but he did put splints on it and left it crooked the way it was at that time." On this occasion plaintiff "asked Dr. Koerber to be sure, if he couldn't fix my finger, to send me to a bone specialist because I didn't want a crippled finger the rest of my life." On several occasions thereafter plaintiff asked defendant about an X-ray picture and defendant stated it would not be necessary to have one taken. Defendant "asked me at one time if I had arthritis and I told him I had never known of it if I did have and I had never been told about having it. * * * He spoke about my large knuckles and I told him that was due to snapping my fingers." According to plaintiff's testimony she saw defendant approximately every ten days or two weeks during October and November. Her finger remained swollen and crooked. About October 25th plaintiff "on my own volition" had an X-ray picture made by a Dr. Stein. Dr. Stein did not treat the finger or remove the splint applied by defendant. Defendant did not see this X-ray; "He didn't ask to see it" although told by plaintiff that she had had it taken. Either "right after I had the X-ray taken" or "around the 20th or 25th" of November plaintiff told defendant "what the X-ray showed, and he told me I could remove the splint for a while and see if it would heal any better without it." Defendant then removed the splint. Plaintiff asked about an *operation on the finger* and defendant said "that it wouldn't do any good to rush an operation if it would help." About January 2, 1942, plaintiff and her husband visited defendant and *she again inquired* "about operating on the finger to remove the bone shown in the X-ray I had taken by Dr. Stein." According to the testimony of plaintiff's husband defendant then "told her to * * * have an X-ray taken, stating that he *should* have done it in the beginning; and my wife said, 'Yes I know, Doctor, I insisted on that to start with.' Dr. Koerber stated, 'Yes, * * * I know, it is not your *fault*, Mrs. Lashley, it is *all my own.*'" (Italics added.)

An X-ray picture was taken. It showed, according to the report of the roentgenologist, dated January 2, 1942, a "fracture of the base of the terminal phalanx whose shaft is *markedly displaced*" (italics added) and, in defendant's opinion, evidence of an arthritic process which had prevented healing. After he had examined this X-ray picture defendant "said he didn't think *after this length of time* it would do any good to operate on it." (Italics added.) On defendant's advice plaintiff went to Dr. Barnard, an orthopedic specialist, who plaintiff's counsel admitted, "is one of the best." Dr. Barnard examined and taped the finger.

The only direct expert testimony was that of defendant. He testified as follows: In case of a fracture of the phalanx a splint

is applied "in the position in which healing is most apt to occur, and that is just what I did in this case." At the time defendant applied the splint "to the extent of clinically treating a fracture of that phalanx I knew that there was a chip off the posterior surface of the phalanx. * * * Any X-ray that might have been taken on September 2nd would merely have been a confirmation of my clinical judgment regarding that fracture. * * * At the time this finger was splinted it was still slightly swollen and inflamed from the crushing force of her injury. The finger was brought up in as full extension as possible, and that is all that anybody can do to reduce that type of fracture. There is no such thing as setting the fracture. What you have to do is to set the main bone as closely as possible to the place that is fractured off," and that was done in this case.

Defendant further testified: As a general proposition a latent arthritic condition tends to retard healing and calls for additional care on the part of the physician. The defendant "made no laboratory test for arthritis; I depended on my senses, my sight and sense of touch." He believed that plaintiff had a latent tendency toward development of arthritis "but there was absolutely no acute arthritis present. * * * In any event, even if she had had acute arthritis, no material difference could be made in the treatment. The treatment is still to splint the finger and keep it immobilized in a condition in which healing is most likely to take place, *which is full extension.* * * * *I knew the finger had to be splinted in full extension,* and simply having taken an X-ray would have perhaps added some slight confirmation to what I did but it would not have changed what I did in the slightest, nor would it have changed the eventual result." (Italics added.)

Defendant testified further that about four weeks after he first treated the injury, at a time just before plaintiff had the X-ray taken by Dr. Stein, "I realized that perhaps it was a little slow in healing but I fully expected that fracture would heal and that she would have a good result from it. * * * Even by that time it is extremely doubtful to me if the arthritis would have shown definitely in the X-ray, at four weeks after the injury." His testimony continues:

"Q. You would have been able to see that the fragment of bone was uniting or out of position, wouldn't you? A. Yes.

"Q. And it would instantly make you suspicious that some thing was keeping it from uniting properly, wouldn't it? A. Yes, I will admit that.

"Q. And if you had taken an X-ray at that time you would have known there was something wrong, wouldn't you? A. I would have known that the healing was slow.

"Q. You would have known that the bone, the fragment, the chip, wasn't in the proper position, wouldn't you? A. I am not willing to admit that at all.

"Q. When do you think that fragment or chip got out of position? A. Some time after the splint was removed [between October 25 and November 25]. * * * As long as the splint was on there it could not have gotten as badly out of position as it shows in the X-ray.

"Q. It could have gotten partly out of position, couldn't it? A. Yes."

At the time to which the testimony last above quoted relates, i.e., about four weeks after the injury, defendant "splinted her finger [and] I said 'Well, when this looks like it needs changing you come back and I will replace it.' She never came back after that [until she returned and told defendant of the X-ray taken by Dr. Stein] and I assumed her finger was getting along all right. I am not going to phone her and ask her why she doesn't come in—perhaps might have but it is not customary. I assume my patients have enough common sense to tell when a splint needs changing, because it is common to get dirty in the course of some days or a week or so with household duties."

Defendant was asked, "When did you first become suspicious in this case that you were not going to get a favorable result?" and testified, "After she returned to me on or about the 1st of December." "[A]t that time the condition of the finger was essentially as shown on that X-ray [taken about January 2 at defendant's direction.]" Defendant also testified that "As far as I know, while she was my patient she did everything I told her to up to the first of January, 1942"; that on the first of January the result was final and "Anything that would be done thereafter would be a fresh operation."

The only testimony as to plaintiff's discharge was that of defendant: that plaintiff returned to his office a few days after she had seen Dr. Barnard; that she said

she had removed the splint or tape which Dr. Barnard put on the finger because it was uncomfortable; and that defendant told her, "if you are not going to follow out the treatment that he orders for you and maintain the splint he applied on your finger, there is nothing further that I can do for you." According to defendant, "If the splint was painful the way he [Dr. Barnard] applied it, it could have been readjusted very slightly to relieve the discomfort," and keeping the finger taped or splinted in traction for a "matter of weeks * * * as a matter of general average * * * four weeks might very well have corrected that deformity. * * * It may not have been a perfect finger when it was through, but it would have been a lot better than it is now."

Defendant testified (on cross-examination under § 2055, Code Civ.Proc.) that of eight doctors in general practice in the community whom he questioned "seven said that it was their custom to treat such fractures without invariably demanding an X-ray."

[2-5] Certain general propositions applicable in malpractice actions are thus stated in Engelking v. Carlson (1939), 13 Cal.2d 216, 220, 221, 88 P.2d 695, 697: "The law has never held a physician or surgeon liable for every untoward result which may occur in medical practice. It requires only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. [Citation.] Whether he has done so in a particular case is a question for experts and can be established only by their testimony. [Citations.] * * * Negligence on the part of a physician or surgeon will not be presumed; it must be affirmatively proved. * * * It is true that in a restricted class of cases the courts have applied the doctrine of res ipsa loquitur in malpractice cases. But it has only been invoked where a layman is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised." And as further enunciated in Bickford v. Lawson (1938), 27 Cal.App.2d 416, 421, 81 P.2d 216, 219, "The necessity of employing an X-ray apparatus in reducing a fractured limb depends entirely upon the circumstances of the particular case. The question as to whether the reduction and treatment of a fractured limb without the use of an X-ray machine constitutes negligence, depends upon what an ordinarily skilled physician practicing in that vicinity, in the exercise of due care and professional judgment, would be required to do under like circumstances. The determination of those questions depends upon expert testimony. [Citations]"

[6-10] The expert testimony which establishes plaintiff's prima facie case in a malpractice action may be that of defendant. (Lawless v. Calaway (1944), 24 Cal. 2d 81, 90, 147 P.2d 604; Anderson v. Stump (1941), 42 Cal.App.2d 761, 765, 109 P.2d 1027.) We can presume that defendant in testifying will state his case as favorably to himself as possible. (See Alper v. Tormey (1907), 7 Cal.App. 8, 12, 93 P. 402.) And extrajudicial admissions of defendant have the same legal competency as direct expert testimony to establish the critical averments of the complaint. (Scott v. Sciaroni (1924), 66 Cal.App. 577, 582, 226 P. 827.) It is true that an extrajudicial statement amounting to no more than an admission of bona fide mistake of judgment or untoward result of treatment is not alone sufficient to permit the inference of breach of duty; the statement "must be an admission of negligence or lack of the skill ordinarily required for the performance of the work undertaken." (Markart v. Zeimer (1924), 67 Cal.App. 363, 371, 227 P. 683, 685.) But as above indicated, in reviewing a judgment of nonsuit, where defendant's statements or inferences drawn therefrom conflict the conflict must be resolved in favor of plaintiff; where the statements are reasonably susceptible of more than one meaning, that meaning is to be placed on them which is favorable to plaintiff.

[11] According to the testimony of plaintiff's husband, the defendant stated "that he *should* have" had an X-ray taken "in the beginning; and my wife said, 'Yes, I know, Doctor, I insisted on that to start with.' Dr. Koerber stated, 'Yes, * * * I know, it is not your *fault,* * * * it is *all my own.*'" (Italics added.) The jury would have a right to believe that defendant, as a physician and surgeon, was using the word "should" to import the duty which he, as a physician and surgeon practicing his profession in that community, owed to his patient in the exercise of ordinary care. Webster (New Int. Dict., 2d Ed.) says,

"*Ought* and *should* express obligation, Ought commonly suggesting duty or moral constraint, Should, the obligation of fitness, propriety, expediency and the like." Furthermore, coupled with defendant's statement as to what he should have done "in the beginning" is the admission that the failure to have an X-ray taken was all his own "fault." The word "fault" in one of its meanings signifies "Responsibility for wrongdoing or failure; culpable cause." (Webster's New Int. Dict., 2d Ed.; see, also, Marston v. Pickwick Stages, Inc. (1926), 78 Cal.App. 526, 534, 248 P. 930.) When the defendant finally did have an X-ray picture taken it showed, according to the report of the roentgenologist, a "Fracture of the base of the terminal phalanx whose shaft is *markedly displaced.*" (Italics added.) It does not require the testimony of an expert, under the conditions shown here, to support the conclusion that a piece of bone which is markedly displaced from the larger bone from which it has been detached is not in proper healing position.

The X-ray picture was not taken until January 2, 1942, and upon examining it defendant stated that "he didn't think *after this length of time* it would do any good to operate on [the finger]." (Italics added.) Defendant testified that "the condition of the finger was essentially" the same about the first of December (as it was after January 2d), but at the earlier date (December 1st), according to plaintiff's testimony, defendant said, "it wouldn't do any good to *rush* an operation." (Italics added.)

On cross-examination defendant admitted that if he had had an X-ray picture taken in the early stages of his treatment of the fracture he "would have been able to see that the fragment of bone was uniting or out of position" and that it would have made him "suspicious that something was keeping it from uniting properly." Yet after the time to which such admissions related the defendant, still without requiring an X-ray picture, removed the splint to "see if it [the finger] would heal any better without it." When defendant originally splinted the finger, according to plaintiff, he "left it crooked the way it was at that time," although as a witness defendant admitted that he "knew the finger had to be splinted in full extension." It is true that defendant also testified that "The finger was brought up in as full extension as possible, and that is all that anybody can do to reduce that type of fracture." But the jury need not have believed such statement. It but created a conflict with the inferences to be drawn from defendant's admissions as to what should have been done in the beginning, as to his culpable negligence in not having taken an X-ray picture earlier, and as to his opinion in January, 1942, that "he didn't think after this length of time it would do any good to operate." The implication of the latter statement would seem to be that an earlier operation would have benefited plaintiff and, hence, that defendant was mistaken in his statement that merely splinting the finger "in as full extension as possible * * * is all that anybody can do to reduce that type of fracture."

An extrajudicial admission of "fault," it has been held, may amount to no more than an admission of bona fide mistake or misfortune and thus be insufficient to establish negligence (Phillips v. Powell (1930), 210 Cal. 39, 43, 290 P. 441, 443 [admission that "it is my fault"]; Markart v. Zeimer (1924), supra, 67 Cal.App. 363, 371, 227 P. 683 [admission that defendant performed a "wrong operation"]; Donahoo v. Lovas (1930), 105 Cal.App. 705, 707, 710, 288 P. 698, 699 [admission that defendant "should never have" administered an injection "and that was what was causing" plaintiff pain]), or it may support the inference that plaintiff was damaged as a proximate result of defendant's negligence (Scott v. Sciaroni (1924), supra, 66 Cal.App. 577, 580, 582, 226 P. 827, 828 [admission that defendant's nurse "left the radium on too long" and "it was his [defendant's] fault" that plaintiff was burned]).

[12] In the present case we are satisfied that a jury, considering the background of all the other evidence, could reasonably conclude that the admissions of defendant physician imported that he had not exercised that reasonable degree of skill and learning and care ordinarily exercised by other doctors of good standing practicing in the community and that as a proximate result of such negligence plaintiff suffered damage. To phrase it differently, in the light of the seeming conflicts in defendant's testimony and all the other circumstances of the case, his admissions that he "should" have had an X-ray taken "in the beginning" and that he was at "fault" in that regard constitute evidence of a character competent to require that the issue of defendant's

negligence be decided as one of fact rather than of law.

For the reasons above stated the judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



LITVINUK v. LITVINUK.*
L.A. 18795.

Supreme Court of California.

Feb. 13, 1945.

Rehearing Granted March 15, 1945.

1. Appeal and error ⇐982(1)

Ruling on motion to vacate judgment under statute relating to mistake, inadvertence, and surprise will not be disturbed on appeal unless abuse of discretion is clearly shown. Code Civ.Proc. § 473.

2. Judgment ⇐363

Trial court's discretion as to vacating judgment under statute relating to mistake, inadvertence, and surprise is a legal one and is not to be exercised arbitrarily or capriciously, but with purpose to dispose of cases on merits. Code Civ.Proc. § 473.

3. Judgment ⇐138(1)

Law favors a trial and looks with disfavor on one who, regardless of issues presented, attempts to take advantage of adversary's inadvertence or neglect. Code Civ.Proc. § 473.

4. Appeal and error ⇐982(2)

Owing to remedial character of statute as to vacating judgment because of mistake, inadvertence, and surprise, appellate court listens more readily where appeal is from order denying relief rather than from one granting relief, especially in divorce cases. Code Civ.Proc. § 473.

5. Divorce ⇐145

In divorce action, where defendant wife on October 6 retained new counsel, then representing one of 38 persons on trial for murder, and on November 23, when divorce case was called after being advanced almost four months from original date of trial, counsel was still engaged in murder trial, as he was on December 4 and 7 when testimony was heard, case should have been continued at least until end of murder trial.

6. Divorce ⇐165(3)

Where divorce case was tried in absence of defendant wife's counsel, then engaged in criminal trial, it was abuse of discretion to refuse to vacate interlocutory decree under statute relating to mistake, inadvertence, and surprise. Code Civ.Proc. § 473.

SCHAUER, J., dissenting.

Appeals from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action for divorce by Paul Litvinuk against Anna Litvinuk. From a judgment for plaintiff and orders denying motions to vacate the interlocutory decree and for a new trial, and also from an order on April 9, 1943, denying defendant's motion to vacate the interlocutory decree under Code Civ.Proc. § 473, on grounds of mistake, inadvertence, and surprise, defendant appeals.

Order of April 9th reversed.

Prior opinions 149 P.2d 882; 150 P.2d 899.

A. P. Coviello, of Los Angeles, for appellant.

Ernest Best, of Los Angeles, for respondent.

EDMONDS, Justice.

Paul Litvinuk sued for a divorce. His wife, who was then living in Pennsylvania, came to California and filed an answer denying the charges made against her. When the case came on for trial, she was present but her counsel did not appear because he was then engaged in the trial of a criminal case before another judge of the same court. Following the denial of a continuance, the husband was awarded an interlocutory decree, and the wife has appealed from the judgment and also from several orders denying motions to set it aside and have a trial on the merits.

* Subsequent opinion 162 P.2d 8.

According to the affidavit of A. P. Coviello, on October 6, 1942, the defendant retained him as her counsel. At that time, he declared, the case was set for trial on March 15, 1943, and he had no knowledge of any motion to be made for its advancement. On October 9th the husband's attorney served a notice of motion for an earlier date of trial. There was then no substitution of counsel on file, and the notice was served upon the attorneys of record.

On October 16th the motion, which was unopposed, was granted and the case reset for November 23rd. According to an affidavit of the attorney for Mr. Litvinuk, it was on October 16th, after the hearing of his motion that Mr. Coviello informed him of the change of counsel; also, although the substitution was dated October 5th, it was not signed by counsel then representing Mrs. Litvinuk "until a week or ten days after October 16th." But there is no denial of Mr. Coviello's assertion concerning the date of his employment, nor is it asserted that the change of attorneys was made for the purpose of delaying the trial.

On November 23d when the case was called for hearing, Mr. Coviello moved for a continuance upon the ground that he was actually engaged in the trial of the criminal case. The motion was denied by the acting presiding judge, but after the ruling was made, the case could not be heard; it was then continued to December 4th, with the order that if Mr. Coviello could not then be present, other counsel should be obtained.

On December 4th, Mr. Coviello was still engaged in the criminal case and made a motion, supported by affidavit, for a short continuance. The motion was denied; but again, because of other cases having priority, the Litvinuk case went over to December 7th, when it was transferred by the presiding judge to a trial department of the court. Mr. Coviello was still engaged in the criminal case and he so informed the court through a clerk who appeared for that purpose. A continuance was denied and, in the absence of Mrs. Litvinuk's attorney, the court heard the testimony of her husband and a witness produced by him for the purpose of corroboration.

At the conclusion of this testimony Judge Stutsman ordered Mrs. Litvinuk to "take the stand." Upon being told by her that, "I can't understand without my attorney here; I would like to have him here," the judge replied: "The record shows your attorney has had plenty of chance to be here. * * * You get up on the stand and I will be your attorney." Again Mrs. Litvinuk remonstrated, "But my attorney, I want him to be here, please." After the judge repeated that the attorney "has had plenty of chance to be here," he asked: "Do you want to tell me about your side of the case?" Mrs. Litvinuk answered, "I can't tell it without my attorney." "All right," said Judge Stutsman, "Decree granted to the plaintiff." Custody of the child was awarded to Mrs. Litvinuk and her husband was ordered to pay $4.00 per week for the child's support but no provision was made for the maintenance of the wife.

Later, on the same day, Mr. Coviello gave notice of a motion, to be heard on December 16th, to vacate the minute entry ordering a decree of divorce in favor of the respondent and to reopen the case. Accompanying the notice of this motion was an affidavit of Mrs. Litvinuk declaring that her husband, shortly before coming to California had instituted an action for divorce in the State of Pennsylvania where they had formerly resided, and upon a trial Mr. Litvinuk was denied a divorce. She also stated that when the court proceeded with the hearing of the divorce proceeding, her counsel was still engaged in the trial of the criminal case which had occasioned the prior continuance and, for that reason, was not present to represent her. Ernest Best, the attorney for Mr. Litvinuk, in a counteraffidavit, did not deny that at the time the divorce proceeding was called for trial, opposing counsel was employed in the defense of a client charged with murder but, he said, as thirty-eight persons were being prosecuted and Mr. Coviello represented only one of them, by reason of "a working agreement with another counsel in the case" he was able to leave the trial from time to time "and do other work that is necessary." Mr. Best also asserted "that to his knowledge no action was ever filed for divorce in the State of Pennsylvania wherein the divorce was denied."

Mr. Coviello unaccountably failed to appear on December 16th and the court's minutes record that "Said motion is denied." Immediately thereafter findings and a decree of divorce were signed and filed. The judgment was entered December 18th.

On January 4th, the appellant filed a motion for new trial upon substantially all of the statutory grounds. The motion was denied. Following the ruling, Mrs. Litvinuk gave notice of a motion, under section 473 of the Code of Civil Procedure, to vacate the decree upon the grounds of "mistake, inadvertence, and surprise." With the notice there was served a verified proposed cross-complaint for separate maintenance, charging Mr. Litvinuk with willful neglect. This pleading included allegations concerning the Pennsylvania proceeding asserted to have been tried and determined in the wife's favor. The motion was submitted for decision upon affidavits and, on April 9th, was denied.

On April 21st, Mrs. Litvinuk filed a notice of appeal (1) from the judgment; (2) from the order denying the appellant's motion to vacate and set aside the interlocutory decree and to reopen the matter for further proceedings; (3) from the order of the trial court denying her motion for a new trial; and (4) from the order denying the appellant's motion to vacate and set aside the interlocutory decree under section 473. But in the appellant's opening brief, no points or authorities are presented as a basis for the reversal of the judgment, or of any of the challenged orders except the one by which the court denied relief under section 473 of the Code of Civil Procedure. As to that ruling, the denial of a divorce in the Pennsylvania proceedings, says the appellant, constitutes a valid defense to the present action and, accordingly, she is entitled to "her day in court." Moreover, the argument continues, because of the interest of the state in safeguarding marital relations, public policy is against "easy" divorces. For these reasons, it is concluded, "the trial court erred and abused its discretion in denying the motion under section 473."

In support of the rulings in his favor, the respondent contends that his wife did not appeal from the judgment of divorce and the determinations of the trial court upon the motion to vacate and the motion for a new trial within the time provided by law; accordingly, he says, the only matter which may now be considered is the propriety of the order denying the motion made pursuant to section 473 of the Code of Civil Procedure. As justifying that order he says: "It is discretionary for the trial court to refuse to continue a case over objection, and if a continuance be granted it may be on whatever terms the court may deem proper."

[1-4] Although it is well settled that a ruling upon a motion made under section 473 will not be disturbed on appeal unless an abuse of discretion is clearly shown (Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385), the discretion is a legal one; it is not to be exercised arbitrarily or capriciously (Waite v. Southern Pacific Co., 192 Cal. 467, 470, 221 P. 204; Miller v. Carr, 116 Cal. 378, 381, 48 P. 324, 58 Am.St.Rep. 180), but always with a purpose to dispose of cases upon their merits. Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148; Melde v. Reynolds, 129 Cal. 308, 311, 61 P. 932; Grady v. Donahoo, 108 Cal. 211, 215, 41 P. 41; Corgiat v. Realty Mortgage Corp., 86 Cal.App. 37, 40, 260 P. 573. The policy of the law favors a trial and looks with disfavor upon a party who, regardless of the issues which are presented for a determination, attempts to take advantage of the inadvertence or neglect of his adversary. Kalson v. Percival, 217 Cal. 568, 20 P.2d 330; Waybright v. Anderson, supra; Gorman v. California Transit Co., 199 Cal. 246, 248, 248 P. 923; Waite v. Southern Pacific Co., supra; Berri v. Rogero, 168 Cal. 736, 740, 145 P. 95. Accordingly, and owing to the remedial character of section 473, an appellate court listens more readily to an appeal from an order denying relief than to one attacking a ruling granting relief (Brill v. Fox, 211 Cal. 739, 743, 744, 297 P. 25; Waybright v. Anderson, supra; Mitchell v. California, etc., S. S. Co., 156 Cal. 576, 579, 105 P. 590), and such a policy is especially desirable in a divorce proceeding, where the state is an interested party. Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020; Deyoe v. Superior Court, 140 Cal. 476, 482, 483, 74 P. 28, 98 Am.St.Rep. 73; Cottrell v. Cottrell, 83 Cal. 457, 23 P. 531.

[5] It is conceded that at the time Mrs. Litvinuk's case was called for hearing, her attorney was engaged in another department of the court. But counsel for the husband insists that, because Mr. Coviello represented only one of a number of defendants charged with murder, he was free to leave the criminal case and try the divorce action. The conclusion is incorrect. Although an attorney is defending but one of several persons who are being jointly prosecuted, it does not follow that he may or should leave the courtroom while the case in which the rights of his client are being determined is on trial. Moreover, ac-

cording to the affidavit of Mr. Coviello, the judge who was hearing the criminal prosecution refused to allow him to leave the courtroom while that case was on trial. Under these circumstances, the orderly administration of justice required the continuance of the divorce proceeding at least until the time Mrs. Litvinuk's attorney had concluded the trial of the case in which he was then engaged. Certainly a litigant should not be penalized because he employs an attorney having more than one client. Every lawyer in active practice has a number of cases pending, and although the courts should not countenance the deferment of trials so as to unduly prolong litigation, hearings should be arranged in such order as to allow counsel to represent the clients who have retained him.

[6] So far as the record here shows, there was no justification whatever for the court's ruling that the divorce action must be tried in the absence of Mrs. Litvinuk's counsel and over her protest. Particularly in a divorce case there should be a disposition to fairly hear the parties and determine the controversy upon its merits, and the rendition of judgment against Mrs. Litvinuk under the circumstances shown cannot be justified upon any ground. For these reasons the court should have granted Mrs. Litvinuk's motion for relief under section 473 of the Code of Civil Procedure and the failure to do so constitutes an abuse of discretion.

The order of April 9th denying the motion to vacate and set aside the interlocutory decree of divorce is therefore reversed.

SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.

SCHAUER, Justice (dissenting).

I dissent. The majority hold, in effect if not expressly, that an attorney is entitled as of course to the continuance of a trial and to repeated continuances, apparently without limit, merely upon a showing that he is elsewhere engaged in trial, and this even though he accepts the employment in the case in which the continuance is sought after its trial date has been set and while he is engaged in the trial which is the sole ground urged for the continuance.

Many trials extend over periods of months, some even years, and if this rule is to be generally followed it may well result in grievous delays in the administration of justice. A conscientious and intelligent judge handling the master calendar in a busy court may find his most diligent efforts toward efficiency in setting and disposal of cases seriously impaired by the fetters of this rule.

The record here admits of substantially conflicting inferences but all must be deemed to have been resolved in favor of the plaintiff by the trial judge. The majority, however, survey it and announce the conclusion, contrary to that of the trial court, that "there was no justification whatever for the court's ruling that the divorce action must be tried in the absence of Mrs. Litvinuk's counsel and over her protest." Actually the record here supports the conclusion that Mrs. Litvinuk deliberately engaged in a campaign for protracted delay.

The complaint was filed on May 21, 1942; the answer, on August 28, 1942. Trial was originally set for March 15, 1943, but on October 16, 1942, on motion of the plaintiff regularly noticed and made, the court ordered the trial date advanced to November 23, 1942. We must presume that this order was made on good cause shown and that the order so adjudicates. At the time of such order Mrs. Litvinuk was represented by attorneys Craig and Weller and Paul A. Amos, but on the same day Mr. A. P. Coviello, who was even then engaged in the trial of a criminal case, representing one of thirty-eight defendants charged with murder, a trial which he knew would be protracted, accepted the substitution of himself as attorney for Mrs. Litvinuk. Apparently he made no effort to avoid the necessity for a delay or to minimize the inconvenience to anyone, but on November 23, 1942, the day set for trial of this action, he moved for its continuance on the ground that he was engaged in the very trial in which he was engaged when he accepted employment in the case. This move apparently was contemplated by him when he accepted the employment.

The record shows the following from the affidavit of Mr. Best (attorney for plaintiff): "that affiant talked to said attorney [Coviello] in his office and over the telephone several times before the date of trial in November, 1942 and about two weeks before said date informed said attorney that he would oppose any motion of said counsel for a continuance on the date of trial for the reason among other things that he was not the original counsel, was engaged in a long trial and was so before he took the case and so forth; that

at said time, said attorney stated that *that was a privilege of any counsel.* * * *" (Italics added.)

However, on November 23d, on Mr. Coviello's motion, over the objection of plaintiff, the trial was postponed until December 4th, the presiding judge specifically ordering at that time that on December 4th "the counsel for the defendant A. P. Coviello, was to try the case or to have the defendant represented by some other counsel who was prepared to go ahead with the trial." Mr. Coviello heard this ruling made. In addition thereto, on the same day, November 23, 1942, he was served by mail with notice in writing that the trial had been continued to December 4, 1942, "with the understanding that if the attorney A. P. Coviello cannot be present in person to represent the defendant at said time that he have some other attorney to represent the defendant or that the defendant have some other counsel to represent her at said time."

Notwithstanding this notice, on December 4th Mr. Coviello, without any showing of diligence or even the slightest effort to comply with the court's order, sought a further postponement and although his motion was at first denied, the trial was eventually continued to December 7th. On that date, the trial court having indulged defendant and her counsel two full weeks of delay, and ample opportunity to have procured other counsel, proceeded to trial.

The foregoing circumstances form the basis for the conclusion of the majority that "there was no justification whatever for the court's ruling that the divorce action must be tried in the absence of Mrs. Litvinuk's counsel and over her protest." I cannot subscribe to such conclusion. On the contrary, in my opinion, not only do such circumstances fail to show that as a matter of law the trial court abused its discretion in denying further delay, but they amply justify the order which was made. There was no error in denying the motion to vacate the interlocutory decree. The record discloses no surprise or mistake or inadvertence on the part of Mrs. Litvinuk or her counsel; they simply deliberately and persistently refused to avail themselves of the opportunity afforded them by the patience and indulgence of the court.

This is the first time to my knowledge, in nearly thirty-two years at the bar and on the bench, that it has been held that an attorney who is engaged in the trial of a case may accept employment and substitution of himself for other counsel in another case, which is already set for trial, and thereby become as a matter of course entitled to a postponement, and to successive postponements, of the trial of the second case without limitation of time, until he shall have completed the first trial. The ruling, it is to be further observed, places no limitation upon the number of cases set for trial in which the counsel may accept substitutions and thereby become entitled to postponements. With this rule in operation I daresay that an attorney who becomes engaged in protracted litigation may find his practice considerably augmented (if he so desires) by new clients who avail themselves of the opportunity afforded by such expedient to secure delays in their trials.

In my opinion the orders appealed from should be affirmed.



68 Cal.App.2d 308

W. R. SPALDING LUMBER CO. v. FRADKIN et al.

Civ. 3145.

District Court of Appeal, Fourth District, California.

March 8, 1945.

1. Mechanics' liens ⇐207

A letter from lumber company, signed by its branch manager, stating that if bank making loan on the property where building was constructed would make all advances on the loan to lumber company there would not be any liens against the property, was a sufficient guarantee that no liens would be filed, and guarantee would run in favor of third persons who furnished labor or materials for the contract, if guarantee was binding on lumber company.

2. Mechanics' liens ⇐281(1)

Evidence supported finding that a letter written by branch manager of a lumber company, guaranteeing that there would be no liens on property arising out of

building contract between property owners and branch manager's son as contractor, was not binding on the lumber company and that there was no authority of branch manager to issue such guarantee.

3. Mechanics' liens ⇐279

In action by lumber company to foreclose mechanic's lien, property owners, filing cross-complaint on plaintiff's alleged guarantee that there would be no liens on the property, had burden to prove that branch manager who signed alleged guarantee for plaintiff was authorized to make such contract.

4. Mechanics' liens ⇐281(4), 288(1)

In action to foreclose mechanic's lien, evidence presented question of fact as to amount due plaintiff and was sufficient to support finding that plaintiff was entitled to the full amount sought as against claim that a further credit should have been allowed.

5. Mechanics' liens ⇐182

Where dwelling constructed on twenty-acre ranch was necessary to operation of ranch and benefited the entire tract, imposing a mechanic's lien for material furnished upon entire tract rather than upon a portion thereof was not an abuse of discretion.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by W. R. Spalding Lumber Company, a corporation, against Harry Fradkin and Annie Fradkin, property owners, and Ernie Thompson, contractor, to foreclose a mechanic's lien, wherein the property owners filed a cross-complaint on a guaranty agreement allegedly executed by plaintiff. From a judgment for plaintiff, Harry Fradkin and Annie Fradkin appeal.

Affirmed.

Russell & Heid, of Tulare, for appellants.

McFadzean & Crowe, of Visalia, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a mechanic's lien. The controversy grows out of the construction of a house on a 20-acre ranch near Strathmore, which is owned by the defendants Fradkin. The lumber company has its head office in Visalia and has branches in several places in Tulare County, including one at Strathmore. One D. E. Thompson was manager of this branch and his son, the defendant Ernie Thompson, was the contractor who built this house. Five other actions involving other claimants were, by stipulation, tried with this action and one judgment was entered covering all six actions. The appeal has been presented and will be considered as though the Spalding Lumber Company were the only plaintiff.

The house on the Fradkins' ranch burned down in the fall of 1940. Early in 1941, they started preparations to rebuild and on March 20, 1941, they entered into a written contract with Ernie Thompson, under which he agreed to build the house according to certain plans and specifications for a price of $5616.50. The Fradkins applied to the Bank of America at Porterville for an F. H. A. loan of $3600. The loan was approved by the F. H. A. authorities and on May 15, 1941, the Fradkins executed to the bank a note for that amount and a trust deed covering the 20-acre ranch, which was recorded on May 20, 1941. Early in June, the manager of this bank suggested to the Fradkins that a faithful performance bond from the contractor should be secured. They took this up with Ernie Thompson and he suggested that he would secure a letter from the plaintiff guaranteeing the completion of the house and that no liens would be filed, in lieu of furnishing a bond. This was satisfactory to the bank and Ernie Thompson secured such a letter from his father, which was delivered to the bank. This letter, dated June 12, 1941, was addressed to the Bank of America at Porterville, and reads as follows:

"Gentlemen:

"This is to advise, that the Harry Fradkin-Job, Ernest Thompson General Contractor, to be built near Strathmore, Calif. is a W. R. Spalding Lumber Company, in a Bundle Job, and are pleased to have you work with us in this line of handling Home Building's, and if you will kindly make all Checks covering advances on the Loan, as the Job progresses to W. R. Spalding Lumber Company, and Ernest Thompson, the bills will all be paid through our office, and there will not be any Liens, against this Contract.

"Yours very truly,
"W. R. Spalding Lumber Company,
"By D. E. Thompson, Manager."

Shortly after the delivery of this letter work on the house was started and the plaintiff began to furnish some of the materials. The house was completed about six months later, a notice of completion being recorded on December 17, 1941. Four partial payments were made as the work progressed, in accordance with the building contract. Each of these payments was for about $1100, being one-fifth of the contract price. The first three were made from the proceeds of the $3600 loan and the fourth, which was made early in December, came from the balance of that loan with additional money furnished by the Fradkins. The respective payments were made by the bank with checks payable to Ernie Thompson and the plaintiff. They were delivered to D. E. Thompson, were indorsed by Ernie Thompson, and were then sent to plaintiff's home office in Visalia, where they were deposited. The home office then sent checks to the various parties who had furnished material and labor, in proportionate amounts. The fifth payment under the contract, amounting to $1106.36, is still held by the bank pending the outcome of this action. The various liens which were filed, including that of the plaintiff, amount to about $1260 in excess of the amount held by the bank.

The plaintiff furnished materials to the amount of about $2500 and has been paid about $1800. In this action it sought to recover a balance of $731.43 and to foreclose its mechanic's lien. The defendants Fradkin, by answer and cross-complaint, contended that the above-quoted letter was a guarantee against any liens, upon which they had relied in entering into the building contract, and that this letter constituted an agreement between the plaintiff and Ernie Thompson to jointly perform that contract. The cross-complaint prayed that the plaintiff be required to pay off all of the liens which had been filed, including its own, it being conceded that upon so doing it should receive the balance still held by the bank.

The court found in all respects in favor of the plaintiff finding, among other things, that Ernie Thompson and the Fradkins entered into the building contract on March 20, 1941; that on June 12, 1941, D. E. Thompson wrote the letter above referred to; that it is not true that this letter was addressed to this bank as an agent for the Fradkins; that it is not true that this letter constituted any guarantee on the part of the plaintiff against the filing of mechanic's liens; that this letter constituted nothing more than an assurance to the bank that all funds paid to the plaintiff in connection with this transaction would be properly disbursed to the persons entitled thereto; that all such funds were so disbursed; that it is not true that the Fradkins relied on said letter when they entered into the building contract; that it is not true that the plaintiff acted jointly with Ernie Thompson in entering into the performance of that contract; that the plaintiff did not participate in the building of this house in any way other than to furnish materials to the contractor; and that it is not true that D. E. Thompson, as manager of the Strathmore yard, was authorized to execute or deliver any agreement of guaranty on behalf of the lumber company.

Judgment was entered awarding the plaintiff $710.28 with certain interest and ordering the twenty acres sold and the proceeds used to pay this claim and those involved in the other actions, the balance to go to the Fradkins. From this judgment the Fradkins have appealed.

[1] Appellants' main contention is that the court erred in finding and holding that the letter of June 12, 1941, was not a faithful performance undertaking and that it did not constitute any guarantee against the filing of liens in connection with this building operation. We are unable to agree with the trial court's interpretation of this letter. In so far as the writing itself is concerned, we think it is sufficient as a guarantee that no liens would be filed, and that it would run in favor of third persons who furnished labor or materials for this job. Woodhead Lumber Co. v. E. G. Niemann Investments, Inc., 99 Cal.App. 456, 278 P. 913.

[2] But, even if we assume that such a guarantee would also run in favor of the appellants as owners of the building, the question remains whether this local branch manager was authorized to bind the plaintiff by writing such a letter. The court found to the contrary and it cannot be held, as a matter of law, that he had such authority. So far as the testimony goes, it supports the finding. It is apparent that this branch manager was attempting to assist his son, the contractor, without regard to the best interests of his employer. He testified that he told the general manager at the home office of the lumber company

that the bank desired such a letter, that the general manager made objections but did not definitely instruct him not to write the letter, that he told the general manager he was going to write the letter, and that he did so the next day. The general manager testified that no such conversations occurred, and that he heard nothing and knew nothing of such a letter until shortly before the house was completed. It is significant, in this connection, that this branch manager did not even claim that he had ever sent a copy of this letter to the home office although, according to his testimony, he promptly sent to the home office copies of all papers issued in the usual course of business at that office.

Nor does it conclusively appear that there was an ostensible or apparent authority to issue this guarantee. Assuming that such authority could be inferred in connection with the ordinary and usual matters in connection with the business transacted at that branch office the matter in question appears, on its face, to be an unusual one. That office was engaged in selling certain materials, not in guaranteeing the sales of its competitors and others. It would be unusual, to say the least, for any one to issue a guarantee in favor of all strangers who might furnish materials or labor for a building in order to get an opportunity to furnish some of the materials. This instrument purported to guarantee bills known to amount to about $5600, and which actually came to about $7000, on the condition that the guarantor would be allowed to handle and distribute the $3600 coming from the loan. There was no provision that it should handle the additional $2000 supposed to be paid by the owner, and it does not even call for the payment of any balance by the owner. This was not only not the ordinary and usual course of business but the instrument itself discloses infirmities and matters of a suspicious nature which should place any one intending to rely upon it on their guard. The instrument itself and the general circumstances are sufficient to constitute rather strong evidence against any possible inference of ostensible or implied authority on the part of this branch manager to issue such a guarantee.

[3] It may be further observed that the appellants failed, on their cross-complaint, to affirmatively prove that D. E. Thompson was authorized to make such a contract on behalf of the respondent. Mariposa Commercial, etc., Co. v. Peters, 215 Cal. 134, 8 P.2d 849. It is not even claimed that he had written authority, and the most that can be said is that the evidence, on the question of authority, with the reasonable inferences therefrom, is conflicting. Moreover, this is not a case where a principal may be estopped from claiming lack of proper authority on the part of its agent. Not only does the record disclose that several of the essential grounds of estoppel are not here present, but this was apparently recognized by the appellants as estoppel was not pleaded and was not urged either at the trial or on this appeal. It can neither be said that the court's finding as a fact, that there was no authority, is without evidentiary support nor that it is contrary to law.

[4] The appellants next contend that the evidence is insufficient to support the finding and judgment for the respondent in the amount of $709.28. It is argued that this ignores a credit slip of $313 given by D. E. Thompson to his son at a time near the completion of the job. A copy of this credit slip was sent to the home office of the respondent and this credit was immediately rejected and disallowed. The two Thompsons testified that this credit was given to conform to an agreement between themselves that the respondent would furnish all material needed, of the kinds handled by the respondent, for a certain fixed price. According to their testimony this agreement was made before plans and specifications were prepared and without any list of materials that would be required, and was made on a general estimate based on a square foot basis without reference to the particular kind or quality of materials that would be used. Later, after the contract was entered into between the son and the appellants, and as the materials were furnished from time to time they were billed by the father to the son at the regular prices and copies of the invoices were furnished to the son and sent to the home office. The trial court had the right to disbelieve portions of the testimony of this father and son, the entire matter presents merely a question of fact, and the evidence sufficiently supports the court's finding.

[5] Finally, it is contended that the court erred in imposing a lien upon the entire twenty acres owned by the appellants rather than upon a portion thereof. There is evidence that this dwelling was

built because it was necessary to the operation of the ranch and for the purpose of improving and benefiting the entire twenty acres. No abuse of discretion appears. California Cor. Culvert Co. v. Stewart, 220 Cal. 104, 29 P.2d 412; Anselmo v. Sebastiani, 219 Cal. 292, 26 P.2d 1.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



68 Cal.App.2d 249

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. SMILEAGE CO., Limited.

Civ. 14675.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1945.

Hearing Denied April 26, 1945.

1. Taxation ⇐593(3)

Evidence sustained finding that, during period covered by judgment for contributions due under Unemployment Insurance Act, defendant was an employer within meaning of act, and was indebted to Employment Stabilization Commission for the contributions levied. St.1937, pp. 2054, 2055, 2066, §§ 37, 38, 44.

2. Evidence ⇐383(4)

Under section of Unemployment Insurance Act making certificate of delinquency prima facie evidence of payment by employer of amount of wages set forth therein, levy of contributions, delinquency, and compliance by commission with all provisions of the act in relation to contributions specified in certificate, certificate of delinquency established allegations necessary to make out a case for collection of such contributions until contradicted and overcome by other evidence. St.1937, pp. 2054, 2055, 2066, §§ 37, 38, 44; St.1939, p. 2053, § 45.1.

3. Taxation ⇐597

In action against employer to collect contributions due under Unemployment Insurance Act, any evidence contrary to prima facie case established by certificate of delinquency merely created a conflict to be resolved by trial court. St.1937, pp. 2054, 2055, 2066, §§ 37, 38, 44; St.1939, p. 2053, § 45.1.

4. Evidence ⇐383(4)

Certificate of delinquency was prima facie evidence of facts therein stated with respect to contributions which became due under Unemployment Insurance Act before effective date of section of act making such certificate prima facie evidence of such facts, since employer was already obligated to pay the contributions when section providing for certificate of delinquency became effective and such section merely provided a new remedy for enforcement of existing rights and did not interfere with any vested right of employer. St.1939, p. 2053, § 45.1.

5. Statutes ⇐267(2)

A statute affecting procedure or providing a new remedy for enforcement of existing rights is applicable to actions pending when statute becomes effective.

6. Limitation of actions ⇐6(4)

Collection of contributions due under Unemployment Insurance Act was not barred by limitations, where collection of such contributions was not barred by limitations when section of act became effective providing that no statute shall limit time within which commission may enforce payment of contributions with respect to which no return has been filed, and only erroneous and inadequate reports with respect to such contributions were filed. Code Civ.Proc. § 338, subd. 1; St.1939, p. 2053, § 45.2.

7. Taxation ⇐589

A return by employer which does not substantially comply with requirements of Unemployment Insurance Act and which gives misleading information calculated to prevent discovery of true facts is equivalent to no return and is not effective to start the running of statute of limitations. Code Civ.Proc. § 338, subd. 1; St. 1939, p. 2053, § 45.2.

8. Limitation of actions ⇐6(4)

Section of Unemployment Insurance Act, providing that no statute shall limit time within which commission may enforce payment of contributions with respect to which no return has been filed, was applicable in action to collect contributions which became due before effective date of

such section, but the collection of which was not barred by limitations at such date, since such extension of period of limitations did not impair any vested right of employer. Code Civ.Proc. § 338, subd. 1; St.1939, p. 2053, § 45.2.

9. Constitutional law ⇐107

The Legislature may extend the time for filing action on a cause of action which is not at the time barred by limitations, providing no vested right is impaired.

10. Appeal and error ⇐977(3, 5)
New trial ⇐6

The granting or refusal of new trial is within sound discretion of trial court, whose action in such respect will not be disturbed on appeal except upon a clear showing of abuse of discretion.

11. New trial ⇐102(6)

Where employer was given ample opportunity at trial to produce books and records to refute evidence of its indebtedness for contributions due under Unemployment Insurance Act, and several continuances were granted for that purpose but employer did not avail itself of opportunity and did not apply for a continuance for purpose of producing records, trial court did not abuse its discretion in denying motion for new trial to permit employer to produce records which allegedly became available only after trial. St.1937, pp. 2054, 2055, 2066, §§ 37, 38, 44.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by California Employment Stabilization Commission, successor to California Employment Commission, formerly Unemployment Reserves Commission, against the Smileage Company, Limited, to collect contributions, interest, and penalties allegedly due from defendant under the California Unemployment Insurance Act. From a judgment for plaintiff and an order denying a new trial, defendant appeals.

Judgment affirmed and appeal from order denying a new trial dismissed.

Charles E. McGinnis, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action under the provisions of sections 37, 38 and 44 of the California Unemployment Insurance Act, St.1937, pp. 2054, 2055, 2066, for the collection of contributions, interest and penalties alleged to be due from defendant in the sum of $8270.84 for the period from January 1, 1936, to September 30, 1939. The trial court found that contributions for the period from January 1, 1936, to June 30, 1936, were barred by the provisions of section 338, subdivision 1, of the Code of Civil Procedure, but entered judgment for the contributions and interest claimed for the period from July 1, 1936 to September 30, 1939. Defendant has appealed from this judgment.

Defendant now claims that the evidence fails to show that, during the period covered by the judgment, it was an employer within the meaning of the Unemployment Insurance Act or that it was indebted for any amount whatever. It is also claimed that plaintiff's action is barred by subdivision 1, section 338, of the Code of Civil Procedure.

[1-3] We are satisfied that the findings of the trial court are supported by the evidence. In addition to evidence concerning the number of employees that were employed by defendant during the period in question and concerning the failure of defendant to file returns, plaintiff relies upon the certificate provided for by section 45.1 of the California Unemployment Insurance Act, St.1939, p. 2053, which was introduced in evidence. By the terms of this section the certificate is made prima facie evidence of the payment by the employer of the amount of wages set forth therein, of the levy of the contributions, of the delinquency and of the compliance by the Commission with all of the provisions of the Act in relation to the contributions and levy of the contributions specified in the certificate. The certificate being prima facie evidence of the facts it sets forth, it established the allegations necessary to make out a case for plaintiff until contradicted and overcome by other evidence. Any evidence in the case contrary to the prima facie case established by the certificate of delinquency merely created a conflict in the evidence to be resolved by the trial court. People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029. Defendant did not present its books at the trial and we

find no evidence in the record which compels a ruling that as a matter of law the prima facie case established by plaintiff by the introduction of the certificate was overcome. Indeed, plaintiff's auditor testified that when seeking to audit the books of the defendant he "saw an incomplete and unintelligible set of records, books and records, that did not tie in"; that he requested the rest of the books and records, and after several visits in the early part of 1939 he saw some of defendant's books and records; that he examined the general ledger, which showed deductions for unemployment purposes; that these deductions had been made from the salaries of employees of the corporation according to law and that these amounts were not sent to the Sacramento office of the department.

[4, 5] We cannot sustain defendant's contention that section 45.1 is not applicable because it became effective in September of 1939, a date subsequent to the time when most of the contributions became due. The section in question is remedial and procedural. A statute affecting procedure or providing a new remedy for the enforcement of existing rights is properly applicable to actions pending when the statute becomes effective. 23 Cal.Jur. 632, and cases there cited. At the time section 45.1 became effective defendant was under the obligation to pay the contributions. The statute provided a new remedy for the enforcement of plaintiff's existing rights and did not interfere with any vested right of defendant.

[6-9] Notwithstanding the action was not filed until March 25, 1942, the court did not err in ruling that it was not barred by subdivision 1 of section 338 of the Code of Civil Procedure. Section 45.2, which became effective on September 19, 1939, provides: "No statute of this State shall limit the time within which the commission may enforce the payment of contributions by civil action or any other remedy provided by this act if with respect to such contributions no return has been filed." It was shown in evidence that no contribution reports were filed by defendant for the years 1936 and 1937, and that erroneous and inadequate reports were filed for the first three quarters of 1938. A return which fails to make substantial compliance with the requirements of the statute and which gives misleading information calculated to prevent the discovery of the true facts is equivalent to no return whatever and is not effective to start the running of the statute of limitations. John D. Alkire Inv. Co. v. Nicholas, 9 Cir., 114 F.2d 607; People's Outfitting Co. v. United States, 58 F.2d 847, 74 Ct.Cl. 419. There is no merit in defendant's contention that section 45.2 is not applicable because its effective date was later than the period for which defendant was obligated to make the contribution. Where a cause of action is not barred by the statute of limitations the legislature may extend the time for filing the action provided no vested right is impaired. Riley v. Havens, 193 Cal. 432, 435, 225 P. 275; Davis & McMillan v. Industrial Accident Comm., 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095. It is clear that no vested right of defendant has been impaired, for it was obligated to pay the contributions at the time of the enactment of the statute.

[10, 11] Defendant complains of the action of the court in denying its motion for a new trial, claiming that it was unable to produce its records at the trial, that there was a sufficient showing of its inability to produce them, and that the records are now available. From the counter affidavit of counsel for plaintiff it appears that defendant was given many opportunities to produce its books and records and to present witnesses to support its contention that the assessments levied were erroneous; that several continuances were granted to defendant but that it did not avail itself of the opportunity to refute the evidence presented by plaintiffs. The record fails to disclose the making of a proper application for a continuance for the purpose of producing the books and records. The granting or refusal of a new trial is within the sound discretion of the trial court and the action of the court in passing upon a motion for a new trial will not be disturbed on appeal unless there is a clear showing of abuse of discretion. We find no abuse of discretion here.

The judgment is affirmed. The purported appeal from the order denying a new trial is dismissed.

MOORE, P. J., and McCOMB, J., concur.

68 Cal.App.2d 241

PEOPLE v. BASSETT.

Cr. 3847.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1945.

1. Criminal law ⇐260(11), 1159(2)

When conviction is assailed as not supported by evidence, the court on appeal will not attempt to determine weight of evidence but only whether on face of evidence it can be held that sufficient facts could not have been found by jury or by court in jury-waived case to warrant inference of guilt.

2. Criminal law ⇐1159(2)

Before conviction can be set aside on appeal on ground of insufficiency of evidence, it must clearly appear that on no hypothesis is there sufficient substantial evidence to support it.

3. Criminal law ⇐260(11), 1159(2)

When conviction is assailed as not supported by evidence, appellate court must assume existence of every fact which jury or court in jury-waived case could have reasonably deduced from evidence and then determine whether such facts are sufficient to support verdict.

4. Criminal law ⇐1159(2)

If evidence supports inference that defendant was unlawfully in possession of narcotics, fact that it would likewise support contrary finding does not warrant reviewing court in setting aside conviction on ground of insufficiency of evidence.

5. Criminal law ⇐260(11)

Where evidence is claimed to be insufficient to support conviction for possessing narcotics, Court of Appeal cannot interfere unless able to say that it obviously does not warrant inference of guilt arrived at by trial court in jury-waived case. St.1941, p. 2820, § 11160.

6. Poisons ⇐4

As regards unlawful possession of narcotics, "possession" is established when it is shown that a person has physical control thereof with intent to exercise such control, or having had physical control, has not abandoned it and no other person has that possession. St.1941, p. 2820, § 11160.

See Words and Phrases, Permanent Edition, for all other definitions of "Possession".

7. Poisons ⇐4

The statute forbidding possession of narcotics does not require proof of possession at very time of arrest, nor proof that accused had narcotics on his person. St. 1941, p. 2820, § 11160.

8. Criminal law ⇐260(11)

In prosecution for possessing narcotics, verity of officers' testimony as to incriminating statements by defendant and of defendant's testimony in denial thereof was for trial court in jury-waived case. St. 1941, p. 2820, § 11160.

9. Criminal law ⇐1159(4)

Unless record discloses that testimony contradicting that offered by defendant, who denied possession of narcotics as charged, is inherently improbable, appellate court cannot pass on credibility of witnesses.

10. Poisons ⇐9

Evidence that officer found opium in paper sack in lightwell about three feet from open window in bathroom of defendant's apartment and about five feet from window of adjoining apartment, together with alleged incriminating statements by defendant, etc., supported conviction for possessing narcotics. St. 1941, p. 2820, § 11160.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Vera Bassett, true name Lucille McBride, was convicted on a charge of violating St.1941, p. 2820, § 11160, relating to possession of narcotics, and from the judgment and an order denying motion for new trial, she appeals.

Judgment and order affirmed.

Max M. Solomon and Ward Sullivan, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of a violation of section 11160 of the Health and Safety Code, St. 1941, p. 2820, which, among other things,

denounces as a felony the possession of narcotics, except as otherwise in said code provided. Upon her arraignment, defendant moved to set aside the information pursuant to section 995 of the Penal Code, which motion was denied. Following the entry of a not guilty plea and waiver of a jury, the cause proceeded to trial before the court, resulting in the conviction of defendant of the offense as charged in the information. Defendant's motion for a new trial was denied and judgment was pronounced. From such judgment and order defendant prosecutes this appeal.

As the sole ground urged by defendant for a reversal of the judgment is that the evidence is insufficient to support the same, it becomes necessary to epitomize the testimony introduced at the trial. In that regard, the record discloses that about 4 o'clock on the afternoon of April 29, 1944, two federal narcotic inspectors, accompanied by two detectives from the Narcotic Division of the Los Angeles Police Department, went to the apartment occupied by defendant in the city of Los Angeles. Federal Inspector Marsh knocked on the door and thereupon defendant looked through a small opening in the door. The federal agent then attempted to gain admission to the apartment by advising the defendant that his name was "Pat" and asking her if she "didn't remember him." Defendant advised him that she was unacquainted with him and closed the little opening in the door, through which she had been looking. Immediately thereafter Inspector Marsh knocked again upon the door and informed the defendant that he and his associates were officers, that they had a complaint that she was "hustling" and desired to make an examination of the premises. Defendant admitted them into the apartment where, in addition to herself, there was present a man and another woman.

The apartment occupied by the defendant consisted of a single bedroom with living room, bath, hallway, kitchen, and in the latter place was a dining space. While the other officers were examining and searching the premises, Inspector Marsh searched the hallway. Later he went into the bathroom and noticed that the window therein was standing open. He reached out of this window in the bathroom and placed his hand over the metal hood in the lightwell, where he felt a paper sack. He thereupon stepped through the window, took his flashlight, observed the paper sack under the metal hood, removed it and took the same and the contents thereof back into the apartment. At that time one of the police officers and the defendant were in the bedroom. Inspector Marsh testified that in order to touch the paper sack he had to reach out about two and a half feet, but that he still had his own feet on the bathroom floor. He estimated the distance from the floor of the lightwell to the lower level of the bathroom window as twenty inches. When Inspector Marsh showed the sack to the defendant "she wanted to know what it was". The Inspector testified that the defendant said "What is it?" to which he replied "You know very well what it is", and defendant said "Let me see it". It might here be noted that the bathroom windows from both the apartment No. 101, occupied by the defendant, and the adjoining apartment No. 102 opened on the same lightwell where the aforesaid sack was found. The contents of the Manilla paper sack, which Inspector Marsh testified he found under the hood in the lightwell, were introduced into evidence and consisted of a black jar, three white jars, a bottle with a tube fastened with a rubber nipple over the top, a piece of newspaper, a piece of tissue paper, a piece of paper cut and folded in cone fashion and held by a needle, an English Oval Phillip Morris cigaret box. At the trial it was stipulated that, if an expert witness was called, he would testify that the contents of the jars aforesaid consisted of opium and would testify that the box contained yen shee.

A small metal lamp was discovered by one of the federal agents on a nicknack shelf in the kitchen under a red colored water tumbler. The inspector testified that he did not notice the lamp under the red glass until he lifted the latter. This witness further testified that he did not smell the odor of alcohol on the lamp, but what he smelled appeared to him to be peanut oil. He testified that upon further examination he discovered that the wick in the lamp was oily.

After making the arrest the federal and city officers took the defendant and her two guests to the United States Narcotic Bureau in the Federal building, where the defendant had a conversation with Inspector Marsh and Supervisor Manning of the Federal Narcotics Bureau. In this conversation, according to the officers, defendant stated that her guest Dorothy Martin did not know anything about the opium. According to the federal inspector, the defend-

ant, when asked by Supervisor Manning if she would say that the opium belonged to her, replied "Well, what else can I say? You found it right in my apartment, didn't you?" When asked if she was trying to protect the person from whom she received the opium, defendant replied "No, I would just rather not say any more about it". It was also testified that in the foregoing conversation the defendant stated she had smoked opium for some twelve or fifteen years "off and on". Inspector Marsh further testified that the defendant stated to him that apartment 101 was hers; that no one else shared it with her, but that she permitted Dorothy Martin to come there occasionally. It might here be noted that the aforesaid Manilla paper bag containing the opium and yen shee was found about five feet from the sill of the window to apartment 102 and approximately three feet from the sill of the window to apartment 101 occupied by the defendant. It was further testified that an examination of the contents of the paper sack was made to determine the existence thereon of any fingerprints. When the defendant attempted to ascertain whether or not any fingerprints were found, an objection to such question was sustained by the court with the statement "If they were found, we will hear about it, and if they weren't we will presume—if we don't hear about it, we will presume there were none found". No evidence was introduced at the trial to show that the defendant's fingerprints were found upon any of the exhibits. Appearing as a witness in her own behalf, defendant testified that on the afternoon in question, when the officers announced who they were, she immediately admitted them into the apartment; that when they started searching the premises she asked "What in the world are you looking for?" to which one of the city police officers replied "Oh, I thought maybe you had some guns around here". The defendant testified that she continually asked "What is this all about", until finally Federal Inspector Marsh came in with the aforesaid paper package, saying "Well, this is it", or "I found it", to which, according to the defendant she stated "What is it?" She also testified that she did not know what it was. That when Inspector Marsh said "You know what it is" she replied "I beg your pardon, I don't know what it is". With reference to the lamp found under the red glass by one of the federal agents, defendant testified that when she was asked "Is this yours?" she replied "That is a little blackout lamp. I use it to burn perfume". With reference to what transpired at the office of the Federal Bureau of Narcotics, subsequent to her arrest, defendant testified "They told me to sit down" and Supervisor Manning said " 'We'll give you a break' ". That thereupon Inspector Marsh said " 'If you will say that this belongs to you, we will let Dorothy Martin and Mr. Levenburg go' ", to which, according to her testimony, she replied " 'How can I say it is mine, when it is not mine? * * * I have never seen it before in my life' ". The defendant further testified that Miss Martin had a key to the apartment, that she had furnished her a key so that she could come in and out of the apartment whenever she desired. Defendant denied that she knew anything about the opium or any of the articles introduced in evidence and further denied that she ever told Inspector Marsh or anybody that she had been smoking opium for twelve years, and testified that she had never at any time smoked opium.

Inspector Marsh also testified with reference to certain of the exhibits being used for the smoking of opium and explained the manner in which they were used. We do not deem it necessary to a decision in this case to relate the substance of this testimony, except in so far as the same concerned the lamp found in the apartment of the defendant. The contents of this last-named lamp were identified as peanut oil which it was testified is a product used in the consumption of opium. Defendant contended that it was not peanut oil, but salad oil. After testifying to the number of years he had been a member of the Bureau of Narcotics of the United States Treasury Department, the numerous investigations concerning narcotic cases, opium and otherwise, he had made, and his familiarity with opium and the manner in which it was used by those who smoked or consumed it, Inspector Carpenter described the lamp found in the apartment of the defendant as an "opium lamp," but he admitted that it could have been used as a "blackout lamp" as contended by the defendant.

[1-3] When a judgment is assailed upon the ground that it is not supported by the evidence, the appellate tribunal is governed by the following rule announced in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779: "The court on appeal 'will not attempt to determine the weight of the

evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." (Citing cases.)

[4, 5] Therefore, if the evidence supports the inference that appellant was unlawfully in possession of the forbidden narcotics, the fact that it would likewise support a contrary finding does not warrant the reviewing court in setting aside the judgment on the ground of insufficiency of the evidence. Appellant places great reliance upon the case of People v. Flores, 58 Cal. App.2d 764, 137 P.2d 767. All that was decided in that case was that as a matter of law there was no evidence, substantial or otherwise, that the crime in question had been committed by the defendant, or justifying an inference of his guilt, and that therefore, the evidence of guilt was legally insufficient. But where the circumstances in evidence are such as to reasonably justify an inference of guilt as found by the court or jury, the fact that an inference of innocence might also just as reasonably be predicated upon such circumstances does not present a question of law reviewable by an appellate court, and we would have no more right to disturb the jury's verdict or the court's decision than we would have in a case wherein the verdict or decision was based upon directly conflicting evidence. We must therefore examine the evidence in the case at bar, but unless we can say that the same obviously does not warrant the inference of guilt arrived at by the trial court, we are powerless to interfere, because to do so would be tantamount to a retrial of the case as arbiters of both law and fact. It requires no citation of authority for the statement that such is not the function of a reviewing court.

[6, 7] In the case with which we are here concerned, appellant was charged with possession of narcotics. "Possession" of a chattel is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control, has not abandoned it and no other person has that possession (Rest., Torts, Sec. 216). The statute does not require "proof of possession" at the very time of arrest (People v. Belli, 127 Cal.App. 269, 271, 15 P.2d 809), nor is it necessary to prove that the accused had the unlawful article on his person. People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23. The question therefore arises, does the evidence in the case before us establish the fact that "possession" of the narcotics was immediate and exclusive and under the dominion and control of appellant. The narcotics were found in a lightwell 2½ feet from an open window leading from the bathroom in appellant's apartment and were accessible to a person leaning out of the window in such bathroom and reaching therefrom into the lightwell, while the narcotics were some five feet distant from the window into the bathroom of the adjoining apartment numbered 102. Then there was the small lamp found in the kitchen of appellant's apartment under a colored glass. The contents of the lamp were identified as peanut oil which an expert witness testified was a product used in the consumption of opium, while the same witness characterized the lamp in question as an "opium lamp", although he conceded it could have been used as a "blackout lamp", and the appellant testified it was a "hurricane lamp" which she "used to burn perfume" and that it contained salad oil. But the court was warranted in assuming that if used as a "blackout" lamp some product other than a slow burning oil such as peanut oil or even salad oil would have been used to fuel it. Added to the foregoing, is the statement of the appellant when asked if the opium

was hers "Well, what else can I say? You found it right in my apartment, didn't you?" together with appellant's statement that "she had smoked opium for the past twelve or fifteen years off and on".

[8, 9] While appellant at the trial denied making these statements, the verity of testimony given in this regard was a question for the trial court. And, unless the record discloses that the testimony given in contradiction of that offered by appellant is inherently improbable it is not competent for the appellate court to pass upon the credibility of the witnesses.

[10] Taking all the facts into consideration, together with the statements made by the defendant, they certainly show more than a suspicion of guilt, and constitute sufficient evidence to sustain the inference made by the trial judge that the defendant was immediately and exclusively in possession and control of the narcotics.

The judgment and the order denying defendant's motion for a new trial are, and each of them is, therefore affirmed.

YORK, P. J., and DORAN, J., concur.



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KATZ v. ENOS et al.

No. 12714.

District Court of Appeal, First District, Division 1, California.

March 2, 1945.

Rehearing Denied March 31, 1945.

Hearing Denied April 30, 1945.

1. Trusts ⇐372(3)

In action for conversion by plaintiff's sister of land allegedly deeded to her when plaintiff was mentally incompetent, for limited purpose of enabling her to raise money for his medical expenses, evidence supported findings in plaintiff's favor.

2. Appeal and error ⇐931(1)

On defendants' appeal, evidence would be construed and conflicts therein resolved in favor of trial court's findings for plaintiff.

3. Trusts ⇐373

In action for conversion of land by plaintiff's sister, finding that plaintiff was mentally incapable of executing deed was not uncertain nor inconsistent with another part of finding that, "so far as he was able to then understand", plaintiff signed deed solely to enable sister to raise money for his medical expenses.

4. Deeds ⇐211(1)

In action for conversion of land by plaintiff's sister, attending physician's testimony supported finding that plaintiff was mentally incompetent when he executed deed to sister.

5. Appeal and error ⇐994(3)

Weight of expert and other testimony as to mental condition of plaintiff when executing deed was for determination of trial court in non-jury case.

6. Trusts ⇐372(3)

In action for conversion of land by plaintiff's sister, evidence showed that plaintiff's deed to sister was for limited purpose of enabling her to raise money for his medical expenses.

7. Appeal and error ⇐1011(1)

In action for conversion of land by plaintiff's sister, conflict in evidence as to whether plaintiff's deed to sister was for limited purpose of enabling her to raise money for his medical expenses was to be resolved by trial court in non-jury case.

8. Appeal and error ⇐1071(3)

In action for conversion of land by plaintiff's sister, finding that sister, taking advantage of plaintiff's mental incapacity, obtained deed with intent to deprive plaintiff of land, was not supported by evidence, but was immaterial, in view of evidence that sister violated trust and sold land and appropriated proceeds.

9. Evidence ⇐269(3)

In action for conversion of land by plaintiff's sister, parol evidence of plaintiff's declarations after executing deed to sister was admissible on issue of plaintiff's intent in executing deed.

10. Evidence ⇐269(3)

Parol evidence of declarations of a person before or after execution by him of written instrument, such as deed of gift, is admissible, though not made in adverse

party's presence, where such person's intention or state of mind is involved.

11. Evidence ⇐269(2)

Where intent is material element, a decedent's declarations made after as well as before alleged act, if indicating intent, whether self-serving or not, are admissible as exception to hearsay rule, not as proving truth of statements, but as bearing on issue of intent.

12. Limitation of actions ⇐103(2)

Where plaintiff, while mentally incompetent, signed a gift deed to his sister, the time when plaintiff first discovered that instrument was a deed was immaterial, since his cause of action for conversion did not arise until sister sold land in violation of trust, and action for conversion within a year after sale was within the limitation period.

13. Pleading ⇐78

Laches is an affirmative defense to be alleged and proved by the party asserting it.

14. Trusts ⇐372(1)

In action for conversion by plaintiff's sister of land deeded to her for limited purpose, defendants had burden of establishing that plaintiff failed to sue within reasonable time after discovering sale of land in violation of trust.

15. Trusts ⇐372(3)

In action for conversion by plaintiff's sister of land deeded to her in May, 1936, for limited purpose, evidence that sister wrongfully sold land in February, 1938, but that plaintiff did not definitely learn of sale before October, did not show laches, where action was brought in January, 1939.

16. Trusts ⇐372(3)

In action for conversion of land by plaintiff's sister, evidence supported finding that plaintiff's deed to sister was without consideration, notwithstanding evidence that sister subsequently supported plaintiff, from whom she also received money, etc.

17. Appeal and error ⇐1010(1)

In action for conversion of land by plaintiff's sister, sufficiency of evidence to sustain judgment for plaintiff, or question whether it clearly and convincingly sustained plaintiff's contention that he deeded land to sister for only a limited purpose, must be determined, in non-jury case, by trial court, whose determination will be accepted as conclusive on appeal.

18. Trusts ⇐372(1)

In action for conversion of land deeded by plaintiff to defendant allegedly for a limited purpose, the rule that deed is presumed to convey absolute title and burden of proving it did not do so is on plaintiff does not apply in case of a confidential relationship.

19. Appeal and error ⇐840(1)

In action for conversion by plaintiff's sister of land deeded to her by plaintiff allegedly for a limited purpose, appeal from judgment for plaintiff, who died before trial, must be determined on evidence and law, apart from principle that escheats are not favored, even though his estate would escheat to the state.

20. Interest ⇐66

In action for conversion by plaintiff's sister of land deeded to her by plaintiff for limited purpose, the court, in awarding plaintiff value of land at time of sale by sister, properly allowed interest from date of sale, though not prayed for in complaint.

21. Damages ⇐67

Interest will be allowed as damages where the demand, although unliquidated, is of such a nature that amount is capable of ascertainment by mere computation, or can be established with reasonable certainty, or determined by reference to well-established market values.

22. Trusts ⇐219(1)

A trustee willfully converting trust property to his own use is liable for interest.

23. Trusts ⇐361

An action for conversion by plaintiff's sister of land deeded to her by plaintiff for limited purpose of enabling her to raise money for his medical expenses was maintainable without offering to reimburse sister for her subsequent expenditures for plaintiff's support.

Appeal from Superior Court, San Francisco County; C. J. Goodell, Judge.

Action by Robert M. Nelson against Dorothy Graham Enos and Zedd S. Riggs, as executrix and executor of the will of Elizabeth A. Nelson, deceased, substituted in

place of Zedd S. Riggs, as special administrator of the deceased's estate, with general powers, for conversion by the deceased of certain land. Plaintiff died before trial and Phil C. Katz, public administrator of the City and County of San Francisco, as administrator of his estate, was substituted as party plaintiff. Judgment for plaintiff, and defendants appeal.

Affirmed.

Bohnett, Hill & Cottrell, L. D. Bohnett, and John B. Bohnett, all of San Jose, for appellants.

Charles R. Collins, Henry F. Boyen, and Frank J. Fontes, all of San Francisco, and Richard V. Bressani, of San Jose, for respondent.

KNIGHT, Justice.

[1] Robert M. Nelson brought this action against the representatives of the estate of his deceased sister, Elizabeth A. Nelson, to recover damages for the alleged wrongful conversion by her of 42 acres of land on Ryers Island in Solano county. The action was based on allegations to the effect that Nelson reposed great trust and confidence in his sister, and that while he was confined in a hospital suffering from a severe illness she procured and induced him to sign a document, the exact nature of which he did not then know; that subsequent to her death he discovered that the document was a deed conveying the property in question to her and that at some time prior to her death she had sold the property and appropriated the proceeds to her own use. Prior to trial Nelson died, and the administrator of his estate was substituted as party plaintiff. The cause came on for trial before the court without a jury. It found generally in plaintiff's favor, and entered judgment against the defendants for $5000, the value of the land at the time it was sold, plus interest from the date of sale. The defendants appeal, one of the several grounds urged being that the evidence is insufficient to support the findings. The contentions made by defendants in this behalf are without merit.

[2] Construing the evidence and resolving all conflicts therein in favor of the trial court's findings, the essential facts may be stated as follows: In May, 1936, Nelson, then being 65 years of age and unmarried, became ill, and went to the Stanford Hospital in San Francisco for care and treatment. He was found to be suffering from a decompensated heart and an enlarged prostate gland, resulting in a damming up of the urine. He was treated for the heart ailment for several weeks, and some treatment was given to relieve the back pressure of the urine, but it was decided that an operation was necessary to remove the prostate gland, and arrangements were made to perform the operation on May 28, 1936. He did not have sufficient funds to pay his expenses, and sent for his sister Elizabeth, who lived in Los Gatos. She visited him on May 27, 1936, and he appealed to her for financial aid. She stated that she did not have money available, but consented to stay in San Francisco for a time to help her brother raise some money. At this time Nelson had a safe deposit box and some money in a savings account in the bank, but a power of attorney was necessary in order to give his sister access thereto. To this end she asked the doctor for the name of a notary public, and he referred her to William E. Schord. She telephoned Schord, asking him to come to the hospital, and upon his arrival she related the circumstances and requested him to prepare a power of attorney. He informed her that it would have to be drawn by an attorney. He suggested the name of Attorney Carol Jacoby, and Miss Nelson asked Schord to get in touch with the attorney and have the power of attorney prepared. All of this took place on May 27, 1936, and late that afternoon Jacoby and Schord arrived at the hospital with the power of attorney. Miss Nelson explained to Jacoby that the purpose for which she wanted the power of attorney was that her brother was about to undergo an operation and that she wanted to place herself in a position to borrow some money, if necessary, to pay the expenses. Thereupon Nelson was requested to sign the power of attorney, which he did. Immediately following the execution of the power of attorney Jacoby had another conversation with Miss Nelson in the hall of the hospital, and at that time he advised her that if it was her desire to borrow money on property belonging to her brother that it would expedite matters if she had a deed—that she would be in a better position to obtain a loan than if she merely had a power of attorney; whereupon she instructed him to prepare the deed, and she called at his office the next morning, May 28th, to give him the description of the prop-

erty. Jacoby prepared the deed—a gift deed—and delivered it to Schord that same day. On the morning of that day the operation was performed on Nelson, and the next day, May 29th, Miss Nelson and Schord called at the hospital and Nelson executed the deed in their presence. Before Nelson signed the deed Schord informed Nelson that it was a deed of gift to his sister, and Miss Nelson told him that it would expedite the getting of the money, whereupon Nelson nodded his head and signed the deed. The deed was then given to Miss Nelson and she caused it to be recorded. Nelson recovered from the operation, and upon his discharge from the hospital went to Los Gatos where he resided with his sister until her death in September, 1938. She furnished him his food, clothing, tobacco and spending money. She also paid his doctor and dental bills, and alimony due from Nelson to his divorced wife in the sum of $600; and she paid the taxes and assessments upon the land in question. Sometime before May, 1936, Nelson had entered into a written lease of said property for a rental of $50 a month, which expired November 1, 1938. He continued to receive the rentals provided for in the lease, but during his sister's lifetime he immediately endorsed the checks to his sister and they were deposited in her bank account.

So far as the record shows Miss Nelson did not borrow any money on the property, but on February 15, 1938, she sold the property to Rio Farms, Inc., for $5000, and received in payment 40 shares of Pacific Telephone and Telegraph stock valued at $4610.95, and $389.05 in cash. The stock was taken in her name, and the cash was deposited by her in her bank account. Upon her death her will was offered for probate. By its terms she bequeathed $1000 to each of two friends, and left her brother the income from the residue, and directed that upon his death one of the defendants herein should receive the principal. After the will was filed for probate Nelson consulted attorney Collins, and explained, so Collins testified, that his sister had died and upon opening her safe deposit box it was found that she had an estate of some $20,000, and that in his opinion she never had any such an estate. He then went on to say, according to Collins, that in 1936 he was in Stanford Hospital, and that while there he had signed some papers to enable his sister to raise money for him, as she did. He said there were several papers presented to him; that he did not know what they were but that he had signed them at his sister's request for that purpose; and that she must have obtained "a deed from him, or something else," because there was not "any other possible means whereby she could have had such an estate." Thereupon, as the result of an investigation made by Collins it was ascertained that she had received a gift deed to the Solano property and that in 1938 she had sold it to the Rio Farms, Inc.

[3] The first specific attack on the findings is made against finding III which reads in part as follows: "* * * that all during the 29th of May, 1936, because of the said physical condition of said Robert M. Nelson, and because of his advanced age, the severity of the operation he had undergone on May 28th, 1936, and the effects thereof on his mind and body, he was mentally and physically incapable of transacting any business or executing any agreement or deed and unable to comprehend or understand the nature or meaning of any business transaction, agreement or deal. * * * that said power of attorney and said deed so signed by said Robert M. Nelson, so far as he was able to then understand the nature of the acts he was then performing, were for the sole and only purpose of enabling said Elizabeth A. Nelson to raise money on his behalf for his hospital and medical expenses on the security of said real property." Appellants contend that the two parts of the finding are inconsistent and uncertain, that if Nelson was not mentally competent to transact any business, he could not have been competent to place limitations and conditions upon any deed he might sign. The words "so far as he was able to then understand" make the meaning quite clear, however; in other words, the trial court found in effect that Nelson realized that he needed money, and believed that he was signing something for the purpose of enabling his sister to raise money on his behalf, but could not fully comprehend the nature of a transaction involving the conveyance of real property.

[4, 5] Appellants also contend in this regard that there is no evidence to support the finding that Nelson was incompetent when he executed the deed. The testimony of his physician, Dr. Bunnell, however, is ample support for the finding. The doctor testified, upon being asked to state

his opinion as to Nelson's mental condition on the day he executed the deed: "I believe that his mental condition on that day, which was the day following his operation, was at quite a low ebb. By that I don't mean hallucinations or delusions but I mean that his vitality was quite low. He was toxic in that he was absorbing all the products of the operation, the serum and the blood turned loose in his system, and he also had just recovered from broken compensation of the heart and from damming back of urine, so that he was toxic from absorption of waste products. Now I am sure that a man the first day after an operation of that magnitude, which was a serious operation, is in no condition mentally to execute some legal document of importance." Dr. Folte, called as an expert witness by defendants, expressed a contrary opinion, and the notary Schord testified that to the extent that Nelson knew what he was doing when he signed the deed, he appeared to be competent to transact business. But the question of the weight to be given their testimony was one for the determination of the trial court; and with reference to Dr. Folte's opinion, the evidence shows that he had never seen Nelson, and that the opinion expressed by him was based solely on an examination of the hospital records, which consumed about half an hour before he took the witness stand. In any event, the most that can be said for the testimony of both witnesses is that it merely raised a conflict with that given by Nelson's attending physician, Dr. Bunnell.

[6] Nor can we agree with appellants' contention that there was no showing that the deed was executed for a limited purpose. In this regard the evidence shows without conflict that Nelson knew he did not have money enough to pay the expenses of his operation, and that the sole purpose of the execution of the power of attorney was to enable his sister to raise the money for him; it also shows that when Miss Nelson explained to Jacoby the purpose for which she wanted the power of attorney, he advised her that the more expeditious way of handling the matter would be to obtain a deed to the property belonging to her brother; and she instructed Jacoby to prepare the deed. So far as the record shows, nothing was said to Nelson about the plan to raise the money through the medium of a deed until the day following the operation, when the deed was presented to him for signature, at which time he was told by Miss Nelson, so Schord testified, that the purpose of the deed "was to get money in a hurry to pay his expenses"; and that Nelson nodded his head and signed the deed.

[7] In behalf of defendants evidence was introduced as to declarations having been made by Nelson after he left the hospital and after his sister's death to the effect that he had deeded the property to his sister under some sort of an agreement that she would take care of him the rest of his life. But on the other hand, the testimony given by the witnesses as to the circumstances leading up to and attending the execution of the deed, shows no such agreement. To the contrary it appears therefrom without conflict that the sole purpose of having the property conveyed to Miss Nelson was to enable her to raise money thereon to pay the expenses of her brother's operation. At the most, the evidence relating to Nelson's post-declarations merely raised a conflict on the issue as to whether the conveyance was made for a limited purpose, and such conflict was one to be resolved by the trial court.

[8] Another portion of finding III reads as follows: "The Court finds that on said 29th day of May, 1936, said Elizabeth A. Nelson, well knowing that he did not, and could not, then understand, and was not then capable of understanding the nature of any such transaction, and with intent to obtain title to said real property and to deprive said Robert M. Nelson thereof, procured and obtained the execution by him of a deed wherein and whereby he purported to grant and convey to her the said two parcels of real property * * *." Appellants contend that there was no evidence to support this finding. We agree with appellants that the evidence fails to show that Miss Nelson took advantage of her brother's condition and designedly secured the deed from him with the intention of depriving him of his property. Quite to the contrary, the evidence shows that the matter of securing the deed was advised by Jacoby in order that Miss Nelson might promptly and without difficulty raise the necessary money on the property to take care of the expenses of her brother's operation; and that Miss Nelson merely followed his advice. But the evidence further shows and the trial court found that after the property had been thus conveyed to her for such limited purpose, she did not carry

out the trust but sold the property and appropriated the proceeds of the sale to her own use. Therefore, it is immaterial to a determination of the appeal whether Miss Nelson did, as the trial court found, procure the deed from her brother designedly with the intent to deprive him permanently of his property.

[9-11] Appellants pleaded the statute of limitation and laches, and the adverse finding thereon (finding IV) was "that on or about October 5th, 1938, said Robert M. Nelson ascertained and learned for the first time that the document signed by him on May 29th, 1936, was, or purported to be, a deed conveying to said Elizabeth A. Nelson said two parcels of real property, and, at the same time he also learned for the first time that said Elizabeth A. Nelson had, on or about the 14th day of February, 1938, sold and conveyed all said real property to Rio Farms, a corporation." The court then went on to find that some time prior to the date of the gift deed Nelson executed a lease to the property for a term expiring on November 1, 1938, at a monthly rental of $50; that Miss Nelson sold the property subject to that lease, but that Nelson continued to receive the rentals until after his sister's death, and "that because said rentals under said lease were so continuously paid to said Robert M. Nelson, he did not know, and had no cause to suspect, that he was not still the owner of said land." Appellants argue that there "is no support whatsoever in the record for this finding other than in the testimony of" Attorney Collins, which was admitted over appellants' objection that it was incompetent, irrelevant and immaterial, hearsay, a matter between attorney and client, and that the testimony was offered in disparagement of a deed made by the declarant. In holding that the testimony was admissible the court stated that it based its ruling on the authority of O'Dea v. Hibernia Savings & Loan Soc., 119 Cal.App. 622, 7 P.2d 318, 319, and obviously the decision therein supports the trial court's ruling. It is there said: "It is argued that the findings of fact are not supported by competent evidence, in that this evidence consisted of parol testimony of declarations of the deceased made after the execution of the instrument. This testimony the appellant claims to be incompetent as in disparagement of the written document. But there is a well-recognized exception to this rule that, when the intention or state of mind of the alleged donor is involved, evidence of declarations made by him before or after the transaction is admissible though the declarations were not made in the presence of the adverse party. [Citing cases.]" The same doctrine is stated thus in the later case of Whitlow v. Durst, 20 Cal.2d 523, 127 P.2d 530, 531, as follows: "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving." In this connection it is also held that such declarations are not admitted to prove the truth of the statements made, but as evidence bearing upon the issue of the intent with which the declarant performed the act in question. Bridge v. Ruggles, 202 Cal. 326, 260 P. 553.

[12-15] Appellants argue, however, that while under the rules above stated Nelson's declarations to Collins may be considered on the issue of the intent with which he executed the deed, such declarations may not serve as the basis for a finding as to when he first discovered that the document he signed was a deed. It would seem to be immaterial, however, as to when Nelson first discovered that the instrument he signed was a deed, for in any event his cause of action for conversion did not arise until Miss Nelson sold the property in violation of the trust. That was in February, 1938, and Nelson filed his action in January, 1939, which was well within the period fixed by the statute. The real question involved is, therefore, whether Nelson was guilty of laches in not bringing the action at an earlier date. The law is well settled that laches is an affirmative defense which must be alleged and proved by the party asserting such defense. Consequently the burden was upon appellants to establish that Nelson failed to file his action for conversion within a reasonable time after discovering that the property had been sold in violation of the trust; and this they failed to do. In fact, Zedd S. Riggs, one of the executors of Miss Nelson's will and her business advisor, was called as a witness by appellants and testified that Nelson came to him a day or two after Miss Nelson's death (which occurred in September, 1938) and talked of business affairs, and that during the conversation the following was said: "Mr. Nelson asked me,

'What did she do about the ranch?' And I said, 'That was sold to Rio Farms, because it was not producing much income.' He said, 'I wondered about that.'" Furthermore and entirely aside from the matter of Nelson's declarations, there is the testimony of Collins to the effect that Nelson called at his office in October, 1938, to consult him with reference to the matter, and that in order to ascertain whether or not the property had been sold Collins sent Nelson to Fairfield, Solano county, to obtain a report from the title company. We are of the opinion, therefore, that there is nothing in the attack made by appellants on finding IV which would call for a reversal.

[16] Appellants also contend that the finding that Miss Nelson gave no consideration for the deed is without evidentiary support. This contention is based largely upon the evidence that she supported him and provided him with a home after he was discharged from the hospital, and paid all his bills and expenses, until her death, and then by her will left him the income from her estate for the rest of his life. The evidence also shows, however, that for more than two years Nelson turned over to her the rent checks from the property, amounting to $50 a month, and by the use of the power of attorney she obtained the undisclosed contents of his safe deposit box and what money he had in a savings account; and that she also collected the dividends from the Pacific Telephone and Telegraph stock she had taken as the major part of the payment of the property. There is no evidence showing that the moneys and assets so received by her were less than the total amount paid out by her in behalf of her brother. In that state of the record it cannot be said that the trial court was not justified in finding that there was no consideration for the deed.

Finding XII contains findings of ultimate facts, based upon the findings above discussed and found to be supported by the evidence. Therefore this finding likewise is supported by the evidence.

[17, 18] Appellants argue generally in regard to the sufficiency of the evidence that in a case such as this, the deed is presumed to convey absolute title and the burden of proving it did not do so is upon plaintiff, and that to overcome this presumption plaintiff's proof must be "clear, satisfactory and convincing." However, the courts have repeatedly held that the question as to whether the evidence is "clear and convincing" or sufficient to sustain a judgment for the plaintiff "must be determined by the trial court," and that the determination of the trial court will be accepted "as conclusive" on appeal. 25 Cal. Jur., Trusts, sec. 114, p. 248, and cases cited; 11 Cal.Jur. 10 Yr.Supp. p. 25, and cases cited. In this connection it should be stated that the presumption and burden of proof rule contended for by appellants does not apply where a confidential relationship is shown to exist between the parties at the time of the execution of the deed. Here the court found that such relationship did exist, and it would seem that the evidence is sufficient to support such finding. Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31. However, even assuming that such relationship did not exist, the evidence is legally sufficient to sustain the trial court's findings under the rule contended for by appellants.

[19] Appellants also call attention to the principle that escheats are not favored in law, and state that this principle is applicable here for the reason that the estate of Robert Nelson after the payment of claims and costs of administration will escheat to the state. They argue, therefore, that any doubts that the court may have should be resolved in their favor. This element was doubtless taken into consideration by the trial court in deciding the cause on the merits; and obviously the appeal must be determined upon the evidence and the law applicable thereto, regardless of who may be the recipients of the estate of Robert Nelson.

[20-22] As stated, the court allowed interest on the judgment from the date of the sale of the property to the date of judgment. Appellants contend that the judgment for interest was improper for the reasons that plaintiff did not ask for interest in his complaint, and that this is an action to establish a trust and the amount of damage was unliquidated until after trial, and therefore interest was not allowable. As to the first point, it has been held that "When interest is allowable, judgment may be rendered therefor, even though not prayed for in the complaint. Perry v. Magneson, 207 Cal. 617, 279 P. 650." Deaux v. Trinidad Bean & Elevator Co., 8 Cal.App.2d 149, 47 P.2d 535, 536. There are several answers to the second point. As held in Bare v. Richman & Samuels, Inc., 60 Cal.App.2d 413, 140 P.2d 895, 899, quoting from 15 Am.Jur. 583, "The more

liberal view now prevails that interest will be allowed as damages where the demand, although unliquidated, is of such a nature that the amount is capable of ascertainment by mere computation, or can be established with reasonable certainty, or determined by reference to well-established market values." Also it is held that where a trustee wilfully converts trust property to his own use, he is liable for interest. As said in Re O'Connor's Estate, 28 Cal.App.2d 527, 530, 83 P.2d 65, 66: "The applicable rule of law is found in the early case of Wheeler v. Bolton, 92 Cal. 159, 172, 28 P. 558, 561, where the court said: 'The general rule applicable to an executor, as well as to any other trustee, is that, except in cases in which he has been guilty of some positive misconduct or willful violation of duty, he is not to be charged with compound interest. In cases of mere negligence, no more than single interest is ever added to the loss or damage resulting therefrom. In cases where he has mingled moneys belonging to his trust with his own funds, and used them for his own advantage, courts have charged him with compound interest, upon the theory that, in the absence of evidence to the contrary, he will be presumed to have received such profits from their use.' In Estate of Piercy, 168 Cal. 755, 757, 145 P. 91, the earlier cases are cited to the point that, when the executor has been guilty of willful violation of duty, or misapplication of the funds of the estate to his own use, there is no room for discretion, but the beneficiaries are entitled to compound interest. In Gaver v. Early, 191 Cal. 123, 125, 215 P. 394, the court, following the same principle, ruled that such interest should run from the dates of the respective misappropriations. The same rule was followed in Estate of McLellan, 8 Cal.2d 49, 55, 63 P.2d 1120." Therefore, under these rules, it would seem not only that the allowance of simple interest was not improper, but that the court would have been justified in charging compound interest. Appellants also argue in this regard that the court was not justified in allowing interest on the proceeds of the sale for the same period of time that Nelson was receiving the rentals from the property; but as stated, it is admitted that he did not cash the rental checks himself, but endorsed them over to his sister, who deposited them in her own bank account.

[23] Appellants also assert that plaintiff's complaint and his proof fail to establish a cause of action in that there is no allegation or proof of reimbursement, or offer of reimbursement, of funds paid by Miss Nelson for the benefit of her brother. But no evidence was offered that Miss Nelson actually raised money on the property with which to pay her brother's hospital expenses, nor that the money in his savings account which she withdrew through her general power of attorney was not sufficient for such purpose; furthermore, there is no direct evidence that the later support she furnished her brother and the payment of his bills was in return for the deed of the property. Under such circumstances Nelson was not required to make tender of the amount of money she expended in his behalf in order to maintain his action for the conversion of his property.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.



PHILLIPS et al. v. WHEELER et al.

Civ. 2372.

District Court of Appeal, Third District, California.

Nov. 16, 1921.

1. Appeal and error ⇐933(4)

Where motion for new trial was based on all statutory grounds and order granting motion was silent as to particular grounds on which it was predicated, presumption existed that order was not made on ground that evidence was insufficient to support verdict. Code Civ.Proc., § 657, subds. 1–7; § 658.

2. Appeal and error ⇐901

An appellate court is not under duty to initiate and prosecute a search through records to find whether errors of law of sufficient gravity to justify a new trial or reversal were committed by trial court either in its instructions or rulings on the evidence.

3. Appeal and error ⇐854(6)

Where motion for new trial was based on all statutory grounds and order granting motion was silent as to particular grounds on which it was predicated, but, on record as made, new trial could have been granted only on ground that verdict was against law or on ground of error in law occurring at trial but such grounds were not covered by briefs on which case was submitted, a reversal of order granting new trial would be justified, but submission of case would be vacated and parties would be given opportunity to file supplemental briefs covering such grounds. Code Civ. Proc. § 657, subds. 6, 7.

4. New trial ⇐127

A party seeking new trial on ground that verdict is against law or on ground of error in law occurring at trial must point out to trial court the particular errors claimed. Code Civ.Proc. § 657, subds. 6, 7.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action for personal injuries by J. W. Phillips and others against John H. Wheeler and others. The jury returned a verdict for defendants. From an order granting a motion by the plaintiffs for a new trial, the defendants appeal.

Submission vacated and leave given to file supplemental briefs.

See also 55 Cal.App. 684, 203 P. 413.

W. H. Hatfield, V. L. Hatfield, and P. H. Johnson, all of Sacramento, for appellants.

Frank L. Gafney, H. T. Hiatt, and C. B. Harris, all of Sacramento, for respondents.

PER CURIAM.

[1] This is an appeal from an order granting a motion by the plaintiffs for a new trial. The motion was based upon all the statutory grounds (see sec. 657, Code Civ.Proc.), and the order granting it was in general language or silent as to the particular ground or grounds upon which it was predicated. There was no showing, by affidavits or otherwise, in support of any of the grounds enumerated in the first, second, third, and fourth subdivisions of section 657, such a showing being required by section 658 of the Code of Civil Procedure. The action was for damages for personal injuries, and, the verdict being for defendants, no question of excessive damages, etc. (subd. 5, sec. 657), is involved herein, and it is obvious, therefore, that the order appealed from was not based upon that ground. The question as to the sufficiency of the evidence to support the verdict is eliminated from consideration here, since the order granting the new trial does not state that it was made on that ground, the presumption in such case being, under said section 657, as amended by the legislature of 1919 (Stats. 1919, pp. 141, 142), that the order was not made upon that ground. It results that there are left but two of the several causes for which an order granting a new trial may be granted upon which the order could have been made, and they are: 1. That the verdict "is against law" (subd. 6); 2. "Error in law, occurring at the trial and excepted to by the party making the application" (subd. 7). But, as to these grounds, neither counsel for respondents nor counsel for appellants have a word to say in their briefs. In fact, the brief of counsel for respondents is devoted entirely to a discussion of the question of the discretion of a trial court in the matter of granting the motion on the ground of the insufficiency of the evidence to support the verdict, while those of appellants involve merely a reply thereto and also the contention that the duty is not upon them to show that the court did not err in any of its rulings or instructions. There was no oral argument of the cause, it having been submitted upon the briefs on file.

[2-4] It is not the duty of an appellate court to initiate and prosecute a search through the record of a case to find whether errors of law of sufficient gravity to justify a new trial or a reversal were committed by the trial court either in its instructions or rulings upon the evidence. This is plainly a burden which belongs to and must be shouldered by the attorneys. In this case, since, on the record as made, there are only two grounds of the several upon which a new trial may be granted which can be considered, namely, that the verdict is against law and error in law occurring at the trial, it would seem that the duty of pointing out wherein the verdict is against law or that errors were committed during the trial is upon the respondents. Unquestionably, on a motion for a new trial, where those two grounds (or either of them) are relied on, it is incumbent upon the party asking a trial de novo to point out to the trial court the particular errors claimed, in

which case the record on appeal would presumably be as it was made below and thus the appellate court advised of the particular errors assigned as justifying the granting of the motion and the affirmance of the order. But however this all may be, it is clear that as the cause now stands submitted a reversal of the order would be justified. Inasmuch, however, as we conceive it our duty to assume that the trial court had some substantial legal reason for granting the motion, we feel reluctant about ordering a reversal without giving the attorneys for the respondents an opportunity to point out, if they can, any errors affecting their vital rights in the trial which occurred during the course thereof. Accordingly, the submission of this case for decision is hereby vacated and set aside, and the respondents are allowed ten days from the date of the notice of this order within which to file a supplemental brief, in typewritten in lieu of a printed form, if they so elect, covering the points hereinabove indicated, and the appellants a like period of time from the date of the service upon them of the said supplemental brief of respondents to file a reply thereto in typewritten form, if they so elect in preference over a printed brief.



WOOD v. SAMARITAN INSTITUTION, Inc. *

Civ. 14541.

District Court of Appeal, Second District, Division 2, California.

Feb. 27, 1945.

Hearing Granted April 26, 1945.

1. Hospitals ⇐7

Defendant, in conducting establishment for treatment of chronic alcoholics, had duty to exercise that degree of care in providing for and in guarding safety of its patients that a reasonable man would exercise under the circumstances, including patient's mental and physical condition and what patient was likely to do because of her condition, but was not required to use a greater care than a reasonable person would use.

2. Hospitals ⇐7

Defendant in operating establishment for treatment of chronic alcoholics was not required to restrain patient or bar patient's windows unless facts were brought to defendant's attention showing that it was reasonably probable that patient would do injury to herself or to some other person.

3. Negligence ⇐121(2)

Where plaintiff, without alleging general negligence, alleged specific acts of negligence upon which she relied, doctrine of res ipsa loquitur was not available.

4. Judgment ⇐570(4)

A judgment of "nonsuit" merely determines that plaintiff has not proven his case, and it is not a bar to an action subsequently filed on same cause of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Nonsuit".

5. Judgment ⇐563(1)
Trial ⇐173

A "directed verdict", as distinguished from a judgment of nonsuit, is a bar to a subsequent action presented upon same set of facts, and, when based upon insufficiency of evidence, should be entered after both parties rest.

See Words and Phrases, Permanent Edition, for all other definitions of "Directed Verdict".

6. Trial ⇐173

Where defendants at close of plaintiff's case, without resting, moved for a directed verdict with the alternative proposal that, if motion were denied, defendants be permitted to produce further evidence, and it appeared that plaintiff's case was insufficient, court should have ordered a nonsuit and should not have directed a verdict.

7. Appeal and error ⇐212

Where defendants at close of plaintiff's case which coincided with end of morning session moved for a directed verdict, or in the alternative, if motion was denied, for permission to adduce further testimony, and, plaintiff's counsel interposed no objection to form of motion, either when made or at opening of afternoon session, plaintiff could not complain

* Subsequent opinion 161 P.2d 556.

on appeal that motion for directed verdict was prematurely made because of defendants' failure to first rest its case.

8. Appeal and error ⇐181

Appellant cannot urge as a ground for reversal an error which he waived by failure to make proper objection in trial court.

9. Appeal and error ⇐1048(2)

Erroneous exclusion of opinion of expert witness concerning general custom and practice in treatment of alcoholics in well-managed institutions in vicinity because it was not shown that witness had had experience in institutions devoted entirely to treatment of chronic alcoholics, although witness was in fact qualified to testify as an expert, was not prejudicial in view of disclosure in record that witness ultimately was permitted to testify and give his opinion on points covered by rejected questions.

10. Appeal and error ⇐1046(5)

Plaintiff was not prejudiced by suggestion of trial judge that matters in issue should be compromised by parties where, in view of showing made by plaintiff, it was apparent that suggestion was in plaintiff's interest.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Florence Margaret Wood against the Samaritan Institution, Inc., for injuries sustained when plaintiff fell or jumped through a second story window of defendant's establishment. From a judgment for defendant upon a directed verdict, plaintiff appeals.

Affirmed.

F. Murray Keslar, of Los Angeles, for appellant.

Chas. E. R. Fulcher, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover for injuries which she received when she fell or jumped through a second floor window of the establishment conducted by defendant for the cure of chronic alcoholics. Among the answers presented by defendant it was claimed that plaintiff received her injuries in an attempt to commit suicide. This appeal is by plaintiff from a judgment entered upon a directed verdict.

Plaintiff had for many years been addicted to the excessive use of liquor and on January 5, 1943, she voluntarily entered defendant's sanitarium to submit herself to treatment. Shortly after midnight of the following day she was found lying upon the cement pavement below her second floor window with serious injuries. While she was at the sanitarium she was highly nervous and at times was delusional. She did not recognize her sister when the latter came to visit her. She thought she was in an insane asylum and at one time the nurse discovered her scrubbing the floor of her room thinking that it was her kitchen floor at home.

In her complaint plaintiff charges that defendant was negligent in failing to guard and restrain her and in failing to properly bar her window to prevent her plunging through the window to the ground below.

[1, 2] Defendant was under the obligation to use reasonable care in providing for and in guarding the safety of its patients, the obligation to use the care and take the precaution to prevent danger which a reasonable man would take under the circumstances shown to exist. The circumstances to be considered included the patient's mental and physical condition and what she was likely to do because of her condition; but defendant's obligation was subject to the rule that it was not required to use greater care than a reasonable person under the circumstances would use. Defendant was not required to take measures to avert injury to its patients which circumstances did not indicate to be reasonably likely to occur. Davis v. Springfield Hospital, 204 Mo.App. 626, 218 S.W. 696. Specifically, defendant was not required to restrain its patient or bar its windows unless facts were brought to its attention showing that it was reasonably probable that the patient would do injury to herself or to some other person. Duncan v. St. Luke's Hospital, 113 App.Div. 68, 98 N.Y.S. 867; Mesedahl v. St. Luke's Hospital Ass'n of Duluth, 194 Minn. 198, 259 N.W. 819; Dahlberg v. Jones, 232 Wis. 6, 285 N.W. 841; Hohmann v. Riverlawn Sanatorium, 103 N.J.L. 458, 135 A. 817; Harris v. Woman's Hospital, 27 Abb.N.C. 37, 14 N.Y.S. 881; Breeze v. St. Louis & S. F. Ry. Co.,

264 Mo. 258, 174 S.W. 409; Stansfield v. Gardner, 56 Ga.App. 634, 193 S.E. 375. In Papini v. Alexander Sanitarium, Inc., 12 Cal.App.2d 249, 55 P.2d 270, the plaintiffs sought damages resulting from the death of their son, who had been killed by a razor blade wielded by a fellow patient at the defendant's hospital, one Boliva, who had been admitted as an "amnesia patient". In reversing a judgment for the plaintiffs the court held that there was no evidence to show that the defendant knew that Boliva was suffering from a form of insanity known as "homicidal mania," that unless restrained he might voluntarily attack other patients, that he had attacked other persons on previous occasions or that he was a dangerous patient to be at large unrestrained. Plaintiff relies upon a number of cases in which awards were upheld for damages received by patients in jumping from windows or otherwise. Durfee v. Dorr, 123 Ark. 542, 186 S.W. 62; Emory University v. Shadburn, 47 Ga. App. 643, 171 S.E. 192; Mulliner v. Evangelischer Diakonniessenverein, etc., 144 Minn. 392, 175 N.W. 699; Robertson v. Charles B. Towns Hospital, 178 App.Div. 285, 165 N.Y.S. 17; Tate v. McCall Hospital, 57 Ga.App. 824, 196 S.E. 906; Wetzel v. Omaha Maternity & General Hospital Ass'n, 96 Neb. 636, 148 N.W. 582, Ann. Cas.1915B, 1224. In those cases, however, facts were shown in evidence which indicated to the defendants that the patients involved were likely to inflict injury on themselves or others. No case is cited in which a judgment was affirmed upon proof that the patient was merely delusional or suffering from other mental disease, unaccompanied by acts pointing to violence. We conclude that the evidence in the instant case is insufficient to entitle plaintiff to recover a judgment.

[3] Plaintiff argues that the doctrine of res ipsa loquitur is applicable but, regardless of the view to be taken on this point, she is not in any event in position to invoke this doctrine, for, without alleging general negligence, she alleged the specific acts of negligence upon which she relies. Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 155 P.2d 42.

[4-8] Plaintiff complains that the motion and order for a directed verdict were made prematurely. All of the plaintiff's evidence being before the court, at the close of the morning session counsel for defendant presented a motion as follows: "I now move the court to instruct the jury to find for the defendants. It is being made in the alternative. If it is denied, I move the court to permit me to proceed with further evidence" (stating grounds of motion). After argument the court stated: "Motion granted. I will instruct the jury when they return at 1:45. In view of the fact that I will instruct them, do you desire to be present or not?" At the afternoon session the jury was directed to return a verdict for defendant. A judgment of nonsuit merely determines that plaintiff has not proven his case and it is not a bar to an action subsequently filed on the same cause of action. A directed verdict is a bar to a subsequent action presented upon the same set of facts and should not, when based upon the insufficiency of the evidence, be entered before both parties rest. Since defendant had presented its evidence and counsel had not announced that he rested, the court should have merely ordered a nonsuit and should not have directed a verdict. But plaintiff is not in position to demand a reversal of the judgment because of the action of the trial court, for no objection whatever was made to the form of the motion. Although counsel had opportunity during the noon recess to give the matter consideration, he did not see fit at the opening of the afternoon session to call the court's attention to the fact that a motion for a directed verdict was being prematurely made and made no objection whatever to the procedure being followed by the court. Appellant will not be heard to urge as grounds for reversal an error which he has waived by a failure to make the proper objection in the trial court. 2 Cal.Jur. 844, § 495, and cases there cited. The point now raised by plaintiff must be included within this rule.

[9] Plaintiff contends that the court erred in refusing to permit an expert witness, Dr. Zumwalt, to give his opinion concerning the general custom and practice in the treatment of alcoholics in well managed institutions in the vicinity of Los Angeles, it not being shown that the witness had had experience in institutions devoted entirely to the treatment of chronic alcoholics. Although it appears that Dr. Zumwalt was in fact qualified to testify as an expert and that the questions should have been permitted, plaintiff was not prejudiced by the ruling of the court, for an examination of the record

discloses that the witness ultimately was permitted to testify and give his opinion on the points covered by the rejected questions.

[10] Plaintiff was not prejudiced by the suggestion of the trial judge, of which complaint is made, that the matters in issue should be compromised by the parties. In view of the showing made by plaintiff it is apparent that the suggestion was in her interest.

The judgment is affirmed.

MOORE, P. J., concurs.

McCOMB, Justice.

I concur in the judgment but I do not concur in the statement in the majority opinion relative to the time for making a motion for a directed verdict. In my opinion such statement is contrary to the established law and procedure in California. See Bias v. Reed, 169 Cal. 33, at page 37 et seq., 145 P. 516.



68 Cal.App.2d 280

MORRISON v. KAUFMAN et al.

Civ. 14674.

District Court of Appeal, Second District, Division 1, California.

March 2, 1945.

1. Courts ⇐472(4)

The estate of deceased is in custody and control of probate court and it is within its exclusive province to determine validity and amount of claims made against estate.

2. Executors and administrators ⇐216(2)

A written agreement between executor and attorneys fixing amount attorneys were to receive for legal services rendered estate did not preclude attorneys from recovering additional fees for extraordinary services, where additional services not contemplated at time of agreement were subsequently rendered and executor orally consented to additional compensation. Probate Code, § 910; Civ.Code, § 1698.

3. Contracts ⇐238(2)
Evidence ⇐445(1)

A written contract modified by an executed oral agreement is valid and enforceable as modified, and evidence in reference thereto does not violate parol evidence rule. Civ.Code, § 1698.

4. Executors and administrators ⇐216(2)

The probate court did not abuse its discretion in making additional allowance to attorneys for extraordinary services rendered by attorneys to estate in connection with claims against estate and sales of real estate. Probate Code, § 910.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Louis W. Morrison, wherein Morrison Morrison, executor, contested the petition of Arthur V. Kaufman and Harry H. Licker for allowance of fees for extraordinary legal services. From an order making an allowance to the petitioners, the contestant appeals.

Order affirmed.

J. Russel Myers, of Los Angeles, for appellant.

Arthur V. Kaufman and Harry H. Licker, both of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from an order allowing respondents the sum of $5400 for extraordinary legal services. It appears that Louis W. Morrison, the father of appellant, died testate on March 26, 1935, and that the appellant became the executor of his father's will. Until December, 1939 the executor was represented by the law firm of Golden and Kaufman, and thereafter by Arthur V. Kaufman who continued as sole attorney for the executor until in September, 1942 when Mr. Kaufman entered the army, at which time Harry H. Licker was associated as attorney for the estate. Assets in the estate were originally appraised at $478,459.84, and the final appraisal was $354,126.51, the assets consisting of property located in California and in New York.

On May 6, 1936 the following document was signed and delivered to the executor, and it is upon this written instrument

that the appellant relies in objecting to the allowance of extraordinary legal fees:

"Received of Morrison Morrison the sum of Six Thousand Dollars ($6,000.00), One Thousand Dollars ($1,000.00) of which has heretofore been received, and Five Thousand Dollars ($5000.00), receipt of which is acknowledged herewith.

"Said sum of Six Thousand Dollars ($6000.00) is received by us as full settlement of any and all claims, which we may have against Morrison Morrison either individually, or as executor of the Estate of Louis W. Morrison, deceased.

"For said sum so received, we agree to complete the probate of the Estate of Louis W. Morrison, deceased, without any further charge whatsoever. It is understood, however, that in the event that we shall be engaged in a contest with reference to inheritance taxes, then and in that event, we shall be paid a reasonable percentage of the amount which we save from the taxes now computed against said Estate, said percentage which we are to receive to be mutually agreed upon.

"Dated: May 6th, 1936.

"Golden and Kaufman,
"By A. V. Kaufman,
"By Milton M. Golden."

Subsequently, on or about March 19, 1943, respondents filed their petition for allowance of fees for extraordinary services to which appellant filed an answer setting up the agreement of May 6, 1936 and denying the performance of any extraordinary service or any subsequent oral agreement on his part to pay any additional attorney fees. Thereafter this petition was withdrawn and a second petition for extraordinary fees was filed, identical with the first except that it set forth the agreement of May 6, and alleged an indebtedness of $2000 due from appellant personally. It was stipulated that the answer to the first petition would be deemed an answer to the second petition. Respondents' petition sets forth, in extenso, the performance of considerable amount of legal work including contested tax claims, litigation, and sales of real estate, specifying 34 court appearances, a time expenditure of 232 days, and alleging a saving to the estate of $65,000. On Nov. 19, 1943, after a four day hearing at which appellant and respondents testified at length, the trial court allowed the sum of $5,400 for extraordinary legal services, apportioning the amount as follows:

"I.	United States Governernment Taxes	$2,100.00
II.	New York State Taxes	00.00
III.	Taxes to the State of California	1,200.00
IV.	Claim of County of Los Angeles	750.00
V.	Claim of Rosenblatt and Jeffe	750.00
VI.	Sales of Real Estate	
	(a) in California	600.00
	(b) in New York	00.00
VII.	Stocks, Bonds and Securities	00.00
VIII.	Account, Suspension and Restoration of Executor's Powers	00.00
	Total	$5,400.00"

In reference to the executor's contention that any claim for extraordinary attorney fees was barred by the written instrument of May 6, 1936 the trial court found as follows: "8. That immediately prior to May 6, 1936, Morrison Morrison, the executor herein, was personally indebted to the firm of Golden and Kaufman in the amount of $2000.00 for legal services rendered to him individually; that at that time Morrison Morrison, as executor of this estate, stated to Arthur V. Kaufman, one of the petitioners herein, he wanted them to close the administration of the estate immediately. That on the basis of said request, and the condition that there would be no further services required of said firm of Golden and Kaufman other than the routine closing of the estate and the handling of the tax matters incidental thereto, the firm of Golden and Kaufman delivered the following writing to Morrison Morrison individually and as executor of the above estate:" (setting forth the writing of May 6, 1936 hereinbefore mentioned).

The trial court further found in substance that the $6000 paid by the executor under the terms of such writing should be allocated as follows: $2,000 for legal services rendered to Morrison Morrison personally, and $4,000 for ordinary legal services to Morrison Morrison as executor of the estate; that the statutory commissions based on the appraised value of the estate at the time of the execution of said

writing amounted to $5,614.60; that thereafter the executor advised petitioner Kaufman "that he had changed his mind about closing the estate immediately, and wanted said petitioner to perform such services as would be required to dispose of the estate's real property." That thereupon, said petitioner advised said executor that such services were not contemplated when the writing of May 6, 1936, was delivered to the executor, and further, that the requested services, and any services other than the ordinary services necessary to close the estate, would constitute extraordinary services, which were not contemplated by, or covered in, the said writing, and compensation for which would have to be fixed by the Probate Court. That the executor then orally agreed with the said petitioner that said petitioner was entitled to additional compensation for any extraordinary services to be rendered by him thereafter, including the sale of said real property. That pursuant to said oral agreement, petitioners performed extraordinary services in reference to the matters hereinbefore set forth and of the reasonable value specified in the order.

Appellant denied the making of the alleged subsequent oral agreement to pay petitioners any additional fee and has taken the position that no extraordinary services were performed. The finding to the contrary, however, finds support in the testimony of petitioner Arthur V. Kaufman which discloses the performance of extensive legal service, many court appearances, contested litigation including an appeal to the Supreme Court of California, contested tax claims, and sales of real estate. There is evidence of the fact that these services were performed with the knowledge of the executor, that they covered a period of several years, and that the matter of extra compensation was several times discussed. Attorney Kaufman testified that there were several similar conversations, for example, in August and September, 1936, when he told Morrison that services other than the routine closing of the estate, would have to be paid for, to which the executor replied, "Don't worry about it. I will take care of that as soon as we get everything straightened up and we reach a point I can pay it." There was a decided conflict in the testimony as to this and other matters, but the record discloses substantial evidence to support the findings of the trial court and the allowance of fees for extraordinary legal services.

It is appellant's contention that the facts establish—"First: That the matter of allowance of attorney fees for extraordinary services was not properly before the Court, the respondents and the executor having entered into a written contract fixing and determining the amount of attorney's fees to be paid; and Second: Even if the petition for allowance of extraordinary services was properly before the Court, the facts and circumstances and the Order made clearly show an abuse of discretion."

[1] As pointed out by respondents, however, it is settled law in California that the estate of the deceased is in the custody and control of the Probate Court, and it is within its exclusive province to determine the validity and amount of all claims made against the estate. Thus in Dobbins v. Title Guarantee & Trust Co., 22 Cal.2d 64, 136 P.2d 572, 574, it was held that the court had jurisdiction in the matter of apportionment of extra compensation between coexecutors notwithstanding a contract between them, and that "Under various circumstances the probate court may determine the validity *and effect* (italics added) of contracts when ancillary to a proper judgment by it." See also Estate of De Barry, 43 Cal.App. 2d 715, 111 P.2d 728, and Estate of Hughes, 3 Cal.App.2d 551, 40 P.2d 295. Section 910 of the Probate Code provides that attorneys for executors shall be allowed such amount as the court "may deem just and reasonable for extraordinary services," and in the Estate of Neff, 56 Cal.App.2d 728, 732, 133 P.2d 413, 415, the rule stated in many previous decisions was followed, namely, that, "In making its order fixing such fees, the court has a large discretion, and when the court has made its determination in respect thereto, its judgment will not be interfered with on appeal, except only in the face of a plain abuse of discretion."

[2, 3] While it is true that the parties had entered into a written contract concerning attorney fees, containing the statement that respondents would complete the probate of this estate "without any further charge whatsoever," nevertheless, it is well settled that any contract in writing may be modified by an executed oral agreement. Civil Code, sec. 1698. Such a contract as modified is valid and enforceable,

and evidence in reference thereto does not violate the parol evidence rule. Bard v. Kent, 37 Cal.App.2d 160, 99 P.2d 308. In Treadwell v. Nickel, 194 Cal. 243, 228 P. 25, 32, this question was before the Supreme Court in reference to a written contract covering the employment of an attorney, and a subsequent modification thereof. The Court there said: "If thereafter the relations of plaintiff and Miller & Lux were governed by such oral agreement, and its object was fully accomplished, the agreement became executed and worked a modification of the original contract of employment." The Court also held that in an action to recover attorney fees where there is a material conflict in the evidence, findings which are based upon reasonable inferences drawn from the facts proved, will not be disturbed on appeal.

[4] Appellant's contention that the trial court took into account alleged improper items in connection with the order for extraordinary services, and which, it is argued, amounted to an abuse of discretion cannot be upheld.

For the foregoing reasons, the order appealed from is therefore affirmed.

YORK, P. J., and WHITE, J., concur.



68 Cal.App.2d 294

In re BASSO'S ESTATE.

SHELLEY v. BASSO.

Civ. 14501.

District Court of Appeal, Second District, Division 3, California.

March 6, 1945.

1. Courts ⇐200½

A widow who is also executrix must account for all property of estate, and in her proceeding for distribution it is proper to determine questions of title to properties in which testator had interest and which are claimed by widow as her own.

2. Executors and administrators ⇐4

In statutory proceeding, as by widow and executrix to establish fact of testator's death, wherein she claims properties as joint tenant with testator, judgment establishing fact of death is only prima facie evidence thereof, and is not adjudication of title nor a judgment from which an appeal may be taken. Probate Code, §§ 1170, 1174, 1175, 1240.

Appeal from Superior Court, Los Angeles County; Clarence L. Variel, Judge.

In the matter of the estate of John Basso, deceased. From an order settling the account of the widow and executrix, Katie Basso, and distributing certain property to the widow, W. Frank Shelley appeals.

Reversed.

Arthur E. Briggs, of Los Angeles, for appellant.

George G. Witter, of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal by W. Frank Shelley from a decree of distribution by which all of the property which was found to belong to the estate of John Basso, deceased, was determined to be community property and was distributed to his widow, Cattarina Basso. Appellant was in court as the assignee of a 20% interest in a share of the estate claimed by decedent's daughter, Jennie V. Geisler.

Decedent by his will left all of his estate to his wife. He failed to name his daughter and his son in the will or to declare his intention not to provide for them, and the daughter had claimed in earlier proceedings the rights of inheritance which she would have enjoyed if her father had died intestate. The will was duly admitted to probate and Cattarina was appointed executrix. She filed a petition to establish the fact of John Basso's death, in which she described ten parcels of property, both real and personal, and alleged that they were held in joint tenancy by her husband and herself. After notice of the hearing the court rendered a judgment on May 22, 1941, granting the petition and reading in part as follows: "It is ordered, adjudged and decreed by the court that John Basso died on the 13th day of November, 1940. The property owned by Cattarina Basso, also known as Katie Basso and Catherin Basso, and decedent as joint tenants is described as follows: [Here a description of the ten parcels.]" Thereafter the daughter filed a

petition to determine heirship, alleging that she and her brother were not named in the will and, with the widow, were entitled to inherit the estate, and praying that the court determine to whom distribution should be made. A hearing was had upon the petition, at which the daughter and the widow were represented, evidence was introduced and findings, conclusions and a judgment were made and entered by which it was determined that certain property, which was particularly described and which we shall refer to as the estate property, was community property of the decedent and Cattarina and that Cattarina was entitled to distribution of the whole thereof. The description listed the property substantially as returned in the inventory but did not include any of the property described in the joint tenancy petition and order; the judgment declared that the court had no jurisdiction to make a determination as to the titles to those properties and no adjudication was made. The daughter attempted to appeal from this decree but she failed to perfect her appeal and it was dismissed in the Supreme Court. In that proceeding appellant sought leave to prosecute the appeal on his own behalf as assignee of a share of the daughter's claimed interest, but his application was denied. In due course the executrix filed her final account, report and petition for distribution, charging herself with the estate as inventoried and as described in the findings in the proceedings to determine heirship. When the matter came on for hearing appellant presented objections and sought to have distributed to him as such assignee one-fifth of one-third of the estate. At the conclusion of the "objector's" case the court made an order denying the objections of appellant, settling the account and distributing to the widow certain specifically described property, being the property described in the final account. No adjudication was made or attempted with respect to the joint tenancy property.

Appellant's record on appeal is presented by what is labeled "Appeal from Decision of the Superior Court in the Above-entitled Matter under Rule 6, Rules of Appeal." It is in the form of an agreed statement, prepared without supervision or certification by the trial judge. It contains a copy of the final account and petition for distribution and the objections of appellant thereto. It purports to set forth certain proceedings had at the time of the hearing. It recites that appellant offered in evidence his written assignment; presumably it was received in evidence. The statement then reads: "Thereupon said attorney for objector made offer of proof, to-wit: that the estate of John Basso, deceased, consists of the following property, to-wit: [Here are listed all of the several joint tenancy properties and the estate property heretofore mentioned, and in addition one parcel of real property which was not elsewhere described in the proceedings.]" The "objector" then offered in evidence the findings, conclusions and judgment in the proceeding to determine heirship, and the bill of exceptions which was settled upon the appeal attempted to be taken from the judgment in that proceeding, including specifications of error on that appeal. Copies of these documents, with the exception of the judgment in the heirship proceeding, are contained in the statement. The statement then recites: "Thereupon the court sustained the objection in behalf of the executrix to the introduction of evidence on the part of said objector W. Frank Shelley and denied the aforesaid offer of proof by said objector and gave judgment for and in behalf of said executrix in words and figures following, to-wit: [Copy of the decree of distribution.]" Also included in the statement are certain documents which were not offered in evidence at the trial, namely, the notice of appeal from the decree determining heirship, a memorandum opinion of the judge in that proceeding, the notice of appeal from that judgment, notice of motion to dismiss the appeal in the Supreme Court, clerk's certificate on the motion, points and authorities on the motion, notice of motion of appellant herein for leave to prosecute that appeal, an answer to the motion to dismiss, remittitur, and a copy of the decree establishing the fact of death in the joint tenancy matter. The statement on appeal ends with the following: "The foregoing statement is hereby stipulated to be correct. [Signatures of attorneys for the parties to the appeal.]" The statement does not recite that it contains a record of all the proceedings had upon the hearing; it shows that the account, report and petition for distribution were duly verified by the executrix but does not state whether evidence was or was not introduced on her behalf. Although the implication of the stipulation is that the statement presents a full and accurate account of the trial, we initiated a proceeding for the taking of additional testimony on the appeal, in the hope that the

record might be supplemented so as to present the matters in controversy on the merits, but our efforts were unavailing and we are obliged to dispose of the appeal upon the record now before us which shows nothing whatever as to the nature of appellant's proposed proof. It would appear that appellant offered to prove "that the estate of John Basso, deceased, consists of the following described property, to-wit: [Listing all of the property described in the proceeding to establish the fact of death and all of the property which was found to be community property in the proceeding to determine heirship.]" Appellant then offered in evidence a record of the proceedings in the matter to determine heirship which had resulted in a determination against the interest which he claimed. It may be inferred that an objection was made upon some ground on behalf of the executrix, since it appears that an objection was sustained. It appears that the court denied "the aforesaid offer of proof," although it does not appear that an objection was made to the offer. Appellant apparently offered the record in the heirship proceeding for the quaint purpose of setting it up as a target. His briefs are devoted in large part to an attack upon the sufficiency of the evidence to justify the findings and the sufficiency of the findings to justify the conclusions of law and the decree in that proceeding. He attempts to argue upon this appeal the merits of the appeal which was dismissed in the former proceeding. He does not question the jurisdiction of the court in the heirship proceeding to make the adjudication that was made therein. As the record of that proceeding was excluded at the trial we do not pass upon the effect of it. Its exclusion was advantageous to appellant.

With reference to the offer of proof, insofar as it related to the joint tenancy property, it would appear to have been assumed, in the hearing on the petition for distribution, either that the court had no jurisdiction in that proceeding to determine the question of title as between the estate and the widow to the properties claimed by the widow as surviving joint tenant, or that the decree establishing the fact of death was an adjudication as between the estate and the widow that the latter held title to the several parcels of real and personal property as surviving joint tenant. This is the only point which is properly before us on the appeal.

The executrix in her final account did not return as belonging to the estate any of the properties allegedly held in joint tenancy. From appellant's objections to the account it is difficult to determine whether he was attempting to put in issue the title to those properties and to require the executrix to account for them as properties of the estate. We may assume, however, that appellant thought he was raising that issue when he prayed for distribution to him of "20% of one-third of said estate" and "that all of said estate be adjudged to be the separate property of decedent" in view of his offer to prove that the estate consisted of all of the properties which we have mentioned. We think we should assume that an attempt was made to place those matters in issue, because if an objection had been made that they were not in issue appellant might have been prompted thereby to amend his objections.

[1] A proceeding for distribution is a proper one for the determination of questions of title to properties in which the testator had an interest and which are claimed by the executor as his own, adversely to the estate. It was the duty of respondent, as executrix, to account for all property of the estate. The property alleged to have been held in joint tenancy consisted of two parcels of real property in the County of Los Angeles, one promissory note secured by deed of trust, six bank accounts, and personal property constituting the equipment of a gas station. Decedent admittedly owned an interest in all of them during his lifetime. They came into the possession of the executrix upon the death of her husband. When she filed her final account and did not charge herself with any of the properties and the issue was raised, it was necessary for the court to determine whether she held all or any of the properties as executrix and for the benefit of the estate. This inquiry would have required a determination as to the nature of decedent's interest, whether the properties were held by him and his wife as joint tenants or otherwise. Best v. Coloneus, 1942, 56 Cal.App. 2d 285, 132 P.2d 260, and cases therein cited.

[2] A judgment establishing the fact of death in a proceeding under sections 1170 and 1175 of the Probate Code is not an adjudication of title. Under section 1174 it is only prima facie evidence of the fact of the death. It is not a judgment from which

an appeal may be taken under section 1240 of the Probate Code.

In further proceedings appellant should be allowed to amend his objections to the account and petition for distribution; a determination should be made as to whether Jennie V. Geisler inherited any property from her father, and in this connection the court should consider the effect of the findings and judgment determining heirship. A determination will also be required as to whether the estate has any interest in the properties claimed by the widow as surviving joint tenant.

The order settling the account and for distribution is reversed, without costs to either party.

DESMOND, P. J., and PARKER WOOD, J., concur.



68 Cal.App.2d 286

CALLAHAN et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

MURRAY et al. v. SAME.

No. 12752.

District Court of Appeal, First District, Division 1, California.

March 5, 1945.

Hearing Denied May 3, 1945.

1. Municipal corporations ⇐46

Under San Francisco charter amendment increasing pay rates of police and fire department members and providing that amendment should become effective when resolution approving it was filed with Secretary of State and board of supervisors had appropriated the funds necessary, increased pay rates did not start upon filing of resolution with Secretary of State but when necessary appropriations had been made.

2. Statutes ⇐250

A statute may be framed legally so as to provide an effective date and also an operative date.

3. Constitutional law ⇐70(1)
Statutes ⇐176

Courts must take the statutes as they find them, and their interpretation must be based on the language used, and they have no power to rewrite statutes so as to make them conform to a presumed intention which is not expressed.

4. Municipal corporations ⇐46

Although amendment to San Francisco charter relating to increased pay rates of policemen and firemen was submitted to electorate as one proposition on the ballot, where evidence established that there were two separate amendments amending separate sections of charter, each amendment must be construed apart from the others, and, when as so construed no ambiguity appeared as respects time when pay increase started, extrinsic evidence was inadmissible.

5. Municipal corporations ⇐46

Where the courts are called upon to construe a statute submitting to electors the question of amendment of city charter, the question is what the electors understood and intended by their votes, and not what was intended by those who approved the form of the amendment.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Mandamus proceeding by Robert Callahan and others, and by Wesley F. Murray and others, against the City and County of San Francisco involving interpretation of San Francisco charter amendment increasing the pay rates of members of the police and fire departments. From the judgment, the City and County of San Francisco appeal.

Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for appellants.

Byrne, Lamson & Jordan and Paul S. Jordan, all of San Francisco, amici curiae in support of appellants.

Melvin M. Belli and Wesley F. Murray, both of San Francisco, for respondent.

KNIGHT, Justice.

These two proceedings in mandamus were consolidated for trial and a single

judgment was entered in favor of the respective plaintiffs, from which the defendants in each proceeding have appealed.

The proceedings called for a judicial interpretation of one paragraph in each of the 1943 amendments to sections 35 and 36 of the San Francisco Charter. The effect of those amendments was to increase the pay rates of the members of the police and fire departments; and the determinative question presented was and is as to when the increased pay rates started.

The pertinent paragraph of the amendment to section 35, relating to the police department, reads as follows: "This amendment shall become effective when the joint legislative resolution approving such amendment is filed with the Secretary of State, *and* the Board of Supervisors has appropriated the funds necessary in connection therewith, but not later than July 1, 1943." (Italics ours) The pertinent paragraph of the amendment to section 36, relating to the fire department, reads as follows: "This amendment shall become effective when the joint legislative resolution approving such amendment is filed with the Secretary of State, *and the increased salaries provided for herein shall be payable only when the proper appropriation has been made to meet said salaries* but not later than July 1, 1943." (Italics ours.)

The amendments were adopted by the electorate of the city at the general election held on November 3, 1942; the joint resolution of the State Legislature approving the amendments was filed with the Secretary of State on January 11, 1943; but the Board of Supervisors did not appropriate the funds necessary to meet the pay rate increases called for by the amendments until June 30, 1943, the ending of the fiscal year 1942–1943. Plaintiffs claimed, nevertheless, that the increased pay rates began on January 11, 1943, the date on which the joint legislative resolution was filed with the Secretary of State; whereas the city contended that the increased pay rates did not begin until July 1, 1943—the beginning of the new fiscal year—that is, the next day after the Board of Supervisors had made the appropriation to meet the payment thereof.

[1] We are of the opinion that the trial court's decision upholding the plaintiffs' contention cannot be sustained without doing violence to the language of those paragraphs of the amendments here under consideration. As will be noted, under the clear and positive terms of the amendment to section 35 (referred to in the briefs as the Policemen's Amendment) the amendment did not "become effective" until the happening of two separate and distinct events: First, the filing of the joint legislative resolution with the Secretary of State, *and* secondly, the appropriation by the Board of Supervisors of the necessary funds in connection with the increases, which the board was required to appropriate not later than July 1, 1943; consequently under no theory could it be held that the increase started prior to the effective date of the amendment. The amendment to section 36 (referred to as the Firemen's Amendment) unlike the Policemen's Amendment, provided that it should become effective when the joint legislative resolution was filed with the Secretary of State, but it then went on to declare in plain terms that the increased salaries provided for therein should be payable "only" when proper appropriation was made to meet the increase, which as in the case of the Policemen's Amendment was required to be made not later than July 1, 1943. In other words, by the terms of both amendments the increased pay rates were not to begin until the Board of Supervisors appropriated the funds sufficient to meet the increased pay; and the only limitation that was placed on the power thus conferred on the board was that it was required to make such appropriation not later than July 1, 1943. Plaintiffs argue that the use of the word "payable" in the second clause of the Firemen's Amendment demonstrates that it was intended that the increase should start on the effective date of the amendment, that is, upon the filing of the joint legislative resolution with the Secretary of State, but that the actual payment of the increase should be delayed until the board made the appropriation necessary to meet the payment thereof. Manifestly, however, if it had been the intention to start the increased pay rates instantly upon the effective date of the amendment, then the second and qualifying clause above quoted would have been omitted entirely, so that the amendment would then have read simply: "This amendment shall become effective when the joint legislative resolution approving such amendment is filed with the Secretary of State."

[2, 3] As said in the cases of County of Los Angeles v. Lamb, 61 Cal. 196, and Williams v. City of Vallejo, 36 Cal.App. 133, 171 P. 834, a statute may be framed legally so as to provide an effective date and also an operative date. There was nothing strange or illegal here, therefore, in thus framing the Firemen's Amendment; and since the second and qualifying clause was added and the amendment was submitted to the electorate and ratified in that form, the latter clause cannot be now eliminated or disregarded by way of statutory construction. "'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." Sutherland, Statutory Construction, 3rd ed., vol. 2, p. 339, sec. 4705. Put another way, courts must take a statute as they find it, and it is their duty to construe it as it stands enacted. Electric Light & Power Co. v. San Bernardino, 100 Cal. 348, 34 P. 819. Their interpretation must be based on the language used. They have no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 5 P.2d 882.

The cases cited by plaintiff interpreting the meaning of the word "payable" are in no way helpful here. All but three of them involved actions arising out of the field of commercial law, and the remaining three have no bearing upon the questions here involved.

The two amendments were submitted to the electorate for ratification or rejection in one proposition on the ballot, and at the trial, subject to the objection of the defendants, plaintiffs were permitted to introduce extrinsic evidence, the asserted purpose of which was to show that it was the intention of the Board of Supervisors to provide that the increases for both policemen and firemen should begin upon the filing of the joint legislative resolution with the Secretary of State. The extrinsic evidence consisted chiefly of the historical background of the two amendments before the Board of Supervisors, and the minutes of the board, which purported to set forth among other things certain oral statements made before the board leading up to the approval of the amendments. Such evidence was introduced and received under the theory advanced by plaintiffs that there was but one amendment—not two—submitted to and voted upon by the electorate; and that a patent ambiguity appeared in this "single" amendment in that it provided that the increase in pay rates for the policemen should begin upon the making of the appropriation therefor by the Board of Supervisors, whereas, so plaintiffs contended, it provided that the increases for the firemen should begin when the joint legislative resolution was filed with the Secretary of State. Plaintiffs urged, therefore, that by applying certain extrinsic interpretive aids the trial court would be justified in holding that since (so plaintiffs contended) the firemen's increase began upon the filing of the joint legislative resolution with the Secretary of State, the increase for the policemen began at the same time.

[4] We are of the opinion that as defendants contend there were two separate and distinct amendments—not one—and that such being the case each amendment must be construed apart from the other; and as already pointed out, when so construed, no ambiguity appears in either. With reference to the question as to whether there was but one amendment, the evidence shows that although both amendments were submitted to the electorate as one proposition on the ballot, the preamble to the proposition plainly stated that it was a proposal to amend two sections of the charter—section 35 relating to the rates of pay for members of the police department, and section 36 relating to the rates of pay for members of the fire department. The proposed amendments were lengthy, and the one amending section 35 was headed "Police Department," and the amendment to section 36 was headed "Fire Department." In other words, each amendment referred to a different subject matter, to a different department of the city government, and amended separate sections of the charter. The mere fact, therefore, that the Board of Supervisors deemed it advisable to submit the amendments jointly as one proposition on the ballot could not and did not convert the two amendments into a single amendment.

Even assuming, however, that under any possible theory the extrinsic evidence was admissible, it did not prove, as plaintiffs contend, that it was the intention of the board to make the increased pay rates begin at the time the joint legislative resolution was filed with the Secretary of State. To the contrary, it shows that the intention was to provide that the increases should begin only when the board appropriated the necessary funds to meet the payment of such increases. In this connection the evidence relating to the historical background of the Firemen's Amendment, which plaintiffs stress, shows the following: As originally presented to the board for approval the amendment read: "This amendment shall become effective when ratified by the State Legislature"; and afterwards a substituted form was presented reading: "This amendment shall become effective when certified by the Secretary of State after ratification by the State Legislature." Obviously had either of those forms been approved the starting period of the increased pay rates thereunder would have been, as plaintiffs contend, January 11, 1943, the effective date of the amendment. But neither of those forms were approved. After considerable discussion the amendment that was finally approved and submitted to the electorate provided first that the amendment should become effective upon the filing with the Secretary of State of the joint legislative resolution approving the amendment, and then there was added thereto the second and qualifying clause that "the increased salaries provided for herein shall be payable only when the proper appropriation has been made to meet said salaries but not later than July 1, 1943." As heretofore pointed out, if it had been the intention of the board to start the increased pay rates instantly upon the effective date of the amendment, then the second and qualifying clause would not have been added and the amendment would then have read: "This amendment shall become effective when the joint legislative resolution approving such amendment is filed with the Secretary of State."

Furthermore the oral statements made before the board show that the question of the ability of the city to pay the salary increases immediately upon approval by the Legislature was squarely presented for the board's consideration and that the advisability of definitely committing the city to payment immediately following legislative approval was questioned. That the problem was considered vital is evidenced by the remarks and suggestions of the various supervisors and representatives of the police and fire departments; and from these statements it definitely appears that the board did not wish to frame amendments which would make the pay increases obligatory upon the city until the board, in its discretion, should so determine and appropriate the necessary money for that purpose, provided, however, that the increases should, in any event, go into effect by July 1, 1943. No other reasonable or fair interpretation can be placed on these statements.

[5] Moreover and in any event, the province of the Board of Supervisors herein was limited to the approval of the form of the amendments that were to be submitted to the vote of the electors. The enactment of the amendments consisted of ratification thereof by the electors, and where the courts are called upon to construe a statute so enacted, the question is as to what the electors understood and intended. Of course the electors here had no way of knowing what discussions took place within the chambers of the Board of Supervisors in framing the measures so to be submitted to the vote of the electors; and it is quite evident, therefore, that in determining what the electors understood and intended by the amendments, the statements made before the Board of Supervisors are of little if any value. None of the other extrinsic evidence introduced has any bearing upon the question at issue, and consequently it need not be narrated.

In June, 1942, just prior to the beginning of the fiscal year 1942–1943, there was allocated to the police and fire departments in accordance with the budget certain sums of money; and it appears that on June 30, 1943, at the end of that fiscal year, there was a surplus of funds so allocated to those departments sufficient to begin the payment of the increased pay rates at that time, whereupon the Board of Supervisors made the necessary appropriation to meet the payment thereof. Plaintiffs argue that since there was a surplus of funds so allocated at the beginning of the fiscal year no further appropriation by the board, after the amendments became effective, was essential. There are two answers to this argument: first, the evidence shows that the allocation of funds at the beginning of the fiscal year were

made for definite purposes, and that there was no way of ascertaining prior to June 30, 1943, that there would be a surplus. Secondly, the provisions of the amendments themselves show definitely that they called for the making of the appropriation subsequent to the effective date of the amendments; and admittedly no such subsequent appropriation was made.

It is our final conclusion, therefore, that since under the terms of both amendments the increased pay rates provided for therein did not begin until the Board of Supervisors made the necessary appropriation to meet the payment thereof, and since the board did not make such appropriation until June 30, 1943, the increased pay rates did not begin until July 1, 1943. The judgment must, therefore, be reversed, and it is so ordered.

PETERS, P. J., and WARD, J., concur.

Hearing denied. GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.



68 Cal.App.2d 360

Ex parte CONNELL.

Cr. 1897.

District Court of Appeal, Third District, California.

March 12, 1945.

1. Criminal law ⇐1201

The habitual criminal statute is highly penal and must be given a strict construction and is not to be extended by including therein offenses not specifically enumerated. Pen.Code, § 644.

2. Criminal law ⇐1202(1)

Defendant's prior Utah conviction of depriving owner of automobile by taking possession of automobile and driving it away did not furnish ground for adjudging defendant, when convicted of burglary, to be an habitual criminal. Laws Utah 1921, c. 81, § 3974x7; Vehicle Code § 503, St.1935, p. 174; St.1931, p. 2133, § 146; Pen.Code, § 487; § 499b, added by St.1905, p. 184; § 644.

3. Habeas corpus ⇐25(1)

Where petitioner had served, with benefit of credits earned and granted, maximum term of imprisonment provided by law for offense of which he had been convicted, his detention was illegal and he was entitled to writ of habeas corpus discharging him from custody.

Habeas corpus proceeding by William Connell against Robert A. Heinze, Associate Warden of the California State Prison at Folsom.

Writ granted and petitioner discharged.

William Connell, in pro. per., of Represa, and S. W. Green, of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and Arthur A. Ohnimus and James O. Reavis, Deputy Attys. Gen., for respondent.

ADAMS, Presiding Justice.

Petitioner alleges that he is now unlawfully imprisoned, confined and restrained of his liberty by the warden of the penitentiary at Folsom, in that he has served, with the benefit of credits earned and granted, the maximum term of imprisonment provided by law for the offense with which he was charged, and that the judgment and commitment under which he is held are void upon the face thereof. He further alleges and the record shows that in an information filed in Los Angeles County in 1935 he was charged with burglary and two prior convictions of felony, one of the priors being denominated "auto theft" committed in Utah. Defendant pleaded guilty to the information as filed, admitting the two priors, and the court, after finding the burglary to be of the second degree, found him to be an habitual criminal and sentenced him to life imprisonment with the possibility of parole. He was received at the state prison on April 10, 1935.

The record before us shows, and it is conceded by respondent, that the prior offense referred to as "auto theft" was charged in the information filed in Utah not as "auto theft" but as "the crime of Depriving an Owner of his Automobile in violation of section 3974x7, Chapter 81, Session Laws Utah, 1921, committed as follows, to-wit:

"That the said William Connell alias William Taufer on the 26th day of Sep-

tember, A.D.1931, at the County of Salt Lake, State of Utah, did wilfully, unlawfully and feloniously deprive Mrs. H. B. Carlisle of one Packard Coupe of the serial #U44733 by taking possession and driving away from the possession of the said Mrs. H. B. Carlisle, said automobile which was standing on a public street of Salt Lake City, Salt Lake County, State of Utah, to-wit, on the street in front of 135 east 2nd South, which automobile was then and there the property of and in the possession of the said Mrs. H. B. Carlisle."

The Utah statute above mentioned was a portion of an act entitled "Motor Vehicles, Garages, etc.," and, at the time of the commission of the alleged offense, read:

"Felony to take vehicle without permit—temporarily or permanently. Any person who shall wilfully deprive the owner of any vehicle, either temporarily or permanently by taking possession of, or driving, or taking away said vehicle, or any person who shall assist in or be a party to such taking possession of, or driving, or taking away of any vehicle belonging to another and standing in any street, road, garage or other building or place, or whoever receives, buys or conceals any vehicle knowing or having reason to believe the same to have been stolen, shall be deemed guilty of felony."

Petitioner here contends that the offense of which he was convicted in Utah in violation of the foregoing statute, is not one of the offenses enumerated in section 644 of the Penal Code of California, that its commission, therefore, constituted no ground for adjudging him to be an habitual criminal, and that the trial court's finding and judgment based thereon lack requisite support; that the offense defined by the Utah statute is comparable to the offenses defined by section 503 of the California Vehicle Code or by section 499b of our Penal Code, violations of which furnish no basis for a finding of habitual criminality.

Section 503 of our Vehicle Code was not enacted until 1935, St.1935, p. 174, so was not in effect in 1931 when the Utah offense was committed. However, section 146 of the California Vehicle Act was in effect at the time (see ch. 1026, p. 2133, Stats. of 1931, in effect Aug. 14, 1931) and provided:

"Any person who shall drive or take a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be deemed guilty of a felony. * * *"

Also, section 499b of the Penal Code at that time provided:

"Any person who shall, without the permission of the owner thereof, take any automobile, bicycle, motorcycle, or other vehicle, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor * * *."

If the offense charged in Utah be held comparable to that defined by section 499b, supra, which was and still is only a misdemeanor, then obviously it was and is not one comprehended by section 644 which specifies felonies only; and if it be held comparable to the offenses defined by section 146 of the Vehicle Act, or by section 503 of the Vehicle Code, though same are defined as felonies, they are not among those specifically referred to in section 644.

[1] Respondent argues that petitioner was convicted in Utah of "auto theft"; that under section 487 of the California Penal Code the larceny of an automobile constitutes grand theft, which is one of the felonies enumerated in section 644, and that, therefore, petitioner was properly found to be an habitual criminal. This reasoning is not convincing. Section 644 is highly penal, and must be given a strict construction. People v. Ball, 204 Cal. 241, 244, 267 P. 701. And we are not disposed to extend its scope by including therein offenses not specifically enumerated. Had the legislature intended that violations of the Motor Vehicle Acts should constitute offenses covered by its language, no reason appears why it should not have enumerated them specifically. Section 146, supra, is more comprehensive than the Utah statute above mentioned, yet it has been held that a violation of same does not furnish a basis for adjudging a defendant an habitual criminal.

In People v. McChesney, 39 Cal.App.2d 36, 102 P.2d 455, the trial court adjudged defendant to be an habitual criminal, and sentenced him to imprisonment for life. The information in that case alleged three prior convictions for which defendant served terms in prison, to wit, in Louisiana for "breaking and entering a building in the night"; in California for violation of

"section 146 of the Motor Vehicle Act of California"; in California for committing a felony, "robbery of the first degree." The court said, 39 Cal.App.2d at page 41, 102 P.2d at page 458: "Two of these convictions were not ones on which a judgment as an habitual criminal could be based. Violation of section 146 of the Motor Vehicle Act * * * is not such an offense as denounced in Penal Code, section 644. The test is not whether one has been twice or thrice convicted of felonies, but they must be either among those enumerated in section 644, or denounced as such by the laws of this state."

In People v. Gibson, 63 Cal.App.2d 632, 146 P.2d 971, this court held that to constitute the offense defined by section 503 of the Vehicle Code, an intent permanently or temporarily to deprive the owner of title or possession of the vehicle must be proven, and that such intent had not been shown. To the same effect are People v. Neal, 40 Cal.App.2d 115, 117, 104 P.2d 555, 557, and People v. Zervas, 61 Cal.App. 2d 381, 142 P.2d 946. In the former case the court said that under section 503 of the Vehicle Code, an intent either permanently or temporarily to deprive the owner of his title or possession of the vehicle taken, must be proven as "an affirmative element of the crime," and that the taking and abandonment of the car by appellant in that case did not necessarily furnish sufficient evidence from which the presence of a specific intent might be inferred. In People v. Pearson, 41 Cal.App.2d 614, 107 P. 2d 463, it was held that a violation of section 503 of the Vehicle Code is not robbery or attempted robbery, since the elements necessary to be proven are different; and in People v. Lohr, 28 Cal.App.2d 397, 82 P.2d 615, the court said that transportation of an automobile in interstate commerce knowing it to have been stolen, in violation of the Dyer Act, 18 U.S.C.A. § 408, while an offense comparable to that defined by section 146 of the California Vehicle Act, is not one of those enumerated in section 644, and that a prior conviction of same could not be used as a basis for a finding that defendant was an habitual criminal.

That grand theft and a violation of section 503 of the Vehicle Code are separate and distinct offenses, and that the latter is a lesser offense, is stated in People v. Jeffries, 47 Cal.App.2d 801, 807, 808, 119 P.2d 190. This is in accord with the statement in Huddy's Encyclopedia of Automobile Law, Vol. 9-10, sec. 116, pp. 192, 193, that "A special provision of law has been enacted in some jurisdictions providing a punishment for the unlawful taking or use of an automobile * * * without the owner's consent. Such a statute is constitutional, and creates a distinct offense, one not necessarily included in the crime of larceny, although it may classify the offense as larceny." And the same authority states, sec. 60, pp. 116, 117, that the essential elements of the crime of larceny of an automobile include "the intent to deprive the owner permanently of the possession thereof," and that where the taking of the vehicle is merely for the purpose of using it for a brief period the crime of larceny or theft is not committed. To the same effect is the statement in 15 Cal.Jur., sec. 12, p. 906, that to constitute the crime of larceny an intent to steal is an essential element of the offense, and it must be an intent wholly and permanently to deprive the owner thereof, which intent must exist at the time of the taking. See People v. Payne, 117 Cal.App. 108, 111, 3 P.2d 328.

In State v. Mularkey, 195 Wis. 549, 218 N.W. 809, a statute provided: "Any person who shall take, use and operate any automobile * * * upon any public highway of this state without the consent of the owner thereof shall, upon conviction thereof," be punished, etc. Sec. 343.18 Stats.1927. The court said this constituted a distinct offense, one not necessarily included in the crime of larceny, citing Eastway v. State, 189 Wis. 56, 206 N.W. 879. In the latter case Eastway was acquitted of larceny, and then charged with taking the automobile in question in violation of section 343.18 of the statutes of the state. The court held that the offenses were distinct and that the acquittal of the larceny was not a bar to prosecution for latter offense.

In Slater v. Commonwealth, 179 Va. 264, 18 S.E.2d 909, the court said that the main difference between common law larceny, and the statutory offense of unauthorized use, is that in the former there must be an intent to deprive the owner of his property permanently, while in the latter the intent is to deprive the owner of possession temporarily and without intent to steal; and that the intent with which property is taken determines the offense. In Smith v. State, 66 Tex.Cr.R. 246, 146 S.W. 547, defendant took a car from a garage and after riding around in it returned it to an alley in the rear of the

owner's house the same night; and it was held that the taking did not constitute theft. In State v. Boggs, 181 Iowa 358, 164 N. W. 759, it was said that the taking of a motor vehicle and operating the same without intention of appropriating it permanently to the use of the person taking and operating it, is not larceny, and could not be punished as such.

The Utah information filed against this petitioner does not charge that he took the automobile with intent to deprive the owner of the title or possession of same either temporarily or permanently; it merely charges that he deprived the owner of the vehicle by taking possession of same and driving it away. Though the offense was designated a felony, nevertheless it bears a closer resemblance to our Penal Code, section 499b, the so-called "joy-ride" statute, than it does to either section 146 or section 503, supra, since, for all that appears, the taking of the vehicle may have been merely for the purpose of temporarily using or operating the same. And it may be said, in passing, that the legislature of Utah has now reduced the offense with which defendant was charged, from felony to misdemeanor.

[2] From the foregoing we conclude that the offense with which petitioner was charged in Utah, had it been committed in California, would not have constituted an offense included among those enumerated in section 644 of the Penal Code, and that petitioner's conviction thereof did not furnish grounds for adjudging him an habitual criminal. It may also be noted that while the judgment of the trial court provided that petitioner should be imprisoned "for the term of his natural life with the possibility of parole," section 1168 of the Penal Code as it read at the time of petitioner's conviction in this state provided that the court in imposing sentence should not fix the term or duration of the period of imprisonment, that being a matter for the State Board of Prison Directors. See Stats.1933, ch. 814, p. 2156.

[3] It being conceded by respondent that petitioner has now served, with the benefit of credits earned and granted, the maximum term of imprisonment provided by law for the offense of which he was convicted in California, to wit, burglary of the second degree, it follows that his present detention is illegal. It is therefore ordered that he be discharged from custody.

PEEK and THOMPSON, JJ., concur.

68 Cal.App.2d 315

KRUZIE et al. v. SANDERS et al.

Civ. 3167.

District Court of Appeal, Fourth District, California.

March 9, 1945.

1. Appeal and error ⇐237(2)

Sustaining of objection was not prejudicial in view of fact that no request was made to strike out answer of witness which preceded the objection and the answer remained.

2. Evidence ⇐151(1)

Generally, a witness may be examined regarding the intent with which he did a certain act when his intent is a material factor in the case.

3. Automobiles ⇐181(2)

The intent with which an automobile ride is offered and accepted has a direct bearing on whether the person accepting the ride is a passenger or guest within automobile guest statute. Vehicle Code § 403, St.1935, p. 154.

4. Appeal and error ⇐1056(1)

In action presenting issue whether automobile occupant was passenger or guest, where driver testified that she had not asked occupant to go on trip because driver wanted occupant's advice in selection of Christmas presents for certain individuals and that she had not told occupant that she desired her assistance in connection with such shopping, but occupant testified to contrary, error, if any, in refusing to allow driver to testify as to her unexpressed intention regarding such shopping, was not prejudicial. Vehicle Code, § 403, St.1935, p. 154.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Personal injury action by Margaret Kruzie and another against Mabel Sanders and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Hoge, Pelton & Gunther, of San Francisco, and Chester O. Hansen and Eckhart A. Thompson, both of Fresno, for appellants.

Thomas F. Lopez and Lawrence W. Young, both of Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for personal injuries arising out of an automobile accident. The only question with which we are concerned is as to whether Mrs. Kruzie, who was riding in an automobile driven by Mrs. Sanders, was a "guest" within the meaning of section 403 of the Vehicle Code, St.1935, p. 154. On a former appeal (Kruzie v. Sanders, 23 Cal. 2d 237, 143 P.2d 704), the Supreme Court reversed a judgment based upon a nonsuit. It appeared from the evidence that Mrs. Sanders had repeatedly urged Mrs. Kruzie to accompany her on a trip from Coalinga to Fresno because she wanted Mrs. Kruzie's advice in the selection of a ring for her husband and her help in choosing Christmas presents for three girls who had formerly worked at a cafe operated by the Kruzies, and that Mrs. Kruzie went on the trip solely for the purpose of assisting Mrs. Sanders in connection with this shopping. It was held that the evidence was sufficient to support a finding that the principal purpose of the trip, including the furnishing of transportation to Mrs. Kruzie, "was not social but was to facilitate defendant's Christmas shopping." On a retrial of the action the evidence in this regard is about the same and the jury returned a verdict for $5000 in favor of the plaintiffs. A motion for a new trial was denied and the defendants have appealed from the judgment.

[1] The only point raised is that the court committed prejudicial error in sustaining objections to two questions asked of Mrs. Sanders. In the first instance, in reference to one of the three girls for whom Mrs. Sanders was supposed to be going to buy presents, the question was asked: "Did you intend to purchase a present for her?" Mrs. Sanders replied: "I did not." Thereafter, an objection was made that the question was self-serving followed by another objection that "It isn't relevant, proper or anything else." After some argument by counsel the court sustained the objection. However, no request was made to strike the answer which preceded the objection and the answer remained. No possible prejudice appears in this connection.

In the only other instance complained of, Mrs. Sanders was asked "Did you when you came to Fresno on December 16, plan to buy them Christmas presents?" This question referred to the three girls above mentioned. An objection made on the same ground was sustained.

[2] The appellants rely on the general rule that a witness may be examined as to the intent with which he did a certain act when his intent is a material factor in the case, citing Runo v. Williams, 162 Cal. 444, 122 P. 1082; Brown v. Newby, 8 Cal. App.2d 203, 47 P.2d 1076; Schubkegel v. Gordino, 56 Cal.App.2d 667, 133 P.2d 475. It is contended that the question of whether a person riding in an automobile is a passenger or a guest depends upon whether or not some form of compensation for the ride is given, and that whether any supposed compensation constitutes a motivating influence for offering and accepting the ride depends upon the intent of the parties. It is argued that such cases as McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909; Whitechat v. Guyette, 19 Cal. 2d 428, 122 P.2d 47; and Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53, have established the rule that the intent with which a ride is offered and accepted is an important element in such a case.

[3, 4] Beyond question, the intent with which a ride is offered and accepted has a direct bearing upon whether the person accepting the ride is a passenger or a guest within the meaning of this statute. Ordinarily, at least, this would be the intent expressed or disclosed by the acts of the parties rather than any secret or undisclosed intent which they may have had. As a practical matter, it would make little difference here whether or not Mrs. Sanders actually intended to do this particular shopping if, in fact, she told Mrs. Kruzie that she did intend to do it and asked her to make the trip for the purpose of giving assistance in such shopping. Mrs. Sanders testified very definitely that she had not asked Mrs. Kruzie to go on this trip for this purpose, that she had not told Mrs. Kruzie that she desired her assistance in connection with this shopping, and that there had been no conversation between them to that effect. Mrs. Kruzie testified flatly to the contrary and the jury has accepted her testimony as true. In view of the rather extensive evidence as to what was said and done by these parties, it is unreasonable to believe that the result would have been changed had Mrs. Sanders been allowed to testify as to her unexpressed intention. Under these circum-

stances, any possible error could not be held sufficiently prejudicial to require or justify a reversal.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



68 Cal.App.2d 217

BASTANCHURY et al. v. TIMES-MIRROR CO.

Civ. 3279.

District Court of Appeal, Fourth District, California.

Feb. 27, 1945.

Rehearing Denied March 27, 1945.

Hearing Denied April 26, 1945.

1. Chattel mortgages ⇐136

Any liens, created by crop mortgages on previously pledged crops or proceeds thereof for years before pledgee took possession of crops and land on which grown after purchasing them at pledgee's sale, were lost to mortgagee, where crops were harvested and removed from land and disposed of with mortgagee's consent. Civ. Code, § 2972.

2. Appeal and error ⇐843(2)

The validity of crop mortgage lien on mortgaged crop or its proceeds became "moot question" after prior pledgee purchased at pledgee's sale, took possession of, and harvested, removed, and disposed of, crop with mortgagee's consent.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

3. Chattel mortgages ⇐170(1)

A crop mortgagee, consenting to bankruptcy referee's order authorizing prior corporate pledgee's sale of crops to itself without specific reservation, unconditionally consenting to pledgee's removal of crops and retention of proceeds thereof, and permitting pledgee to take possession of crops and land on which grown, cultivate, harvest, and sell crops, waived right to proceeds of sale and could not recover money judgment against pledgee for wrongful conversion of crops. Civ.Code, §§ 1589, 3521; Code Civ.Proc. § 1962, subd. 3.

4. Evidence ⇐588

The trial court was not bound to believe all of plaintiffs' evidence, but could disregard a portion thereof.

5. Trover and conversion ⇐17, 42

One holding property by virtue of lien thereon may maintain action for conversion of property, if wrongfully disposed of by owner without authority, in which case measure of damages cannot exceed amount secured by lien, compensation for loss of time, and expenses incurred in pursuit of property. Civ.Code, §§ 3336–3338.

6. Trover and conversion ⇐16

In action for conversion, plaintiff need not be absolute owner of property converted, but must show that she was entitled to immediate possession thereof at time of conversion.

7. Money received ⇐3, 6(3)

The foundation of action for conversion on money had and received count is wrongdoer's unjust enrichment, and plaintiff must show that defendant received definite sum to which plaintiff is justly entitled.

8. Money received ⇐12

In action for conversion on money had and received count, corporate defendant has right to show that it disbursed money sued for in due course of business between itself and plaintiff and to show any facts entitling it to retain money, either on legal or on equitable grounds by way of estoppel or waiver, and, if defendant's right to retain money is equal to that of plaintiff, defendant must prevail.

9. Evidence ⇐60

Court will not presume that a corporation director's sons who were also directors, and bank officials, one of whom was made corporation's secretary-treasurer at bank's request and took active part in managing corporation's financial affairs, were parties to fraud in inducing such director to loan money, borrowed by her from bank, to corporation, on security of crop mortgages, by misrepresenting or suppressing fact of prior loan to one of such sons by another corporation and assignment thereto of borrower's rights under planter's agreement with owner of land on which crops were grown as collateral security for such loan.

10. Fraud ⇐50

The presumption is always against fraud.

11. Appeal and error ⇐1011(1)

Knowledge or notice of facts which would make the taking of negotiable instrument a taking in bad faith is fact question for trier of facts when evidence is conflicting or such that reasonable minds might draw different conclusions therefrom, though holder of instrument testifies that he received it without knowledge or notice of defect in title or other legal defense.

12. Chattel mortgages ⇐215½

Evidence supported conclusions that crop mortgagee and bank, from which she borrowed money which was loaned by her to corporate mortgagor, had notice of prior assignment of rights of mortgagor under planter's agreement with owner of land, on which crops were grown, to another corporation as collateral security for a loan and were not purchasers in good faith for value in due course of crop mortgages and notes secured thereby, so as to bar foreclosure of mortgages and recovery of damages from prior assignee for conversion of crops. Civ.Code, §§ 19, 2973, 3133–3138.

13. Chattel mortgages ⇐177(3)

A claim of title to proceeds of mortgaged crops by corporation to which planter assigned his rights under planter's agreement with owner of land, on which crops were grown, as security for loan, before assigning such rights to mortgagee, suing to foreclose mortgages and recover from such corporation for conversion under count for money had and received, was not unjustified nor an unjust enrichment under evidence.

14. Estoppel ⇐52

Strictly speaking, "waiver" designates act or consequence of act of one person only, while "equitable estoppel" applies where one's conduct has induced another to take such a position that he will be injured if actor is permitted to repudiate his acts.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel" and "Waiver".

15. Estoppel ⇐52

A "waiver" is intentional relinquishment of known right or conduct warranting inference of such relinquishment and may result from express agreement or be inferred from circumstances indicating intent to waive.

16. Estoppel ⇐52

One may waive a right given by contract or an advantage of law intended for his benefit. Civ.Code, § 3513.

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action by Juanita C. Bastanchury and another, coexecutrices of the will of Maria O. Bastanchury, deceased, against the Times-Mirror Company, a corporation, to foreclose crop mortgages and recover money had and received, in which the Union Bank & Trust Company of Los Angeles was made a party on defendant's motion and defendant filed a cross-complaint to quiet title to the mortgaged crops and the proceeds thereof and for declaratory relief against the bank. Judgment for defendant and cross-complainant, and plaintiffs and cross-defendant bank appeal.

Affirmed.

Harvey, Rimel & Harvey, of Santa Ana, and A. P. G. Steffes, of Los Angeles, for appellants.

Cosgrove & O'Neil, T. B. Cosgrove, and John N. Cramer, all of Los Angeles, and Leonard A. Diether, of Pasadena, for respondent.

GRIFFIN, Justice.

Action to foreclose crop mortgages and for money had and received. There appears to be little or no variance between counsel for the respective parties as to their statements of facts in the instant case. They do not agree, however, as to the legal effect of those facts. We have examined the entire record and find defendant's statement to be a full and fair recitation thereof. Therefore, we will adopt it for the purposes of this opinion:

"The Union Oil Company in 1925 entered into a Planter's Agreement with Gaston A. Bastanchury, who immediately undertook the execution thereof. On November 26, 1929, he borrowed from defendant The Times-Mirror Company the sum of $500,000, giving his note and depositing as collateral security his rights under the Planter's Agreement. He also executed a Collateral Assignment of his rights and

benefits accrued and to accrue under the Planter's Agreement and agreeing to continue to perform all obligations on his part to be performed and agreeing that The Times-Mirror Company shall not be obligated to perform any of such obligations. Bastanchury Ranch Company, a corporation, executed the note as guarantor. The Union Oil Company executed a written consent to the Collateral Assignment.

"On January 28, 1931, Gaston Bastanchury assigned his rights in the Planter's Agreement to the Bastanchury Ranch Company. Union Oil Company consented to this second assignment subject to its prior consent to the Collateral Assignment to The Times-Mirror Company. Promptly thereafter (Feb. 1, 1931) Bastanchury Ranch Company borrowed from Maria O. Bastanchury $300,000, giving its note and executing as security a crop mortgage covering crops 'grown during the 1931 cropping season' under the Planter's Agreement. Simultaneously, Gaston Bastanchury (and his two brothers) executed an Agreement of Guarantee and Pledge to Union Bank & Trust Company (from which Maria O. Bastanchury had borrowed the $300,000 loaned to Bastanchury Ranch Company), guaranteeing the payment of loans made by said Bank to Maria O. Bastanchury and pledging to said Bank as collateral the stock of Bastanchury Ranch Company owned by said three guarantors. This pledge specifically recites that said stock of said Gaston Bastanchury had been theretofore pledged by him to The Times-Mirror Company to secure the payment of said loan of $500,000, and also recites that the hypothecation of said stock to said Bank as guarantee of payment of said loan of Maria O. Bastanchury was subject to the prior pledge of said shares heretofore made to The Times-Mirror Company. Immediately (February 2) Maria O. Bastanchury assigned to Union Bank & Trust Company the $300,000 note and the 1931 crop mortgage. On the same day Bastanchury Ranch Company issued its check in the amount of $16,172.50 to The Times-Mirror Company in payment of interest due on the Gaston Bastanchury $500,000 note. Shortly thereafter (March 2, 1931) Maria O. Bastanchury was elected director of Bastanchury Ranch Company, signed Waiver of Notice and Consent to Special Meeting, and on May 4, 1931, attended a regular meeting of its Board of Directors.

"The Bastanchury Ranch Company issued its two checks on May 25, 1931, in the amount of $15,000 and $57.50 respectively to The Times-Mirror Company in payment of interest due it on the Gaston Bastanchury $500,000 note.

"On June 29, 1931, Bastanchury Ranch Company executed a Supplemental Crop Mortgage, reciting that the existing crop mortgage of January 28, 1931, covering only the 1931 crops, would be insufficient security for the payment of the $300,000 note of Maria O. Bastanchury to the Union Bank & Trust Company. On the following day (June 30, 1931) Maria O. Bastanchury assigned the Supplemental Crop Mortgage to Union Bank & Trust Company." (It should be here noted that the original and supplemental crop mortgage also included many hundreds of additional acres of oranges grown by the Bastanchury Ranch Company.)

"A Receiver in Equity (state court) was appointed for the Bastanchury Ranch Company October 3, 1931, took possession of the Planter's Agreement lands and operated them until February 19, 1932. Previously (January 28, 1931) the corporate name had been changed to Bastanchury Corporation, Ltd. An Involuntary Petition in Bankruptcy against Bastanchury Corporation, Ltd. was filed shortly thereafter (Feb. 19, 1932); a Receiver in Bankruptcy was appointed (Feb. 23, 1932) who on that date took possession of the lands and the growing crops covered by the Planter's Agreement. The corporation was adjudged a bankrupt March 21, 1932. Approximately one and one-half years thereafter, viz., September 23, 1933, The Times-Mirror Company filed a Petition in the bankruptcy proceeding for Order to Show Cause why the property pledged as collateral to secure the payment of the $500,000 note of November 26, 1929 (then in default) should not be sold at Pledgee's Sale. An Order of the Referee Authorizing The Times-Mirror Company to Hold Pledgee's Sale and declaring that the bankrupt estate had no interest in the pledged property was entered September 25, 1933. On the same day (Sept. 25, 1933) the Trustee surrendered possession of the lands and growing crops covered by the Planter's Agreement to The Times-Mirror Company, which took possession and operated the property continuously until December 30, 1940, retaining the proceeds of such operation. The

Trustee in Bankruptcy later (October 20, 1933) filed a Petition for Leave to Abandon. Following hearing on the Petition an Order Authorizing Abandonment and Surrender of Property by Trustee was entered (November 6, 1933). The order recites the appearance of Maria O. Bastanchury by A. P. G. Steffes, her counsel, and that no objection was made to the issuance of the order. In the meantime, following Posting of Notice of Pledgee's Sale, all property pledged to The Times-Mirror Company as collateral for the payment of the $500,000 loan to Gaston Bastanchury was sold to The Times-Mirror Company for the purchase price of $355,570, and Sheriff's Certificate of Sale was issued October 27, 1933. The Abandonment and Surrender of Property by Trustee to The Times-Mirror Company was executed November 25, 1933. Defendant, The Times-Mirror Company, continued in possession of the property covered by the Planter's Agreement, harvested the crops and retained the proceeds until December 30, 1940, when it returned and surrendered the properties under the terms of the Planter's Agreement to the Union Oil Company, the owner; plaintiff in the meantime (March 15, 1935) instituted the action at bar", and on March 15, 1935, filed a release of mortgage as to all property contained within the original and supplemental crop mortgages except the property mentioned in the Planter's Agreement with the Union Oil Company.

The record of the pleadings, as related by counsel for appellants, is this: On March 15, 1935, Maria O. Bastanchury (hereinafter referred to as plaintiff) filed this action against The Times-Mirror Company, as defendant (hereinafter referred to as defendant), alleging two causes of action. The first one sets forth the promissory note in the sum of $300,000, dated February 1, 1931, payable to Maria O. Bastanchury and executed by the Bastanchury Ranch Company, a corporation. Attached thereto is the original crop mortgage and the supplemental crop mortgage to which reference has heretofore been made. She alleged nonpayment of the note and that the interest of defendant The Times-Mirror Company was subject and inferior to the lien of plaintiff under her crop mortgage and supplemental crop mortgage. In her second cause of action she alleged that the defendant had received $300,000 for and on account of monies had and received to plaintiff's use and benefit. The prayer of the complaint seeks a foreclosure of the crop mortgage and supplemental crop mortgage, together with a judgment against the defendant for the principal sum of $300,000, together with interest thereon from the first day of February, 1931. On April 15, 1936, an amendment to the complaint was filed setting forth a release of the mortgage and supplemental mortgage to certain property which was included therein and which belonged to the Bastanchury Ranch Company and other parties. The release did not cover the property included in the Planter's Agreement. On May 1, 1936, plaintiff filed a supplemental complaint alleging in substance that since the filing of the original complaint the defendant had become indebted to her in the sum of $250,000 for and on behalf of monies had and received to plaintiff's use and benefit. On August 10, 1936, defendant filed its answer in which it denied substantially all of the material allegations of both causes of actions contained in the complaint and in the amendment to the complaint and set up certain defensive matters as will be hereinafter discussed.

Contemporaneously with the filing of its answer, defendant filed a cross-complaint to quiet its title against the plaintiff in and to the crops and proceeds therefrom. On March 26, 1937, defendant filed a notice of motion for leave to file an amended cross-complaint and for an order bringing in the Union Bank and Trust Company of Los Angeles (hereinafter referred to as the Bank) and the Bastanchury Ranch Company and Bastanchury Corporation, Ltd. (hereinafter referred to as the Ranch Company), as new parties therein. This motion was denied.

On the issues thus presented, the case was tried before the Honorable Homer C. Ames, as trial judge, who rendered a written opinion in favor of defendant, but before findings were presented the judge died. On July 13, 1940, defendant again filed a notice of motion to bring in as a new party the Union Bank and Trust Company of Los Angeles. This motion was granted and pursuant thereto, defendant filed its amended cross-complaint to quiet title and for declaratory relief against that cross-defendant. After issues were joined the action was tried before the Honorable George K. Scovel, Judge presiding, without a jury. The trial was concluded February 17, 1942.

On January 3, 1943, plaintiff Maria O. Bastanchury died and on April 16, 1943, Juanita C. Bastanchury and Elizabeth Eadington, co-executrices of the last will and testament of Maria O. Bastanchury, deceased, were substituted as plaintiffs and cross-defendants in the action. The court rendered its decision in favor of defendant and cross-complainant on September 14, 1943, and found in accordance with defendant's claimed defenses, which findings are substantially as follows:

That the Bastanchury Ranch Company was a corporation organized under the laws of the State of California; that on January 28, 1931, that company, by amendment of its articles of incorporation, changed its name to "Bastanchury Corporation, Ltd."; that from the time of its organization until February 7, 1931, the corporation had its principal place of business in the County of Orange; that on that date it changed its place of business from Orange County to Los Angeles County and ever since said date had its principal place of business in Los Angeles County.

The "Planter's Agreement", set out in the findings, provides generally that the Union Oil Company is the owner of certain lands in Orange County; that the planter is engaged in the business of citriculture and is able and willing to supply the knowledge and skill, supervision and management necessary to plant, cultivate and develop the lands for the purpose of growing citrus fruits thereon; that the owner desires that its lands be set out with citrus trees in the manner and to the extent that they shall produce the greatest practicable utilization of said lands for the growing thereon and marketing therefrom of citrus fruits and that for this purpose the planter be given possession of such lands for the purposes hereinafter provided; that the parties agree as follows: that the owner will furnish and make available the lands to be set out to citrus trees and will furnish certain described facilities, but shall be reimbursed therefor in a manner therein provided; planter to furnish all laterals and water lines, etc. The owner is to pay one-half the cost of all water wells to be drilled upon the property, and the distribution thereof is to be done by the planter; to pay all taxes and charge to the owner's credit, and the owner is to be reimbursed therefor. The planter is to set out all the land with trees and all of the lands shall be planted to citrus trees within four years. Planter further agrees to supervise and manage in person all operations and activities under the contract and to devote his full knowledge, experience and skill to carrying out the contract, and agrees not to transfer to any person all or any part of his interest in the contract, or delegate to any person all or any part of his personal duties hereunder; planter to receive "as full compensation for all work done, supplies furnished and monies expended up to and including the time when the seventh year crop shall have been harvested from each unit hereunder, *all crops which may be harvested from such unit to and including the seventh year crop.*" All expenses of the harvesting and marketing of said crops are likewise to be borne exclusively by planter. It is expressly understood that planter is taking a chance that there will be no net profits from the production and marketing of said crops, and in such case he will receive no compensation or reimbursement for said work performed, supplies furnished and monies expended; after the seventh year from the date of the completion of the planting all net proceeds remaining from the sale of crops and/or fruit after deducting therefrom taxes and interest and paying the same to the owner, shall be divided equally between the owner and the planter; owner shall at all times retain full title to said land and to all unharvested crops thereon, and shall have the right to sell all or any part of said land with the unharvested crops thereon at any time. This agreement shall be effective for 30 years and shall inure to the benefit of and be binding upon the heirs, personal representatives, successors and assigns of the parties hereto.

The court further found that on November 26, 1929, Gaston A. Bastanchury borrowed $500,000 from defendant, The Times-Mirror Company, and executed a promissory note in that sum payable to defendant company. The promissory note recites that "I hereby *deposit with said* The Times-Mirror Company, *as collateral security* for the *payment of this note,* the following property, namely, certain certificates of shares of stock in the Bastanchury Ranch Company, a corporation, certain certificates of shares in the Pacific Pump Works, a corporation, issued in the name of Gaston A. Bastanchury and an *assignment of all rights of Gaston A. Bastanchury* in that certain agreement dated June 15, 1925, made with Union Oil Company of Califor-

nia, a corporation, as evidenced by an assignment affixed to said agreement". In addition thereto, there was an assignment of Bastanchury's rights and interests in certain policies of life insurance (now elapsed) on the life of Gaston A. Bastanchury in favor of Bastanchury Ranch Company, a corporation. The note then provides that the Times-Mirror Company has the right to call for such additional security as it may deem proper and on failure to respond the obligation shall become due and payable and that on nonperformance of any promises therein contained or nonpayment of the note the company is given full power to sell the securities or any substitute therefor at public or private sale without any demand or notice and that the company may become the purchaser of such securities thereat. By proper endorsement the Bastanchury Ranch Company guarantees the payment of the note, to which is attached the minutes of a special meeting of the Board of Directors of that company as of November 25, 1929, authorizing such endorsement and guarantee. The court then found that Bastanchury "pledged and deposited with and delivered to" the Times-Mirror Company all of the property in said instrument specifically described; and that by a written instrument dated November 26, 1929, and concurrently with the execution of the said note and delivery of the property therein described he then executed and delivered to said company an assignment, as collateral security for the loan of $500,000, "all his rights and benefits accrued and/or to accrue to him under said Planter's Agreement." The collateral assignment provides that Bastanchury transfers and assigns to the Times-Mirror Company "all rights and benefits accrued and/or to accrue to me (Bastanchury) under the attached contract, as collateral security for the payment to said The Times-Mirror Company of the sum of Five Hundred Thousand Dollars ($500,000.00) * * * as is evidenced by a collateral promissory note * * *. In making said assignment, I agree to continue to perform all obligations on my part to be performed as is provided in the contract to which this writing is attached, and said The Times-Mirror Company, in accepting said assignment, shall not be obligated to perform, in my place and stead, any of said obligations." Attached thereto is the following: "Union Oil Company of California, a corporation, hereby consents to the foregoing assignment upon the conditions and for the purposes herein named." The court then found that on January 28, 1931, Gaston A. Bastanchury assigned in writing *his interest* in said Planter's Agreement to Bastanchury Ranch Company. The Court then specifically found: "That at the time of said assignment said Bastanchury Ranch Company had notice of said prior pledge and assignment by said Gaston A. Bastanchury to defendant The Times-Mirror Company, and said Bastanchury Ranch Company took said assignment of January 28, 1931, with notice of said prior pledge and assignment; * * * that said assignment was consented to in writing by said Union Oil Company, subject to its prior consent to said pledge and assignment from Gaston A. Bastanchury to The Times-Mirror Company." The consent of the Union Oil Company to the assignment of January 28, 1931, contained the following provision: Bastanchury assigns to the Bastanchury Ranch Company, its successors and assigns, "all my right, title and interest in, to and under that certain agreement executed on June 15, 1925, between Union Oil Company of California and the undersigned". The acceptance of assignment by the Bastanchury Ranch Company contains the following provisions: The Ranch Company hereby accepts the foregoing assignment and agrees to assume all of the obligations, covenants and undertakings of Gaston A. Bastanchury arising under said agreement. The consent to the assignment by the Union Oil Company contains the following provision: "This consent is given subject to the consent of the undersigned to collateral assignment from Gaston A. Bastanchury to The Times-Mirror Company dated November 25, 1929."

The court then found that on January 28, 1931, the Ranch Company executed the crop mortgage on crops grown during the 1931 cropping season on the property owned by said Ranch Company and which included the property mentioned in the Planter's Agreement. It is then found that on February 1, 1931, the Ranch Company executed and delivered to plaintiff a promissory note in the sum of $300,000 and that on June 29, 1931, the Bastanchury Corporation, Ltd. executed the supplemental crop mortgage above mentioned covering the same property. The resolution of the corporation attached to the supplemental crop mortgage recites that "Whereas, it now appears that said crop mortgage covering

only 1931 crops upon lands more particularly described in said crop mortgage will be insufficient security for the payment of said note, and it is the desire of Mortgagor to provide additional security for the payment of said note by the execution and delivery of this Supplemental Crop Mortgage covering, in addition to 1931 crops, all crops that may hereafter be grown upon the lands described" until the note has been paid in full. Attached to the Supplemental Crop Mortgage is the affidavit of the president and secretary of the corporation and also an affidavit of Maria O. Bastanchury, mortgagee, who was also a member of the Board of Directors of the Bastanchury Corporation at that time, acknowledging that the supplemental crop mortgage was made in good faith and without any design to hinder, delay or defraud any creditor or creditors.

The court then found that the supplemental crop mortgage was acknowledged on June 29, 1931, but was not recorded until July 6, 1931, in Orange County; that neither at the time of its execution nor at any time subsequent thereto was it recorded in Los Angeles County, the county in which the mortgagor, Bastanchury Corporation, Ltd., then resided and in which its principal office or place of business was then established. It was then found that at the time of the execution of the supplemental crop mortgage, plaintiff Maria O. Bastanchury "had notice and knowledge that prior thereto Gaston A. Bastanchury had borrowed a sum of money from The Times-Mirror Company and had pledged and assigned as collateral for the payment of said loan, his interest in said Planter's Agreement of June 15, 1925; and also had notice and knowledge that the assignment of Gaston A. Bastanchury dated January 28, 1931, of his right, title and interest in said Planter's Agreement to Bastanchury Ranch Company was given by said Gaston A. Bastanchury and was acquired by said Bastanchury Ranch Company subject to and with notice of said prior pledge and assignment." It is then found that the supplemental crop mortgage was not made or taken in good faith as against defendant The Times-Mirror Company; and that plaintiff "had knowledge of the existence of said assignment dated November 25, 1929, of said Gaston A. Bastanchury to the defendant The Times-Mirror Company".

In reference to the bankruptcy proceedings, the court specifically found that on or about September 25, 1933, The Times-Mirror Company took possession of the land of the Union Oil Company described in the Planter's Agreement, "with the knowledge and acquiescence of and without objection by plaintiff and cross-defendant Union Bank and Trust Company of Los Angeles", and the trustee in bankruptcy, and at all times since September 25, 1933, and to and until December 30, 1940, defendant had been in possession of the real property, operated and maintained it, cultivated and harvested the crops thereon, and "has removed the same from said lands, has sold said crops and retained the proceeds thereof all with the consent, knowledge, permission and acquiescence of the plaintiff" and of the cross-defendant Union Bank and Trust Company. It is then found in support of the finding of estoppel or waiver, that in the hearing before the referee in bankruptcy, that plaintiff Maria O. Bastanchury was represented by her counsel and that her counsel made no objection to the proposed holding of the pledgee's sale; that the referee made an order authorizing The Times-Mirror Company to hold such sale upon condition that no claim be allowed against the bankrupt estate on account of any deficiency that might arise as the result of said pledgee's sale; that in said referee's order it was found that the bankrupt estate had no equity nor interest in or to the property assigned by Gaston A. Bastanchury to The Times-Mirror Company, as security for the payment of said note in the amount of $500,000; that notice of such sale was regularly given to the creditors of said bankrupt and notice of the petition for the order authorizing and directing the trustee to disclaim and abandon as worthless to said estate any and all the right, title and interest of the bankrupt in and to the Planter's Agreement, and directing the trustee to surrender such interest of the bankrupt in that agreement to The Times-Mirror Company, as the holder of an incumbrance thereon. The court then found that in accordance with the terms of the promissory note, on October 27, 1933, all right, title and interest of Gaston A. Bastanchury arising out of the Planter's Agreement were then and there sold at pledgee's sale to The Times-Mirror Company; and that ever since said date the defendant has been and now is the absolute owner of all rights or interests of said Gaston A. Bastanchury in or to said Planter's Agreement; that plaintiff was represented by counsel and no objection

was made by her or her counsel to the granting of said petition or to said sale; that under the crop mortgage and supplemental crop mortgage, plaintiff acquired collateral security for the payment of the note dated February 1, 1931, other than and in addition to the crops to be grown on the land described in the Planter's Agreement, but that prior to the commencement of the action plaintiff voluntarily, and without the consent of The Times-Mirror Company, released said other and additional collateral and security.

It was then found that at the time of the commencement of this action The Times-Mirror Company did not hold any security for the payment of the note of November 26, 1929, and that all collateral pledged, assigned or hypothecated to secure said loan in the amount of $500,000 had, prior to the commencement of the action, been sold under the terms of the pledge and assignment and that title thereto had passed to The Times-Mirror Company as purchaser at the pledgee's sale.

Finding number XXXII recites that from September 25, 1933, to and including December 30, 1940, The Times-Mirror Company has operated at its own expense the lands of the Union Oil Company described in the Planter's Agreement, husbanded the crops, removed the same from the lands and sold them and retained the proceeds thereof, *all with the consent, knowledge, permission and acquiescence of plaintiff Maria O. Bastanchury and cross-defendant Union Bank and Trust Company;* and that at no time until the commencement of the within action has plaintiff or the other cross-defendant made any objection to the operation or removal of said crops nor has either made any claim to the proceeds derived from said crops; that all crops were removed and proceeds thereof were retained by The Times-Mirror Company with the consent, knowledge, permission and acquiescence of both plaintiff and cross-defendant and that they are estopped from asserting against The Times-Mirror Company any lien upon the crops or the proceeds thereof because of their failure to object to the husbanding of said crops by The Times-Mirror Company at its sole expense after having knowledge thereof.

The court then generally found as untrue the allegations of plaintiff's complaint that the crop mortgage and/or supplemental crop mortgage were prior to any rights of The Times-Mirror Company or that any consent to the order of the referee was made with the specific reservation that the rights of plaintiff under their crop mortgage or supplemental crop mortgage were prior or superior to the rights of The Times-Mirror Company.

It then found that The Times-Mirror Company took possession under the pledgee's sale and under the order of the referee in bankruptcy and the disclaimer, quitclaim, and surrender of the trustee in bankruptcy, and that the mortgagors named in the crop mortgage and supplemental crop mortgage ceased to have any interest in the crops growing on said lands at the time said defendant and cross-complainant took possession as aforesaid and ceased to have any interest in the Planter's Agreement or in the lands included in the Planter's Agreement.

The court then denied the plaintiffs right of recovery under the complaint and rendered judgment in favor of defendant quieting its title to all crops growing and maturing on the premises on and after October 27, 1933, and prior to December 30, 1940, and to all proceeds derived therefrom and to the interest of Gaston A. Bastanchury, his successors and assigns under said Planter's Agreement.

Counsel for defendant have prepared extensive briefs and presented many legal theories upon which it is claimed the trial court's judgment might be supported. The first is that from an examination of the entire record, plaintiff is now estopped from claiming the lien upon any of the crops or their proceeds after consenting to and allowing defendant to enter into possession of the property and finance the cultivation, care, fertilization and irrigation of it, and after harvesting and selling the crops without any objections; that since she consented to and acquiesced in the removal of the crops from the lands upon which they were grown she waived her lien (if any) upon such crops and to the proceeds therefrom.

Other theories presented are, second, that plaintiff had no lien upon the crops in question because there was no recordation of the supplemental crop mortgage in the county where the corporation had its principal place of business, citing Fassett v. Wise, 115 Cal. 316, 47 P. 47, 1095, 36 L.R.A. 505; former sec. 2959, Civ.Code; Gallup v. Sacramento, etc. Drainage District, 171 Cal. 71, 151 P. 1142; and Noyes v. Bank of Italy, 206 Cal. 266, 274 P. 68.

Third, that the evidence is sufficient to justify the finding of fact and conclusion of law that defendant acquired a lien upon the crops and the proceeds from the sale thereof by virtue of a valid pledge of the rights of Gaston A. Bastanchury under the Planter's Agreement to The Times-Mirror Company, citing Joint Pole Ass'n v. Steele, 213 Cal. 233, 2 P.2d 335; Brewster v. Hartley, 37 Cal. 15, 99 Am.Dec. 237; and that there was a valid sale of the pledged property which sale terminated the lien, if any, of plaintiff on all crops not harvested at the time of sale, citing Penryn Fruit Co. v. Sherman-Worrell Co., 142 Cal. 643, 76 P. 484, 100 Am.St.Rep. 150. Fourth, that termination of Bastanchury Corporation, Ltd.'s interest in the Planter's Agreement likewise terminated the rights of its mortgagee in any crops thereafter grown, citing Fisher v. Chaffee, 49 Cal.App.2d 97, 99, 121 P.2d 51. Fifth, that plaintiff, at the time she acquired her supplemental crop mortgage, had knowledge and notice of the prior pledge and assignment in favor of The Times-Mirror Company, citing such cases as First National Finance Corporation v. Five-O Drilling Co., 209 Cal. 569, 573, 289 P. 844.

Counsel for plaintiffs have elaborately discussed the points and theories presented by counsel for defendant and cited many cases which they contend support their argument in opposition thereto.

We are convinced, from an examination of the entire record, that the evidence fully supports the trial court's finding on the first theory, i. e., that the representatives of plaintiff are now estopped from claiming, and have waived their rights to the proceeds from the sale of the crops in dispute, and that they are not entitled to recover under the complaint. It will therefore not be necessary to consider the merits of the other theories upon which the judgment might be supported.

[1] It is conceded here that defendant did not take or have possession of the land and crops here involved until September 25, 1933, which was after the pledgee's sale. This action, therefore, does not involve any crops or proceeds derived therefrom prior to that time. All of the crops, including 1931, were harvested, removed from the land, and disposed of, apparently, with the consent and acquiescence of the plaintiff. If any lien was created on those crops or proceeds, by virtue of the original or supplemental crop mortgage, for the years previous to September 25, 1933, such liens, if any, have been lost to plaintiff.

Section 2972 of the Civil Code provides: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor."

There are numerous cases construing this code provision. Horgan v. Zanetta, 107 Cal. 27, 40 P. 22; I. S. Chapman & Co. v. Ulery, 15 Cal.App.2d 452, 59 P.2d 602.

In Gates v. Tom Quong, 3 Cal.App. 443, at pages 446, 447, 85 P. 662, at page 663, the court said: "* * * although it (the lien) was lost by the severance of the crop and its removal from the demised land, the cases recognize an exception to the rule of the Code where there is a tortious removal of the crops". In that case the court concluded that the removal was not tortious and that after removal of the crops there was no lien in favor of the mortgagee against either the crops or the proceeds.

In Valley Bank v. Hillside Packing Co., 91 Cal.App. 738, 267 P. 746, it was held, under similar circumstances, that the money received for the crops was released from the operation of the lien *except as between the original parties to the loan.* In this connection plaintiff argues that defendant, by virtue of the pledgee's sale, "stepped into the shoes" of the Ranch Company and therefore the money received from the crops retained the lien because it was in effect between the original parties to the loan.

[2] The question of the validity of the lien of the original 1931 crop mortgage on that particular crop or its proceeds has become moot, and any decision as to priority of liens in connection therewith presents merely an academic question unnecessary to decide at this time. 2 Cal.Jur. p. 803, sec. 472.

[3, 4] Plaintiff agrees that defendant was peaceably and under a claim of right let into possession of the property and crops in the year 1933, and subsequently cultivated, husbanded and disposed of them without objection on her part. She further admits that she had previously made proposals and had previously but conditionally agreed with defendant Times-Mirror Company, through her attorney, that in the event the company proceeded to sell at a

pledgee's sale all of the property mentioned in the pledge, it might manage and control the operation of the property and plaintiff would then be allowed and permitted to redeem all of the pledged property upon payment to defendant company of the balance due upon Bastanchury's note for $500,000 payable to The Times-Mirror Company, and that the period for redemption would be fixed at a later date for a period of from one to four years (Defendant's Exhibit F–1), but claims, through her counsel, that at all times she stated that she wished to preserve any rights she had to her claimed prior lien and to bring an action to recover the proceeds of the crops grown upon the property and that she consented to the agreement because of some hope entertained by her counsel through conversation or communications with Mr. Chandler, president of defendant company, that some compromise would be effected.

Counsel for plaintiff testified that subsequent to the pledgee's sale and after the hearing before the referee in bankruptcy, he informed the referee, by letter (Defendant's Exhibit F–1), of the conditions under which he had consented to the order. He also testified that after the sale by the referee in bankruptcy, this action on the note was filed merely "to toll the statute of limitations" and that no objections to the defendant's collecting the proceeds from the crops were made "because of the financial solvency" of defendant company.

There was evidence, if believed by the trial court, substantiating plaintiff's contention that the agreement was a conditional one. However, the trial court apparently disregarded that portion of plaintiff's evidence, which it had a right to do (Whitechat v. Guyette, 19 Cal.2d 428, 435, 122 P. 2d 47), and found that the plaintiff's consent to the order of the referee was not made with any specific reservation or condition and that the removal of the crops and the retention of the proceeds thereof was with her unconditional consent, knowledge, permission and acquiescence. There is evidence to support this finding. Defendant openly claimed its right to possession through a pledgee's sale under its claim of lien and without objection on the part of plaintiff or her assignee and with her apparent consent. She permitted defendant to enter into possession of the property, finance, at great expense, the cultivation, care, fertilization and irrigation of the crops, harvest and sell them, and during all of that time she stood by and took her chances on a net profit being made with no liability on her part in case of loss.

The reason the trustee in bankruptcy relinquished his duty of operating the property was due to the fact that it was operated at a net loss. Plaintiff should not now be permitted to seek a recovery by means of a money judgment based upon a wrongful conversion of the crops by defendant rather than attempt to make timely foreclosure of her claimed crop mortgage lien. Fowler v. Ozcoidi, 7 Cal.2d 268, 60 P.2d 279; Gribble v. Columbus Brewing Co., 100 Cal. 67, 34 P. 527; Miller & Lux v. Kern, etc., Co., 154 Cal. 785, 99 P. 179; Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 683, 93 P. 1021; Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 P. 1017, 45 P. 252; Secs. 3521 and 1589, Civ.Code; Sec. 1962, subd. 3, C.C.P.; Dool v. First Nat. Bank of Calexico, 209 Cal. 717, 290 P. 15; Banning v. Kreiter, 153 Cal. 33, 94 P. 246; Dessert Seed Co. et al. v. Garbus et al., 66 Cal.App.2d 838, 153 P.2d 184; Allen v. Hance, 161 Cal. 189, 118 P. 527; Austin v. Hallmark Oil Co., 21 Cal.2d 718, 734, 134 P.2d 777.

In connection with the claimed waiver or estoppel, it may be stated that Mrs. Bastanchury filed her claim in bankruptcy on the notes here involved, set forth a statement of the crop mortgages in which she recites that "said creditor * * * does hereby disclaim any right which she may have under the laws of the State of California to enforce payment of any of the aforesaid debts * * * of said bankrupt in her favor separately from or in or by any action or procedure independently of procedure for the enforcement of her said agreements of security and/or the securities therein provided."

Equity would not now permit plaintiff to release what appears to be a major portion of her security under her so-called lien by virtue of the crop mortgages, which mortgages cover the property here involved as well as additional property of the ranch company, without defendant's consent and thus burden defendant's interest in the crops and proceeds therefrom with the entire obligation. It further appears that defendant's claim to the crops and proceeds thereof was apparently based upon the supposition that it possessed a prior lien upon those crops and the proceeds therefrom by virtue of its pledge. Plaintiff's attorney fully understood and had notice of such

claim. The alleged claim of plaintiff under her supplemental crop mortgage was set forth in defendant's petition to creditors for an order to show cause why that and other property therein mentioned should not be sold at the pledgee's sale. Plaintiff appeared and made no objection thereto, and according to the findings, the apparent abandonment or waiver of her claimed prior lien was unconditional. Surely, plaintiff cannot now be heard to claim that new life has been breathed into her so-called supplemental crop mortgage and claimed lien so as to permit a recovery from this defendant under the claim of wrongful conversion. The gist of plaintiff's complaint against defendant, according to her closing brief (page 134) is "the conversion" by defendant of those "crops" which were "subject to her lien".

[5] One who holds property by virtue of a lien upon it may maintain an action for conversion if the property was *wrongfully* disposed of by the owner and without authority, in which case the measure of damages can be no greater than the amount secured by the lien and for loss of time and expenses in pursuit of the property. Connell v. Hogg, 181 Cal. 730, 186 P. 134; Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770; Atkins v. Gamble, 42 Cal. 86, 10 Am.Rep. 282; Civ.Code, secs. 3336–3338; 24 Cal.Jur. p. 1056, sec. 31.

[6] In such an action it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was *entitled to immediate possession at the time of conversion.* Imperial Valley Land Co. v. Globe G. & M. Co., 187 Cal. 352, 202 P. 129; Lowe v. Ozmun, 137 Cal. 257, 70 P. 87.

[7, 8] The foundation of an action for conversion on a money had and received count is the unjust enrichment of the wrongdoer, and in order for plaintiff to recover in such action she must show that a definite sum, to which she is justly entitled, has been received by defendant. French v. Robbins, 172 Cal. 670, 158 P. 188. Defendant has the right thereunder to show that it disbursed the money sued for in due course of the business between itself and the plaintiff and to show any facts which entitle it to retain the money sued for, either upon legal grounds or upon equitable grounds by way of estoppel or waiver. If the right of the defendant to retain the money is equal to that of plaintiff, the defendant must prevail. Whittle v. Whittle, 5 Cal.App. 696, 91 P. 170; Hallinan v. Hearst, 133 Cal. 645, 66 P. 17, 53 L.R.A. 216; Mauss v. Kato, 117 Cal.App. 663, 4 P.2d 179; Briggs v. Marcus-Lesoine, Inc., 3 Cal.App.2d 207, 39 P.2d 442; Hillwig v. Boyer, 81 Cal.App. 763, 254 P. 662.

There is no evidence to support any contention of plaintiff that defendant company took over the management of the property and harvesting of the crops with the understanding that the proceeds from the sale thereof would *first be applied to the payment of plaintiff's claimed crop mortgage lien.* There is evidence, however, that defendant company entered into possession of the property, under a claim of right to the crops and their proceeds and that such proceeds might be applied to the payment of the note and pledge due defendant company and that plaintiff might be privileged to redeem the defendant's interest as well as any interest of the Ranch Company therein within an undetermined number of years ranging from one to five. That plaintiff was willing for defendant company to take over the operation of the ranch for a five-year period and endeavor to pay off all of the indebtedness is clearly expressed in her letters to Mr. Chandler (Defendant's Exhibits XX and YY), which read in part as follows:

"Dear Mr. Harry Chandler. I take the liberty to tell you in few words Miss Yaeger gave you the letter which my attorney made without my permission so I do not wish to sign those papers. Now I ask you for your advice for what I should do. My intention is to clean out the bankruptcy court. It is a benefit to you and the Union Oil Company and myself. If we keep together, this is better. I hope you and the Union Oil Company will help me. Sincerely, Maria O. Bastanchury."

The second letter received by Mr. Chandler about September 25, 1933, at the time he took possession of the ranch, reads as follows: "Mr. Harry Chandler, My dear Mr. Chandler. I am very glad now and I guess you are to now the bankruptcy is out from the ranch. Now we will know where will go the money. I have all my confidence on you because you are main body so I trust you. And when you make new arrangement you remember every 3 partys aproportions equal. You head be and with good management within 5 years all *indepness* be paid. We are not fraid we seen before this bad times too well now I ask you

pardon if I have offense you talking too much to you. Respectfully your, Maria O. Bastanchury."

Just how the proceeds were to be applied is not clearly expressed in the letters. The trial court's determination that such proceeds might be first applied to the indebtedness due defendant company is not unreasonable because the company was financing the growing and harvesting of the crops and was taking all the chances on the project being a total loss without plaintiff assuming any liability in any manner. Apparently the net profits from the operation were not sufficient to warrant the expenditures required. Plaintiff did not offer to exercise her claimed right of redemption. The Planter's Agreement was surrendered to the Union Oil Company.

[9, 10] The evidence shows that the bank advised Mrs. Bastanchury that she shouldn't make the loans above mentioned because she was foolish to obligate herself to the Union Bank in that sum of money as she was then comfortably fixed and if the Ranch Company did not repay her she would be stripped of practically everything she had; that she advised them she wanted to loan it to the boys to help them out; that she thought she had fine security and that she became rather hostile because the bank did not want to loan her the money; that the bank official "started to let her have it" and she replied that "she had been a customer of the bank for a good number of years—and she expected to borrow the money and she expected the bank to loan it to her"; that the bank official then said that he would loan it to her but if she didn't get her money back from the Ranch Company that she would be held to pay this obligation herself. Although it was stipulated at the trial that Mrs. Bastanchury would testify, if present, that she did not know "of the existence" of the assignment of the Planter's Agreement to the defendant at the time she took the supplemental crop mortgage, the evidence would indicate otherwise because it shows, in addition to the matters herein related, that throughout these transactions and negotiations she was in constant communication with cross-defendant Union Bank and Trust Company and also her sons who were members of the board of directors of the Ranch Company. The bank's officials advised her in her negotiations with that company. They all had actual notice of the assignment of the Planter's Agreement to defendant. Mrs. Bastanchury was a director of the Ranch Company when the supplemental crop mortgage was executed and one of the bank's officers was made secretary-treasurer thereof, at the bank's request, and took an active part in managing its financial affairs. It will not be presumed that her sons and the bank officials were parties to a fraud in inducing her to make the loan by misrepresenting or suppressing the fact of the prior loan and assignment. The presumption is always against fraud. Truett v. Onderdonk, 120 Cal. 581, 53 P. 26.

[11] The trial court specifically found that the supplemental crop mortgage was not made nor taken in good faith. Knowledge or notice of such facts and circumstances as would make the taking of a negotiable instrument a taking in bad faith is generally a question of fact for the jury or trier of facts, and when the evidence is conflicting or is such that reasonable minds might draw different conclusions therefrom, it is for the jury or trier of facts to determine whether plaintiff knew of such facts and circumstances as would make the taking of the instrument a taking in bad faith, and this is so even where the holder may testify that he received it without knowledge or notice of defect in title or other legal defense, if there are other circumstances or other evidence contradicting it from which an adverse inference might be drawn. 11 C.J.S., Bills and Notes, § 699c, p. 207; Barthelmess v. Cavalier, 2 Cal.App.2d 477, 38 P.2d 484.

[12] The evidence fully supports the conclusion that not only Mrs. Bastanchury but also the Union Bank and Trust Company, at the time of the execution of the supplemental crop mortgage, had actual notice within the meaning of section 2973 of the Civil Code, as well as constructive notice under section 19 of the Civil Code of the prior assignment to defendant; that they acquiesced in or consented to the actions later taken; and that neither was an innocent holder of nor purchaser in good faith of the Ranch Company's notes and crop mortgages, for value and in due course under sections 3133–3138, Civil Code. Ocean Shore R. Co. v. Spring Valley Water Co., 218 Cal. 86, 21 P.2d 588; Phillips v. Phillips, 163 Cal. 530, 127 P. 346; Enterprise Foundry & Machine Works v. Miner's Elkhorn Coal Co., 241 Ky. 779, 45 S.W.2d 470; Greenville Gas Co. v. Reis, 54 Ohio St. 549, 44 N.E. 271; Gay v. Young Men's Consol. Co-Op. Mercantile Inst., 37

Utah 280, 107 P. 237; Darling & Co. v. Petri, 138 Kan. 666, 27 P.2d 255.

[13] Without discussing the merits of plaintiff's and defendant's arguments as to which claimed lien was prior in point of time, it cannot be said under the evidence of this case that defendant's claim of title to the proceeds of the crops here involved was unjustified or constituted an unjust enrichment. Joint Pole Ass'n v. Steele, supra; McCaffey Canning Co. Inc. v. Bank of America, 109 Cal.App. 415, 294 P. 45; Gay v. Moss, 34 Cal. 125; Brewster v. Hartley, supra; Cannon v. Chapman, 24 Cal.App.2d 448, 75 P.2d 522.

[14] Whether the established facts in any given case constitutes, in its most technical sense, an "equitable estoppel" or a "waiver" is not always easily distinguishable. These terms are sometimes employed indiscriminately. McCormick v. Orient Insurance Company, 86 Cal. 260, 24 P. 1003; First National Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am. St.Rep. 64; Wheaton v. North British & Mercantile Insurance Co., 76 Cal. 415, 18 P. 758, 9 Am.St.Rep. 249. Strictly speaking, the latter is used to designate the act or the consequence of the act of one person only, while the former is applicable where one's conduct has induced another to take such a position that he will be injured if the first be permitted to repudiate his acts. 25 Cal.Jur. 926, sec. 2.

[15] A waiver is the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive. Davis v. Brinkhouse Hotel Co., 74 Colo. 199, 219 P. 1074; Johnson v. De Waard, 113 Cal.App. 417, 298 P. 92.

[16] The rule is clearly stated in Michaels v. Pacific Soft Water Laundry, 104 Cal.App. 349, 286 P. 165, 1071, that one may waive a right given by contract or advantage of law intended for his benefit. See, also, Civ.Code, sec. 3513.

Estoppel has been variously defined and contains several necessary elements. 10 Cal.Jur. 626, sec. 14; Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898; California Pear Growers Ass'n v. Herspring, 60 Cal.App. 503, 213 P. 518.

Whether some of the facts established in the instant case constituted a waiver within its strict sense or, when considered as a whole, constituted an equitable estoppel in its most technical sense, is not readily distingishable.

We are convinced, however, that there are sufficient facts to support a finding of an equitable estoppel or a waiver of plaintiff's claimed right to a prior lien on the crops involved and to the proceeds thereof and that there was no wrongful conversion of plaintiff's money.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

25 Cal.2d 930

GIBSON v. CITY OF SAN DIEGO et al.
L. A. No. 19099.

Supreme Court of California.

Feb. 16, 1945.

Rehearing Denied March 15, 1945.

1. Municipal corporations ⇐162(1)

Where pension provision in municipal charter is sufficiently clear as to reasonably remove all doubt as to its meaning or legislative intent with respect thereto, there is no room for judicial construction. St.1935, p. 2637, § 184(a).

2. Municipal corporations ⇐200

San Diego charter provision for war service credit to a fireman who returned to active duty with fire department after honorable discharge in computation of period of service in fire department necessary for retirement was not so free from obscurity as to preclude judicial construction with respect to a city fireman whose retirement time was completed while he was serving with navy and who applied for retirement from fire department before his discharge from navy. St.1935, p. 2637, § 184(a).

3. Municipal corporations ⇐200

San Diego charter provision for war service credit in computing retirement time discloses legislative intent to encourage city employees to enter military service during time of war or national emergency and to protect them in their civil service rights. St.1935, p. 2637, § 184(a).

4. Municipal corporations ⇐58

In construing provision of city charter, court must consider obvious purposes and objects sought to be attained by adoption of such provision and must construe language used, insofar as it reasonably permits, to the end of giving it vitality and efficacy in the accomplishment of such purposes and objects and fairness in its application.

5. Municipal corporations ⇐220(9)

Pension provisions appearing in city charter and covering municipal employees must be liberally construed in favor of applicant for pension who enters military service in time of war. St.1935, p. 2637, § 184(a).

6. Municipal corporations ⇐200

Under San Diego charter provision for war service credit in computation of time of service in fire department prerequisite to retirement, fireman who, while in military service, completes period required for city retirement, so that city cannot exact any further service from him, may not be compelled to wait until he has left military service before he can collect his pension or retirement pay. St. 1935, p. 2637, § 184(a).

7. Municipal corporations ⇐200

The phrase "who shall have returned to such fire department within three months, after having been honorably discharged from said military service", as used in San Diego charter provision for war service credit in computation of service required for retirement from fire department, applies only to those firemen whose term of service required for retirement has not been completed at time of discharge or release from active duty status by military authorities. St.1935, p. 2637, § 184(a); 10 U.S.C.A. §§ 358, 424; 34 U.S.C.A. §§ 853(c), 853(d).

In Bank.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by John E. Gibson against the City of San Diego and others for declaratory relief for construction of certain provisions of defendant's charter relative to computation of time and completion of service required for retirement on pension by members of city fire department. Judgment for plaintiff, and defendants appeal.

Affirmed.

J. F. DuPaul, City Atty., and Edward H. Law and J. H. McKinney, Deputy City Attys., all of San Diego, for appellants.

C. Rupert Linley and Monroe & McInnis, all of San Diego, for respondent.

SCHAUER, Justice.

In this action for a declaratory judgment both parties seek, on allegations of the complaint which are admitted by the answer, to secure judicial construction of certain provisions of the Charter of the City of San Diego relative to computation of the time and completion of service required for retirement on pension by members of the city fire department. Defendants are the city of San Diego and the three members of the Board of Trustees of the Firemen's Relief and Pension Fund of

that city. The provisions (found in section 184[a] of the Charter of the City of San Diego, Stats.1935, p. 2635) are, in material part, as follows:

"Whenever any person who shall have been duly appointed * * * and shall have served for twenty years or more in the aggregate as a member in any rank or capacity of the regular constituted force [of the Fire Department] * * * the Board of Trustees [of the Firemen's Relief and Pension Fund] *shall* upon the written request of any person, or his guardian, or without such request if it deem it for the good of the service, retire such person from further service in the Fire Department; and from the date of making such order, the service of such person shall cease, and the person so retired shall thereafter during his lifetime be paid * * * a yearly pension equal to one-half the amount attached to the rank held by him for one year or more previous to the time of his retirement * * *.

"In computing the time of service required for retirement the amount of time served in the United States Army, Navy, Marine Corps or any division thereof in time of war by any member of the Fire Department who shall have left said Department for the purpose of and entered such service of the United States Army, Navy, Marine Corps or any division thereof immediately thereafter, *and who shall have returned to said Fire Department within three months, after having been honorably discharged from said military service,* or any member having served as substitute in the San Diego Fire Department, shall have such time counted as part of the aggregate service required for a retirement pension." (Italics added.)

It appears that plaintiff was appointed a member of the San Diego Fire Department approximately January 18, 1923, and continued in the performance of his duties as such until February 2, 1942, a period of nineteen years and one-half month. Shortly prior to the latter date (the United States then being in a state of war with Germany, Italy, and Japan) plaintiff had become interested in entering the military service and had inquired of his superior officer in the fire department as to what effect entry into the military would have upon his pension rights. The inquiry was transmitted to the office of the City Attorney of the City of San Diego, and that office, on January 19, 1942, by written opinion advised that plaintiff would be entitled to receive a pension as provided by the terms of the San Diego City Charter in case he entered military service *"at the same time as though he had remained on duty with" the fire department.* In reliance upon such advice, plaintiff sought and on February 2, 1942, was granted by the proper officials leave of absence from the fire department for the purpose of entering military service.

On the day that such leave was granted plaintiff entered the United States Navy as a Torpedoman, Second Class, and prior to the time of the institution (on March 28, 1944) of this action had received two promotions. He was still in the Navy, serving honorably, on March 28, 1944. Prior to January 18, 1943 (which date marked the completion of a period of twenty years from the time plaintiff first became a member of the San Diego Fire Department) plaintiff, agreeable to the advice which previously had been given him by the city attorney, applied for his retirement pension from such department. The application was approved by the board of trustees of the pension fund on approximately January 25, 1943, and plaintiff was paid his pension through the month of April, 1943. Thereafter payment was suspended and defendants now claim that plaintiff was at no time entitled to a pension and will not become entitled to one until and unless, within three months after honorable discharge from military service, he "returns" to the San Diego Fire Department, and that the city is entitled to a refund from plaintiff of the pension payments already made to him. No dispute exists as to the amount payable if it be determined that plaintiff's pension rights have accrued.

Each party moved for judgment upon the pleadings, and the trial court thereupon rendered judgment for plaintiff, whereby it was decreed that plaintiff became entitled to retirement and to a pension upon January 18, 1943, and "is entitled to receive pension as provided for in such [San Diego City] charter for the period since the month of April, 1943." From such judgment defendants have appealed, urging that the charter provisions involved (quoted hereinabove) are free from ambiguity, doubt, and uncertainty, are therefore not open to construction by the courts, and must be applied as requiring that those in plaintiff's position in order to receive a pension be honorably dis-

charged from military service and return to the Fire Department within three months thereafter.

In support of their position, defendants cite many cases to the effect that "Where the meaning of the statute is plain, there is no room or justification for judicial interpretation, and the only function of the court is the application of the enactment to the facts at bar." Riley v. Robbins (1934), 1 Cal.2d 285, 287, 34 P.2d 715, 716; see, also, Norcop v. Jordan (1932), 216 Cal. 764, 770, 17 P.2d 123; State Bd. of Equalization v. Superior Court (1935), 5 Cal.App.2d 374, 377, 42 P.2d 1076. Reliance is also placed upon Montgomery v. Board of Administration (1939), 34 Cal. App.2d 514, 93 P.2d 1046, 94 P.2d 610. In that case another provision of the San Diego City Charter, authorizing the retirement of city employes, other than those in the fire and police departments, upon reaching the age of sixty-two after ten years of continuous service, was before the court. At page 521 of its decision in 34 Cal.App.2d, at page 1050 of 93 P.2d the District Court of Appeal, in holding that a specific requirement for "continuous service" would not be construed to mean instead "intermittent and interrupted service," said: "Practical construction of a statute can only be resorted to in order to clear up uncertainties and ambiguities. [Citations.] * * * The provisions of the charter in question not being uncertain, there is no opportunity for practical construction here."

Defendants argue further that even though a literal construction of the charter provisions as written might work a hardship in cases such as that of plaintiff here, that fact will not justify the construction placed upon the provisions by the trial court. In support of this position they quote general language found in several cases, among them, In re Mitchell (1898), 120 Cal. 384, 386, 52 P. 799, 800, wherein this court stated: "Where the language of a statute is clear, and leaves no doubt as to the legislative intent, there is no room for interpretation, and judicial discretion cannot break its force, however disastrous the consequences may be * * *." And, although conceding the rule that pension statutes will be liberally construed, appellants assert that such rule is not applicable because, as said in Klench v. Pension Fund Commissioners (1926), 79 Cal.App. 171, 187, 249 P. 46, 51, "* * * these rules of statutory construction, as applied to pension laws, are of no consequence where the language itself of the statute is sufficiently clear or free from obscurity as to reasonably remove all doubt as to its meaning or the legislative intent with respect thereto."

[1, 2] Plaintiff does not dispute the abstract essence of the rules above enunciated but challenges their applicability to the facts of this case. He urges that the charter provisions are uncertain and incomplete; that they disclose a controlling purpose and object but fail to specifically prescribe the precise rule to be followed in cases such as his, where there has been no discharge, honorable or otherwise, and where the twenty years' service which is the prerequisite to a retirement pension expires while the applicant is still in military service; that therefore it becomes the duty of the courts to construe the provisions and that the construction placed upon them by the trial court is fair and lawful in all respects and carries out the obvious intent and purpose of the law-making authority. We are in accord with this position and with the views leading to such conclusion as helpfully expressed by the learned trial judge in his oral opinion reported in the transcript.

The construction now sought to be placed upon the charter section by defendants appears to be not so much a literal one as a narrow one and obviously is not the only one to which it is reasonably susceptible. In strict literality the mooted provisions of the charter are so ungrammatically stated as to be ambiguous and well-nigh meaningless without judicial construction. Reduced to the essential elements of its syntax the controlling sentence reads: "In computing the time of service required for retirement, the amount of time served in the United States Army * * * shall have such time counted as part of the aggregate service required for a retirement pension." That language is most remarkable in that it fails entirely, read in exact literality, to provide that *any person* who has served in the Army, Navy, etc., "shall have such time counted" as part of the aggregate required for his pension. If we were to construe and apply the section with such complete literality it would confer no benefit whatsoever on any person for service in the armed forces and would have operated to mislead to his

detriment every employe of the city of San Diego who, in reliance upon such section and the construction first placed on it by the city attorney, had entered the military service. We are satisfied that it was not the intention of the drafters of the city charter, or of the citizens who adopted it, to insert a clause which was either meaningless or fraudulent in design.

[3, 4] We are further satisfied that it was the intent and purpose of the citizens of San Diego, in framing and adopting the provisions in question, to encourage city employes to enter the military service during time of war or national emergency, and to protect them in their civil status rights so that they should be wholly relieved by the city from any detriment or penalty in their relationship to it which otherwise would ensue from their patriotic service to the nation. The grammatical ambiguity and the uncertainty of such provisions necessitate our placing a construction upon them and in so doing we are bound by accepted rules of construction to consider the obvious purposes and objects sought to be attained by their adoption and to construe the language used, insofar as it reasonably permits, to the end of giving it vitality and efficacy in the accomplishment of such purposes and objects and fairness in its applications.

[5] It is a general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant. For instance, Douglas v. Pension Board (1925), 75 Cal.App. 335, 242 P. 756, 757, involved a charter provision that the retired employe should receive a pension "equal to one-half of the salary paid him one year prior to his retirement." The court construed the provision so as to entitle a per diem employe who because of illness had not worked or been paid for all the working days of the year prior to his retirement, to a pension based upon the wages he would have earned had he worked every working day of that year.

We are of the opinion that a like liberal construction in favor of plaintiff and others so situated should be placed upon the charter provisions now before us. Laws protecting the civil rights of public employes who enter the armed forces in time of war or emergency are favored. National, state, and municipal legislative bodies, and the people themselves by direct vote, have been alert to meet the need for special protective and encouraging measures. In a like progressive spirit both federal and state courts "have kept pace and have evinced a firm intention to take a liberal view" of these enactments "in order that their protective purposes may be fulfilled without undue imposition of constitutional limitations or hindrance through narrow judicial construction." (McCoy v. Board of Supervisors (1941), 18 Cal.2d 193, 196, 114 P.2d 569, 571; People ex rel. Happell v. Sischo (1943), 23 Cal.2d 478, 486, 144 P.2d 785, 150 A.L.R. 1431.)

The primary purpose and effect of encouraging city employes to enter the armed forces during time of war could operate to perpetrate fraud unless the indicated reward of credit for such time served actually shall be given in every case wherein the employe has faithfully performed all the obigations upon his part to be performed. Yet if the service-credit provision here is construed to apply only to those persons who have been *discharged* (whether honorably or otherwise) from the armed forces and who have *returned to actual service in the fire department* it may exclude from any benefit some who are most deserving of it.

Under our traditional military scheme we have a relatively small regular Army and Navy with substantial (at least in time of war) reserve corps. The bulk of the actual fighting today, and the direst burdens of warfare, are borne by our citizen soldiers and sailors, the men and women of our reserves. Many of them, at the termination of hostilities or upon earlier removal from active duty status, *will not receive discharges*, honorable or otherwise, unless the legal structure of our forces shall be radically changed. They will simply be transferred from an active duty status to an inactive (or perhaps retired) status in the reserve corps. (10 U.S.C.A. §§ 358, 424; 34 U.S.C.A. §§ 853c, 853d.) It does not seem reasonable that the framers of the charter provisions in question intended to exclude employes in such a category from the benefits of credit for their honorable service.

[6] Neither does any sound reason appear why an employe, who while in the military service completes the period required for city retirement, should be compelled to wait until he has left the military service before he may collect that to which he is otherwise entitled. The city cannot

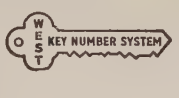
exact any further service from him. If the time of his service in the armed forces is to be counted and if it plus the time of his service to the city aggregate the time which entitles him to the pension then he has a vested right to collect it. As observed by this court in O'Dea v. Cook (1917), 176 Cal. 659, 661, 169 P. 366, 367, "A pension such as this law contemplates is not a gratuity or a gift. * * * [W]here, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." And in Klench v. Board of Pension Fund Commissioners (1926), supra, 79 Cal.App. 171, 185, 249 P. 46, 50, the court said: "A pension is a gratuity only where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation. [Citations.] And herein lies an important distinction between pension laws which, like those we now have before us, provide for pensions for services performed for the government or disabilities occurring while rendering such services after the law has been passed, and a pension system designed to care for or reward soldiers for disabilities suffered or services rendered in the past * * *."

To deny the completely earned pension benefit to those who continue on active military duty would tend to discourage rather than encourage such service—directly contrary to one of the primary purposes of the charter provision. Furthermore, to sustain the defendants in their claim of a right to postpone actual payment of the earned pension until discharge of the employe-veteran from military service and his "return" to the fire department might well operate to deprive the employe and his family altogether of the pension benefit. If he should be kept on active military duty after his right to the pension had otherwise matured (as is the case here) and if he should die before he had been "discharged" and had "returned" to the fire department, the position taken by the city in its argument here, if sustained, would forever preclude such employe and his heirs from any recovery on the pension.

[7] There is apparent no purpose to be served by requiring any employe who has completed his period of service so as to be fully entitled to a pension to return to the fire department. The fire department has no right to his return because it has no right to further service from him. He has fully earned his pension. The phrase "and who shall have returned to said Fire Department within three months, after having been honorably discharged from said military service" is to be construed, therefore, as applying only to those whose "time of service required for retirement" has not been completed at time of discharge or release from active duty status.

For the reasons hereinabove stated the judgment appealed from is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.



25 Cal.2d 938

DIERKES v. CITY OF LOS ANGELES et al.

L. A. 19198.

Supreme Court of California.

Feb. 16, 1945.

Rehearing Denied March 15, 1945.

1. Municipal corporations ⇐220(9)

Pension provisions appearing in city charter and covering municipal employees must be liberally construed in favor of applicant for pension who enters military service during time of war. St.1927, pp. 2020, 2026, §§ 180, 189; St.1937, p. 2955, § 513(d); St.1941, p. 3407, § 17.

2. Municipal corporations ⇐187

Los Angeles charter provision for war service credit toward retirement time, which did not specifically cover case of a policeman who had served city for approximately 19 of required 20 years when he entered military service and while in military service completed remainder of time required for a pension, was not so complete and certain as to preclude judicial construction. St.1927, pp. 2020, 2026, §§ 180, 189; St.1937, p. 2955, § 513(d); St. 1941, p. 3407, § 17.

3. Municipal corporations ⇐187

The phrase "who shall have returned to such department within a period of one year after having been honorably discharged from war service", as used in Los

Angeles charter provision for war service credit in computing time of service to police department requisite for retirement pension, applies only to those policemen whose term of service required for retirement has not been completed at time of military discharge or release from active duty. St.1927, p. 2026, § 189; St.1937, p. 2955, § 513(d); St.1941, p. 3407, § 17.

4. Municipal corporations ⇐187

Los Angeles policeman, who had served 19 years less one day with police department when called out of retirement by navy for active duty and who remained on naval duty for approximately 15 months, was entitled to retirement from police department under war service credit a year and a day after he entered naval service and at any time thereafter notwithstanding that navy subsequently returned officer to inactive status and officer again reported for duty with police department. St.1927, pp. 2020, 2026, §§ 180, 189; St. 1937, p. 2955, § 513(d); St.1941, p. 3407, § 17.

5. Municipal corporations ⇐187

The words "honorably discharged", as used in Los Angeles charter provision for war service credit in computation of service required of policeman before retirement, means honorably relieved, released, transferred or retired from active duty status by military or naval authorities. St. 1927, p. 2026, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Honorably Discharged".

6. Municipal corporations ⇐187

Purpose of amendment to Los Angeles city charter relating to war service credit toward retirement time of municipal employees called into active service in armed forces and on military leave is to liberalize the service credit provision previously appearing in charter by recognizing application of service credit provision to persons in reserve corps who may be released rather than discharged from active duty. St. 1927, p. 2026, § 189; St.1941, p. 3407, § 17.

7. Municipal corporations ⇐187

The provision that "no such leave of absence shall be allowed in the case of any person who is dishonorably discharged from the service to which he was called", appearing in Los Angeles charter provision for war service credit toward retirement time and declaring that city employees in military service shall be considered as on leave of absence, does not necessitate deferment of application for credit until separation of municipal employee from armed forces since the proviso is in derogation of rights otherwise conferred and should not be extended by implication. St.1941, p. 3407, § 17.

8. Municipal corporations ⇐187

Los Angeles policeman in naval service in time of war, who had 20 years of service with police department when war service credit was included, was entitled to apply for retirement pension regardless of discharge or release from active naval service so long as he had not been dishonorably discharged and regardless of return to actual service in police department. St.1927, p. 2026, § 189; St.1941, p. 3407, § 17.

9. Mandamus ⇐151(2)

Under Los Angeles charter provision placing administration of pension fund in exclusive control of board of pension commissioners, in mandamus to enforce or compel payment of pension to city policeman, mayor, city treasurer, city clerk, and city controller, none of whom were members of such board, were not proper defendants and action should have been dismissed as to them. St.1927, p. 2020, § 180.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Mandamus by Henry B. Dierkes against the City of Los Angeles and others to compel the city to pay plaintiff a retirement pension. Judgment for defendants, and plaintiff appeals.

Reversed and remanded with directions.

Edward C. Purpus and Morris Lavine, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Robert J. Stahl and Edward J. Olstyn, Deputy City Attys., all of Los Angeles, for respondents.

SCHAUER, Justice.

In this case plaintiff, a retired police officer of the city of Los Angeles, seeks a writ of mandate to compel the city to pay him a retirement pension, to which he claims to be entitled under certain provisions of the Los Angeles City Charter. Named as defendants are the city, its

board of pension commissioners and the members thereof, and the mayor, the treasurer, the city clerk, and the city controller. The trial court, upon uncontroverted facts set forth in the pleadings, determined that "plaintiff * * * is not presently entitled" to the pension which he seeks and rendered judgment for defendants. From such judgment plaintiff now appeals and we have concluded that it cannot be sustained.

Section 181 of the Charter of the City of Los Angeles (Stats. 1927, p. 2020) provides that "Any member of the Fire or Police Department [of such city] * * * after twenty years' aggregate service, on request of such member * * * shall be retired and paid in equal monthly installments * * *" a pension, the amount of which is not here disputed.

Section 180 of such charter (Stats.1927, p. 2020) provides that "The Board of Pension Commissioners shall administer the fire and police pension system of the city, and have exclusive control of the administration * * * of the fire and police pension fund * * *."

Section 189 of the charter (Stats.1927, p. 2026) provides that "In computing the time of service for retirement the amount of time served in the United States Army, Navy, Marine Corps, or any division thereof, in time of war, by any member of the Fire or Police Department, who shall have left such department to enter the United States Army, Navy, Marine Corps, or any division thereof, and who shall have returned to such department within a period of one year after having been honorably discharged from such service, shall be counted as a part of the aggregate service required for a retirement pension."

Section 17 of the charter (Stats.1941, p. 3407) reads as follows: "Notwithstanding any other provision of this charter, every officer or employee called into active service in the armed forces of this state or of the United States, during time of war * * * shall, during the period of such service * * * and for a period of ninety (90) days from and after his discharge or release from such service, be considered as being on leave of absence from the service of the City of Los Angeles, provided that no such leave of absence shall be allowed in the case of any person who is dishonorably discharged from the service to which he was called. * * * In addition to credit for time served in the United States Army, Navy, Marine Corps, and any division thereof, in time of war as allowed under the existing provisions of Sec. 189 and subdivision (d) of Sec. 513, credit shall be given for periods of military leave as provided in this section to the same extent and with like force and effect as now allowed for war service under the charter sections hereinabove mentioned."

Subdivision (d) of section 513 of the charter (Stats.1937, p. 2955) sets out provisions for war service credit similar to those contained in section 189 and makes them applicable to "any member" of the City Employees' Retirement System. The section is only analogically pertinent to the question at bar and does not affect the discussion or result herein.

Plaintiff became a member of the Los Angeles Police Department on August 15, 1922, and, except for a fourteen-day absence on leave without pay, he continued in the actual performance of his duties as such until August 28, 1941, an aggregate period of nineteen years less one day. Prior to his employment as a member of the police department plaintiff had served in the United States Navy for a period of sixteen years and was, under Navy regulations, a member of the Fleet Reserve of the Navy and liable to call to active duty in case of war or national emergency. In 1937 plaintiff was placed on retired status in the Navy, but under the law and regulations continued to be liable to call to active duty in time of war or national emergency. On August 28, 1941, he was recalled to active duty with the Navy and continued upon such duty until November 20, 1942, on which date he was released therefrom for the purpose of resuming his duties as a member of the police department and claiming a retirement pension. If he was entitled under any of the provisions of the charter hereinabove quoted to have the time of his active duty with the Navy (subsequent to August 28, 1941) credited to his city service, then the twenty-year period became complete on August 29, 1942, and at any time after that date he was entitled to the pension upon application for it.

On approximately November 24, 1942, plaintiff reported for duty with the Los Angeles Police Department and thereafter actually served as a member thereof until December 2, 1942. On November 27, 1942, he applied to the board of pension com-

missioners for a retirement pension to commence on December 3, 1942. On December 15, 1942, he was recalled to active service with the Navy and was still so engaged at the time of the trial of this case. On April 8, 1943, the Board of Pension Commissioners of the City of Los Angeles denied his application for retirement pension, and on May 24, 1943, he filed his petition for writ of mandamus in the court below, which proceeding, upon trial, resulted in the judgment for defendants from which this appeal is taken.

Defendants seek to uphold the trial court's judgment through a literal reading and strict application of the provisions of section 189. They would, in fact, as is hereinafter discussed in more detail, have us extend the application of section 189 (adopted in 1927) as interpreted by them to control and limit the operation of the later (1941) adopted section 17. They also contend that plaintiff's transfer from active duty to inactive status in the Naval Reserve after honorable service therein and his return to and actual service in the police department from November 24 to December 2, 1942, should be held not to bring the plaintiff within the status of one "who shall have returned to such [police] department within a period of one year after having been honorably discharged from such service." None of defendants' contentions can be upheld.

[1] It is a general and well recognized rule that pension provisions of the type here involved shall be liberally construed in favor of the applicant. Gibson v. City of San Diego, 1945, Cal.Sup. 156 P.2d 737. Admitting such general rule, it is pointed out in behalf of defendants that the provisions of section 189 of the Los Angeles City Charter, with which we are now concerned, are not in all respects as ambiguous and uncertain as are those of section 184(a) of the San Diego City Charter, which we were considering in the San Diego case, and hence, it is contended, there is no room for construction of the Los Angeles charter provisions.

[2-4] It may well be observed that the provisions of section 189 of the Los Angeles City Charter cannot be said to be wholly complete and certain in their application to the facts of this case. They do not specifically cover the case (which we have here) of a member of the police or fire department who has served the city for nearly all (approximately nineteen twentieths) of the time required for a pension and who in time of war goes from such service into the Army or Navy and there completes, with the credits allowed for such war service, the time of service required for a pension. There appears to be no good reason for such an employe to return to the city department; no further city service can be exacted of him. These considerations point to the same conclusion here as was reached in the San Diego case; i.e., that the phrase "and who shall have returned to such department within a period of one year after having been honorably discharged" from war service should be construed to apply only to those whose "time of service required for retirement" has not been completed at time of discharge (or release, see infra) from active military duty. There is, however, in this case, as related above, the additional fact that the plaintiff was temporarily transferred from active to inactive status in the reserve and returned to his city police duties, and there are, in the Los Angeles City Charter, the provisions of section 17, above quoted, which did not appear in the San Diego Charter. Giving effect to that additional fact and these provisions, regardless of whether the provisions of section 189, standing alone, would require the construction indicated, we are satisfied that plaintiff's right to receive the pension is conclusively established.

Preliminarily it may be stated that the general discussion in the San Diego case in respect to the purposes and objects of the military service-credit provisions applies with equal force here. Likewise here it is our duty to avoid, if reasonably possible, a result which would upon a purely arbitrary basis (the fact that the particular employe-veteran was given an "honorable discharge" instead of being transferred without discharge to inactive status in a reserve corps) confer credit benefits upon some city employe-veterans who had served the nation honorably in the armed forces (and had been "discharged") while denying such benefits absolutely to other city employe-veterans who had served equally honorably in the armed forces (but who had been transferred to inactive status in the reserve corps or retired instead of being discharged).

[5] We are satisfied that the words "honorably discharged from such service" must be construed to mean, in a proper case, honorably *relieved, released, trans-*

ferred, or retired from active duty status, and, hence, that the plaintiff herein, when he resumed the discharge of duties in the police department on November 24, 1942, under the circumstances hereinabove related, fulfilled all the requirements of section 189 which are applicable to a city employe-veteran whose time of service for a police pension is not otherwise complete. But this is not the only basis upon which plaintiff is entitled to the relief sought.

[6] Section 17 of the Los Angeles City Charter was adopted in 1941. It is, in effect, amendatory or augmentative of section 189, adopted in 1927. Section 17 (hereinabove quoted more fully) declares that "Notwithstanding any other provision of this charter, every officer or employee called into *active service* [in the armed forces] * * * during time of war * * * shall, *during the period of such service* * * * and for a period of ninety (90) days * * * after his discharge *or release* from such service, be considered as being on leave of absence from the service of the City. * * * In addition to credit for time served in the [armed forces] * * * as allowed under the existing provisions of Sec. 189 * * * *credit shall be given for periods of military leave as provided in this section* to the same extent and with like force and effect as now allowed for war service under the charter sections hereinabove mentioned."

The purposes of this amendment seem obvious. Its provisions at least impliedly recognize that an employe may be on a reserve status in the armed forces and "called into active service" and that after honorable service, he may receive a "release from such service" rather than a discharge. Its purpose, clearly, is to liberalize and augment, and perhaps in some respects to construe, the service-credit provisions of section 189. It extends, or recognizes the application of, such service-credit provisions to persons in the reserve crops who may be *released,* rather than *discharged,* from active duty; it confirms recognition of the status of a city employe, absent on military duty, as being on *military leave* and hence as remaining in a limited sense in the employ of the city (see McCoy v. Board of Supervisors (1941), 18 Cal.2d 193, 199, 114 P.2d 569; People ex rel. Happell v. Sischo (1943), 23 Cal.2d 478, 495, 144 P.2d 785, 150 A.L.R. 1431); it adds ninety days "after his discharge or release" from active service to the period of actual active service for which he must be given credit in computing his time of service for a pension; it imposes no requirement of previous discharge from military status, or of release from active duty status, or of return to service with the city, as a condition precedent to operation of the credit on account of time served; rather does it expressly provide that *"during the period of such service"* the employe "shall * * * be considered as being on leave of absence," etc., and that "credit shall be given for *periods* [note the plural] of military leave as provided in this section."

[7] We find not persuasive an argument of defendants that the proviso that "no such leave of absence shall be allowed in the case of any person who is dishonorably discharged from the service to which he was called" necessitates deferring the application of the credit until separation of the employe-veteran from the armed forces. Neither the proviso nor any other part of the section so specifies. The proviso is in derogation or limitation of the rights otherwise conferred and should not be extended by implication. If we would undertake to so extend it against the rights of a pension applicant we should at once be faced with uncertainty as to how far we ought to extend it. Should we interpret it to require only that the employe-veteran be temporarily or indefinitely released from active duty status without a dishonorable discharge? Or should we exact from him final and complete severance from the service (a status which many might never attain until death)? There could be no absolute certainty that any person remaining on a military status, whether active or inactive, might not eventually be dishonorably discharged. If the quoted proviso is to be interpreted as requiring final and complete severance from military status without a dishonorable discharge then its meaning in this respect is exactly the same as that ascribed by defendants to the quite different language in section 189. We are satisfied that under proper rules of construction we should not enlarge the scope of the proviso to defeat rights otherwise conferred by section 17.

[8] It has also been suggested that the concluding language of section 17 providing that "credit shall be given for peri-

ods of military leave as provided in this section to the same extent and with like force and effect as now allowed for war service under the charter sections hereinabove mentioned [§§ 189 and 513(d)]" should be construed as adding nothing to the credit provisions of section 189 except a possible allowance of ninety days extra time after separation from active war service, it being urged that the phrase be interpreted and applied as though it read "credit shall be given for periods of military leave as provided in this section [*only upon the same conditions precedent*] to the same extent and with like force and effect as now allowed for war service under the charter sections hereinabove mentioned." A sufficient answer to this contention is that the inserted words "only upon the same conditions precedent" do not appear in the charter, and the words which do appear there do not reasonably admit of such meaning. The provision that the credit provided for in section 17 shall be given "to the same extent and with like force and effect as now allowed for war service under the charter sections hereinabove mentioned" seems clearly designed neither to define conditions precedent upon which the credit provided for by section 17 shall become operative nor to limit the benefits created by section 17 to those already ordained by section 189 or section 513(d), but rather to ensure that all of the credits independently encompassed by section 17 shall have application and force in their own right equally with and not limited in any way by the provisions of the older sections. It follows, therefore, that by the provisions of section 17 plaintiff became entitled to apply for his pension on August 30, 1942, regardless of discharge or release from active naval duty (so long as he had not been dishonorably discharged) or return to actual service in the police department, and upon the showing here his right had fully matured.

[9] Inasmuch as administration of the pension fund is placed under the exclusive control of the Board of Pension Commissioners of the City of Los Angeles (see § 180 of the city charter) it appears that the mayor, the city treasurer, the city clerk, and the city controller (none of whom are members of such board) are not proper defendants herein, and that the action should be dismissed as to such defendants.

As hereinabove mentioned the material facts are uncontroverted. The judgment is reversed and the cause is remanded with directions to the trial court to amend its conclusions of law (including those set forth in its designated findings of fact) to comply with the views hereinabove expressed and thereupon to render judgment as prayed for by plaintiff against defendants the City of Los Angeles, a municipal corporation, and against the board of pension commissioners of such city and the members thereof, and to dismiss the action as against the other defendants.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE, JJ., concurred.



26 Cal.2d 101

CITY OF LOS ANGELES v. POST WAR PUBLIC WORKS REVIEW BOARD et al.

LOS ANGELES COUNTY v. SAME.

CITY OF OAKLAND v. SAME.

L. A. 19213, 19224; S. F. 17128.

Supreme Court of California.

Feb. 23, 1945.

1. Constitutional law ⇐70(1)

Whether substantive provisions of act are germane to declared purpose of securing formulation and execution of plans to meet problems arising out of transition from war to peace and the problem of post war unemployment relief is, primarily, a question for the Legislature and not for the courts. St.1944, Fourth Ex.Sess., c. 47, §§ 1–27, 32.

2. Constitutional law ⇐70(1)

If declared legislative purpose has a reasonable relation to substantive provisions of enactment, judicial inquiry into that question is at an end.

3. Paupers ⇐2

The act providing for post war public works projects is not unconstitutional on ground that substantive provisions of act are not germane to declared purpose of providing post war unemployment relief. St.

1944, Fourth Ex.Sess., c. 47, §§ 1–27, 32; War Mobilization and Reconversion Act §§ 101–606, § 501, 50 U.S.C.A.Appendix, §§ 1651–1678, § 1671; Const. art. 16, §§ 9–11.

4. Constitutional law ⇐70(3)

The selection of direct method of furnishing relief from unemployment or furnishing employment on public works projects is a matter of legislative policy. Const. art. 16, §§ 9–11.

5. Constitutional law ⇐70(3)

The fact that statute providing for post war unemployment relief made funds immediately available for preparation of plans and acquisition of sites was matter of legislative policy. St.1944, Fourth Ex.Sess., c. 47, §§ 1–27, 32.

6. Constitutional law ⇐70(3)

In determining validity of statute providing for post war unemployment relief, the question whether amount of employment to be furnished was to be given consideration in choosing particular project was matter for legislative determination, and was not matter of judicial concern so long as reasonable relationship exists between the statute and its declared purpose. St.1944, Fourth Ex.Sess., c. 47, §§ 1–27, 32.

7. Paupers ⇐2

The statute providing for post war unemployment relief is not objectionable because of adoption of 1940 census as basis for proportional allocation of the appropriated sums throughout the state. St. 1944, Fourth Ex.Sess., c. 47, § 25.

8. Constitutional law ⇐26

The Constitution is not a grant of power but rather a limitation upon the powers of the Legislature.

9. Constitutional law ⇐48

If there is any doubt of Legislature's power to act in a particular case, the doubt is resolved to uphold constitutional intendments.

10. Paupers ⇐11

The fund appropriated by statute providing for post war unemployment relief is not required to be administered under constitutional provision governing administration through a relief administrator of fund raised by issuance of unemployment relief bonds, nor by constitutional provision vesting Legislature with power to provide for administration of any constitutional laws concerning administration of relief. St. 1944, Fourth Ex.Sess., c. 47, §§ 1–27, 32; Const. art. 16, §§ 10, 11.

11. States ⇐119

The act providing aid to municipal agencies to enable them to furnish post war employment does not violate constitutional provision prohibiting Legislature from giving or lending credit of state to municipal corporation or provision prohibiting imposition by the state of taxes for city and county purposes. St.1944, Fourth Ex.Sess., c. 47, §§ 1–27, 32; Const. art. 4, § 31; art. 11, § 12.

12. States ⇐119
Taxation ⇐38

Where project for which state fund is appropriated has a state purpose, it is immaterial, in determining whether constitutional provision prohibiting Legislature from giving or lending credit of state to municipal corporation, or provision prohibiting imposition by state of taxes for city or county purposes are violated, that in other respects the project is local in nature. Const. art. 4, § 31; art. 11, § 12.

13. States ⇐119

Section 12 of the act providing for reimbursement of municipal agencies for funds expended in work of preparing plans for relief of post war unemployment, begun after July 1, 1944, and before effective date of the act, does not violate constitutional provision prohibiting gift of public funds. St.1944, Fourth Ex.Sess., c. 47, § 12; Const. art. 4, § 31.

14. Constitutional law ⇐190
Paupers ⇐2

Even if section 12 of the act providing for reimbursement of municipal agencies for funds expended in work of preparing plans for relief of post war unemployment begun after July 1, 1944, and before effective date of act should be considered retroactive in operation, the rule permitting retroactive operation is complied with by the inclusion of a definite provision showing that to be the legislative intent. St.1944, Fourth Ex.Sess., c. 47, § 12.

15. States ⇐131

The act appropriating $10,000,000 for relief of post war unemployment to be devoted on a matching basis by local agencies solely to a program of public works engaged in by cities and counties does not violate constitutional provision that no bill making an appropriation of money, except a budget bill, shall contain more than one item of appropriation and that item for a

single purpose to be expressed in the act, notwithstanding part of the sum appropriated was to be expended for plans and another part for acquisition of sites and others for cost of administration. St.1944, Fourth Ex.Sess., c. 47, §§ 1–27, 32; Const. art. 4, § 34.

16. States ⇐131
Statutes ⇐119(3)

The fact that amount appropriated by the act for relief of post war unemployment was to be expended in installments or for subsidiary objects looking to the execution of the primary purpose of the act of providing unemployment relief does not militate against singleness of appropriation or of object. St.1944, Fourth Ex.Sess., c. 47, §§ 1–27, 32; Const. art. 4, § 34.

17. Statutes ⇐73(2), 76(2)

Section 25 of the act for relief of post war unemployment regarding computation of the maximum amount to be allowed to a county based on the 1940 census, and containing an exception to apply in cases of counties comprising several large urban areas, is not invalid as special legislation or as lacking uniformity of operation, even though the exception applied to but one county, in view of fact that such county would not have had an equitable distribution of funds available for allocation to all agencies within it including the county, in absence of the exception. St.1944, Fourth Ex.Sess., c. 47, § 25; Const. art. 1, § 11; art. 4, § 25, subd. 33.

18. Statutes ⇐73(2), 76(2)

Legislative classification which is founded on reason and is unlimited in operation is not objectionable as special legislation or as lacking in uniformity of operation even though it applies to only one county. Const. art. 1, § 11; art. 4, § 25, subd. 33.

19. Constitutional law ⇐63(1)
Paupers ⇐2

Section 25 of act for relief of post war unemployment providing that in counties comprising several large urban areas where maximum amount would be less than 10 per cent. of minimum amount and county area amount to be allocated to all local agencies within county including county, a local commission is to determine the maximum county allocation which shall be not less than 10 per cent. of total allocation to all local agencies within county including county, is not objectionable as a delegation of power to a special commission to control county improvements or property, since the commission's sole duty is to compute the amount of state funds available for matching by local agencies. St.1944, Fourth Ex. Sess., c. 47, § 25; Const. art. 11, § 13.

In Bank.

Separate proceedings by the City of Los Angeles, by the County of Los Angeles, and by the City of Oakland against the Post War Public Works Review Board and others, for a writ of mandate to compel the Board to perform its duties.

Writ granted.

J. H. O'Connor, Co. Counsel, Harold W. Kennedy, Asst. Co. Counsel, Ray L. Chesebro, City Atty., and William H. Neal and Bourke Jones, Asst. City Attys., all of Los Angeles, and F. B. Fernhoff, City Atty., Archer Bowden, Deputy City Atty., Ralph E. Hoyt, Dist. Atty., and R. Robert Hunter, Asst. Dist. Atty., all of Oakland, for petitioners.

Robert W. Kenny, Atty. Gen., Charles W. Johnson, Supervising Deputy Atty. Gen., and Robert E. Reed, Deputy Atty. Gen., for respondents.

SHENK, Justice.

The city of Los Angeles, the county of Los Angeles and the city of Oakland filed separate petitions for the writ of mandate to compel the respondent Post War Public Works Review Board to perform its duties pursuant to chapter 47, Statutes of 1944, Fourth Extraordinary Session, approved June 20, 1944. They are deemed to be companion proceedings and are submitted on the petitions, the demurrers thereto, and the briefs of the parties.

The petitions present the question of the constitutionality of said act which is entitled: "An Act making an appropriation for allocation to cities, counties, and cities and counties to develop a postwar public works program comprising the preparation of surveys and plans and specifications for proposed public works and the acquisition of rights-of-way and sites for major streets, roads, bridges, sewerage and other public facilities, and providing the procedure for making such allocations."

The legislative purpose and declaration contained in section 1 reads as follows:

"The termination of the present war will inevitably create serious economic problems for the people of this State.

"The change from a war economy to a peacetime economy and the tremendous and sudden increase in population in this State necessitate a corresponding increase in public works and facilities which is so widespread that it is a matter of State interest, necessary for the state-wide protection of the public health, safety and public welfare.

"The prevention of unemployment and the relief of hardship and destitution due to and caused by postwar unemployment is a joint obligation and duty of the Nation and the State within the limits of their resources. Postwar unemployment and its attendant misfortunes can be partially averted and alleviated by making adequate plans and preparation for an extensive program of public works to be constructed and engaged in during the period of postwar adjustment and until such time as private industry and commerce can provide employment for the men and women who will be discharged from the armed forces or who will be released from their present employment upon the termination of wartime activities. The experience of this State during the depression years of unemployment and its attendant hardships points to the necessity for a public works employment program. Failure to make provision for an adequate public works program in time to meet the economic problems which will rise upon termination of the war will require the State to expend large sums to provide direct relief to persons who might otherwise be usefully employed in constructing necessary public works. Funds appropriated under this act by the State together with funds provided by local agencies to assist the State in carrying out the purposes of this act will enable the local agencies to engage in a large construction program which will provide employment for those military personnel discharged from the armed forces and those whose present employment will be terminated by the cessation of war production.

"A substantial program of postwar public works for the above purposes can be formulated only if such a program is planned now and carried out jointly by the State and by the counties and cities of the State, making provision in such a program for Federal participation at such time as the National Government may declare such a policy.

"The Legislature hereby declares that the granting of financial assistance in the preparation of plans and the acquisition of sites by the counties, cities and counties and cities, as provided in this act, is for State purposes because of the statewide need for increase in public works and facilities and also as a part of and incidental to the averting of a serious postwar economic crisis and in furtherance of its plans to provide employment for some part of its citizens during the period of economic readjustment that will result upon the termination of the war or the substantial diminishing of war production in this State."

Section 5(a) creates the Post War Public Works Review Board, consisting of the Director of Finance as chairman, the Director of Public Works, the Director of Reconstruction and Reemployment, and the Legislative Auditor, to function without compensation except reimbursement for actual and necessary expenses out of moneys made available from the appropriation for the support of the Director of Finance. The board is given the duty in subsection (b) to "prescribe rules and regulations for the general administration of this act, requiring such procedure, forms and information as it deems necessary." By subsection (c) the Director of Finance is required to administer the act and provide such assistance to the board as the latter may require.

Section 6 reads: "The sum of ten million dollars ($10,000,000) is hereby appropriated out of any money in the State treasury not otherwise appropriated to be expended pursuant to allocations to local agencies made in accordance with the provisions of this act and for the purpose of administering this act."

By section 7, $6,875,000 of the $10,000,000 appropriation is permitted to be expended for the purpose of defraying one-half or less, designated as the state's share, of the cost of preparing plans for specific projects to be allocated to local agencies (defined by section 2 as any county, city and county, or city of the state) as provided in section 25. Three million dollars may be expended for one-half or less, called the state's share, of the cost of acquisition by local agencies of rights of way and sites for public works projects in which there is a state interest aside from the relief of unemployment, naming but not as exclusive, highways, and, major street improvement, sewage treatment and disposal plants, and sanitary fa-

cilities (§ 16). Fifty thousand dollars is made available for the support of the controller and $75,000 for the support of the Director of Finance (§ 26).

Section 8 provides that a local agency may from time to time apply to the Director of Finance for an allotment of the state's share of the estimated cost of preparing a plan which is defined by section 4 as a set of engineering field surveys and engineering or architectural designs, working and detailed drawings and specifications required for a specific project, including (§ 3) new construction modifications and alterations (but not ordinary repair and maintenance) of public buildings, streets, bridges and publicly owned and operated facilities, including but not limited to sewage treatment and disposal plants and sanitary facilities, airports and existing water supply systems, except public utilities not expressly mentioned. The director is required to approve the application within sixty days after receipt of all information requested by him and thereupon make the allotment provided by section 25.

Sections 9, 10 and 11 deal with the method of reimbursement to the local agency, which the board shall by rule prescribe, from the allotted share of the state as the work of preparation progresses.

Section 12 provides that if work is begun on any plan before the effective date of the act, the estimated cost includes the cost of work done on the plan on and after July 1, 1944.

Sections 13, 14, 15, 17, 18, 19, 20 and 21 are mainly procedural.

Section 22 provides that title to rights of way and sites shall vest, not in the state, but in the local agency making the acquisition. Sections 23 and 24 deal respectively with change of use of a site from that originally intended and return of advances in case of nonuse of a site.

Section 25 prescribes the minimum and maximum amounts for plans and sites to be allotted each county or city and county and the local agencies within each, which are to be computed on the basis of the United States Census of 1940. The section makes it the duty of the Director of Finance to determine the amounts to be allocated to each local agency, according to the specified formulae.

Section 27 provides for reversion to the general fund of any portion of the amount appropriated remaining unexpended or unapplied for prior to December 31, 1945.

Other sections make provision for joint undertakings and for assignments. Section 32 contains the usual severability clause.

Briefly, in order to put into effect a program designed to relieve statewide unemployment to be anticipated upon termination of the present world conflict, the Legislature has appropriated $10,000,000 from the general state fund to be allocated to cities and counties on a so-called matching basis, as state aid in the immediate formulation of plans and the acquisition of sites for the construction of needed public works to commence upon the return to civilian life of a large proportion of the state's population now actively engaged in the war and in the production of war materials.

The enactment may be said to be in concert with the War Mobilization and Reconversion Act of October 3d, 1944 chap. 480, Public Law 458, 50 U.S.C.A.Appendix, §§ 1651–1678 adopted for the purpose among others of securing the formulation and execution of plans to meet the problems arising out of the transition from war to peace. Section 501 of that act, 50 U.S.C.A.Appendix, § 1671, is intended as an encouragement to immediate planning for public works. Subsection (a) provides: "In order to encourage States and other non-Federal public agencies to make advance provision for the construction of public works (not including housing), the Federal Works Administrator is hereby authorized to make, from funds appropriated for that purpose, loans or advances to the States and their agencies and political subdivisions (hereinafter referred to as 'public agencies') to aid in financing the cost of architectural, engineering, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action preliminary to the construction of such public works: Provided, That the making of loans or advances hereunder shall not in any way commit the Congress to appropriate funds to undertake any projects so planned."

The petitioner city of Los Angeles by Ordinance 88625, approved August 3, 1944, appropriated $2,000,000 to the "Postwar Public Works Reserve Fund" to be used to pay the cost of preparation of plans for public works projects, the construction thereof, and the acquisition of sites and

rights of way necessary to their completion. The city's appropriation makes available the funds for matching the state funds required to be allocated to the city upon appropriate application therefor. The city proposes to prepare plans for the construction of a $20,000,000 sewage treatment and disposal plant to dispose of sewage from the city of Los Angeles, ten additional cities, four sanitation districts, and surrounding unincorporated territory. The city has already begun work and has expended money for the preparation of the plans. The city also proposes to prepare plans and acquire sites for a public health clinic, a police administration building, several additional fire stations, and an extension of the municipal airport to serve the needs of a large area in Southern California.

The petitioner county of Los Angeles by resolution adopting its budget for the fiscal year 1944–1945, budgeted $3,318,854 to be used for the preparation of plans, acquisition of sites, and construction of certain public works including a court and detention building for use of the county as a Juvenile Hall, Civic Center developments including a new county court house, a park, playground and recreational area in the unincorporated community of Graham, an isolation unit as an adjunct to the county general hospital, a patrol station building in Topanga Canyon to house forest firemen and forest fire fighting apparatus, a salvage warehouse and salvage operation unit for the purchasing agent, and certain storm drainage and sewer improvements.

The petitioner city of Oakland, by the adoption of appropriation ordinances has provided funds to match state funds available for the preparation of plans and the acquisition of sites in the proposed construction of a sewage treatment and disposal plant to serve the needs of the cities of Oakland, Alameda, Albany, Berkeley, Emeryville and Piedmont, a health center to provide care for expectant mothers, a building to accommodate a central police station, central fire station, and the criminal courts, recreational structures including community center buildings and swimming pools, a central public library, main line sanitary sewers and storm sewers.

In each of the petitions it is alleged that the respondent Post War Public Works Review Board, by resolution adopted on September 13, 1944, has refused to perform the duties imposed on it by the provisions of the act. The purpose of the present proceedings is to compel the respondents to prescribe the rules and regulations for the general administration of the act, the procedure to be followed, the forms and the information to be submitted, to proceed to the allocations of the state funds made available by the legislative appropriation, and to the performance of the other duties required by the act.

[1-4] The question of the validity of the act requires the consideration of various provisions of the Constitution. First to be noted is the general contention of the respondents that the substantive provisions of the act are not germane to the declared purpose. The respondents urge that the substantive provisions, as distinguished from the stated purpose, bear no relation to the problem of postwar unemployment relief and therefore do not reflect a statewide interest aside from such possible interest in specific works. Whether the relationship exists is, primarily, a question for the Legislature and not for the court. That the Congress had postwar unemployment also in mind when it adopted the provisions of section 501 of the War Mobilization and Reconversion Act is apparent from other sections of that act (see §§ 201, 202, 203(c)(2), 301, 302, 401, 402, 50 U.S.C.A.Appendix, §§ 1656, 1657, 1658(c)(2), 1661, 1662, 1666, 1667) in which it is indicated that the federal government will not retain persons in the armed forces and in war production merely for the sake of furnishing employment, but in which also consideration is given to reemployment and unemployment. If the declared legislative purpose has a reasonable relation to the provisions of the enactment, judicial inquiry into that question is at an end. County of Los Angeles v. LaFuente, 20 Cal.2d 870, 877, 129 P.2d 378; County of Alameda v. Janssen, 16 Cal.2d 276, 281, 106 P.2d 11, 130 A.L.R. 1141; Housing Authority v. Dockweiler, 14 Cal.2d 437, 450, 94 P.2d 794. A conclusion that the construction of public works projects is reasonably related to the relief of unemployment is supported by experiences following the first world war. Relief then was undertaken in two ways: by direct payment of state funds, and by furnishing employment on public works projects. From these experiences the Legislature may well have determined that the second method was more harmonious with the American way of life. The respondents do not question, in fact they admit, that

the Legislature may constitutionally provide for relief from unemployment, and that unemployment relief is a proper state function (Const., art. XVI, §§ 9, 10, 11). That being so, the selection of the direct method or furnishing employment on public works projects is a matter of legislative policy.

[5] The fact that under the present act funds for the preparation of plans and the acquisition of sites are made immediately available and before an acute need for relief of unemployment arises, is also a matter which bears upon the question of legislative policy. When the time is ripe for preparation is a matter for legislative determination. The Legislature may be commended for the use of foresight in meeting a situation normally to be expected by the transition from a war to a peace time basis. The respondents would require some guarantee that the unemployment situation will arise and that the expenditure of the funds will actually serve to alleviate unemployment. Prevention of unemployment is a proper legislative objective equally with relief of existing unemployment. The Legislature should not be held bound to await the actual occurrence of the undesirable condition before commencing preparations for its prevention. It is obvious that if such a plan for relief of unemployment is to operate efficiently, preparation for the commencement of its operation must be made well in advance of the expected need. That the actual need may never become apparent may be due in whole or in part to timely activity in public works construction and may prove nothing more than that the plan was successful. In Gillum v. Johnson, 7 Cal.2d 744, at pages 760, 761, 62 P.2d 1037, at page 1044, 63 P.2d 810, 108 A.L.R. 595, this court said: "History discloses that financial panics, periods of depression, or hard times are recurrent. After much investigation, research, and thought upon the subject, the Legislature has determined that it is wise and prudent policy to provide in advance some measure of security as against the lean years which the future may bring forth. If it be within this reversed power of the state to care for those in need when the actual need is present, and as to this there can be no question, it would seem to be likewise true that to anticipate the necessities of the future is not only a reasonable but a wise and salutary governmental policy. Whether the plan now projected is the best that could be devised is not the question. Economic theorists have divergent views on the subject, but it is not for the court to say whether some other plan would be preferable or that experience may demonstrate the economic fallacy of the particular plan promulgated. If constitutional restraints do not prevent, the legislative power is present." And certainly criticism may not be leveled at the legislative policy to provide for employment on much needed public works, rather than on work merely improvised, as a measure for the relief of unemployment.

But, say the respondents, if the funds are expended at this time for plans and sites, and the planned project is never constructed, the state funds have been used, and no relief or prevention of unemployment has resulted. The respondents have overlooked section 24 making provision that moneys advanced for the acquisition of a site which is not used for the purpose should be returned. If the declared purpose of the use of the funds is not prohibited by the Constitution, the fact that in executing the provisions of the act it may transpire that some of the funds through no one's fault will not be devoted directly to the declared purpose, does not of itself negative the otherwise reasonable relationship of the provisions to the purpose.

The respondents state that governmental agencies have long tried to obtain permission and priorities to construct needed public projects during the war, and that, in the event priorities and materials are obtained, a great many projects will be constructed without any relation to the need for construction projects to prevent unemployment. The truth of the assertions, however, is a matter for legislative investigation and determination.

[6] The respondents ask, if insurance of employment is the primary concern, why is it that in choosing particular projects not a word is contained in the act indicating that the amount of employment to be furnished by that project shall be given any consideration. The reason probably is that no more is allocable to any one community than the normal population justifies, and that the Director of Finance is designated as the agency to make recommendations, if recommendations are needed. The legislative determination in that respect is not in this case a matter of judicial concern, so long as the reasonable relationship exists between the act and its declared purpose.

[7] The respondents next assert that there is a complete absence of any factual basis for assuming that postwar unemployment, if any, will occur on a strict formula conforming to the method of allocation set up in the act. They assume that funds for relief of unemployment must be made available where the unemployment exists, consequently construction projects designed to prevent unemployment should be available in areas where they are most needed. What the respondents have in mind is the well known fact that war production concentrates the population in certain central areas. They assert that the use of the 1940 census shows an utter disregard on the part of the Legislature of the changes in population due to the war effort, and that it has based the allocation of funds for postwar unemployment relief on a strict mathematical formula without regard to shifts in population.

It is exceedingly doubtful that the Legislature did not give the matter studied consideration. On the contrary a need for decentralization of the population and a shift back to the rural areas may well have been the motivating purpose in the adoption of the 1940 census as the basis for the proportional allocation of the appropriated sum throughout the state. In assuming that relief must be afforded where the unemployment is to be anticipated, the respondents have made an assumption contrary to experience. From the commencement of immigrations to this country, opportunity has not followed the people, but the people have followed opportunity. They likewise followed it in the first world war, during the subsequent unemployment period when government works projects furnished the invitation, during the present world war in the migrations to the war industrial centers, and they will retrace their steps in the postwar period to other regions when opportunity again beckons as it will when construction of public works projects is commenced in other areas. The adoption of the current population figures in the enactment of chapter 581, Statutes of 1943 (p. 2154) referred to by respondents proves nothing. That act related to the determination of the wartime population of cities and cities and counties for purposes of the allocation and expenditure of moneys from the State Highway and Motor Vehicle License fee funds. Obviously, the nature of that legislation required a basic computation involving current wartime population figures, while just as obviously, because of the normal dispersal of the population from war industrial and encampment centers after the war, the present act required a computation based on a return to peacetime distribution of population. There is, therefore, a fundamental relation between the figures of the 1940 census and the expected distribution of population when hostilities have ceased.

This branch of the discussion may be closed with the observation that the declared purpose of the act is not merely an artifice to evade the provisions of the Constitution, and that there is a reasonable relationship between the substantive provisions and the declared purpose. It is also true, however, that the reasonable relationship between the declared purpose of the act and its provisions will not excuse a violation of the Constitution.

The respondents contend that the appropriated funds must be administered in accordance with sections 10 and 11 of article XVI of the Constitution. Section 10 was adopted on November 6, 1934, to appropriate and provide for administration through a Relief Administrator of a $24,000,000 fund authorized to be raised by the issuance of unemployment relief bonds and to be expended prior to July 1, 1935, as grants by the state without repayment by any grantee. Also included in such administration were funds made available by the United States Government for unemployment relief within this state. By section 11, adopted on November 8, 1938, notwithstanding any provision of section 10, the Legislature was vested with "plenary power to provide for the administration of any constitutional provisions or laws heretofore or hereafter enacted concerning the administration of relief * * *." Also included in that section was the provision conferring "power to * * * provide for the administration of the relief of hardship and destitution, whether resulting from unemployment or from other causes, either directly by the State or through the counties of the State, and to grant such aid to the counties therefor, or make such provision for reimbursement of the counties by the State, as the Legislature deems proper." It is apparent from a reading of this provision that it contemplates relief from hardship due to an existing condition of unemployment by distribution of funds or relief directly to the donee. This conclusion is supported by the arguments on the

proposed constitutional amendments submitted to the voters in the year of the adoption of section 11, showing that the amendment was designed to overcome a possible construction of section 10 that the provision for a relief administrator was not a mere temporary expedient; also to open the way for appropriate distribution of unemployment relief through the Department of Social Welfare and to provide for joint state and county administration of state aid to those in need and to prevent the hardship and confusion resulting because of different definitions of employability and standards of relief for unemployables adopted by the state and various counties; also to avoid the difficulty of determining the form of aid to which an applicant is entitled, the delays and interruptions in provision of relief, and duplication in investigating eligibility and in keeping records. The purpose of section 11, therefore, was to remove the supposed inhibition of section 10, and to open the way for joint state and county administration of direct relief of destitution and hardship whether resulting from unemployment or otherwise.

[8, 9] The provisions of sections 10 and 11 have no application in the present case. The guiding principle here was reiterated in Collins v. Riley, 24 Cal.2d 912, 152 P.2d 169, to the effect that the Constitution is not a grant of power but rather a limitation or restriction upon the powers of the Legislature; that the court does not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited, and if there is any doubt of the Legislature's power to act in a particular case, the doubt is resolved to uphold constitutional intendments. Restrictions and limitations are not extended to include matters not covered. See, also, Delaney v. Lowery, 25 Cal.2d 561, 154 P.2d 674.

[10] There is in the sections relied upon no inhibition upon the inherent power of the Legislature to administer the provisions for state aid in the manner selected if otherwise the act is constitutional.

[11] The question then is whether the Legislature may provide aid to municipal agencies for the purposes stated in the act. In this connection the respondents assert that the act violates section 31 of article IV prohibiting the Legislature from giving or lending the credit of the state to a municipal corporation or making any gift of public money to a municipal corporation; also the provisions of section 12, article XI, prohibiting the imposition by the state of taxes for city or county purposes. The respondents concede that such appropriations may be made and taxes imposed therefor if a state purpose is to be subserved by the expenditure of the funds; but they assert that if the funds so collected be appropriated for purely local purposes, the appropriation would constitute a gift in violation of those sections. City of Los Angeles v. Riley, 6 Cal.2d 621, 59 P.2d 137, 106 A.L.R. 903; County of Los Angeles v. Riley, 6 Cal. 2d 625, 59 P.2d 139, 106 A.L.R. 903.

Section 16 of the act requires that in the acquisition of sites for public works projects with the aid of the appropriated funds there be a state interest in the projects themselves other than unemployment relief. But the respondents state that it is clear from the provisions of sections 3 and 8 that the money appropriated for plans is to be allocated to local agencies without regard to any possible state interest in the project for which the plans are to be prepared. Therefore, say the respondents, the expenditure for plans may be for such as deal with a project of purely local concern.

[12] It is often difficult to draw a distinct line between a matter of statewide and one of purely local concern. In many cases the spheres of operation overlap. City of Los Angeles v. Riley, supra, 6 Cal.2d at page 623, 59 P.2d 137, 106 A.L.R. 903; Gadd v. McGuire, 69 Cal.App. 347, 231 P. 754. It is well settled, however, that where the project has a state purpose, it is immaterial that in other respects it is local in nature. County of Los Angeles v. Riley, supra, 6 Cal.2d at page 627, 59 P.2d 139, 106 A.L.R. 903, referring to City of Los Angeles v. Riley, supra.

As we view the immediate problem, it is not necessary to discern in the specific project for which plans are prepared with the aid of funds made available by the act, a state purpose other than or in addition to the declared purpose of relief of unemployment. The state has an interest in the preparation of plans for and the construction of public works projects undertaken for the relief of unemployment in the period following the cessation of war, even though a local agency also receives a benefit. See County of Los Angeles v. La-Fuente, supra, 20 Cal.2d at page 876, 877, 129 P.2d 378, citing many cases; County of Alameda v. Janssen, supra, 16 Cal.2d at

page 282, 106 P.2d 11, 130 A.L.R. 1141, and cases cited; Housing Authority v. Dockweiler, supra, 14 Cal.2d at page 451, 94 P.2d 794; Veterans' Welfare Board v. Jordan, 189 Cal. 124, 208 P. 284, 22 A.L.R. 1515; Kinney v. City of Astoria, 108 Or. 514, 217 P. 840; State v. Davidson, 114 Wis. 563, 88 N.W. 596, 90 N.W. 1067, 58 L.R.A. 739; 26 R.C.L. p. 75. The primary purpose of the use of the money is a public one, namely, to create employment and thus prevent or alleviate unemployment, and it is not to be regarded as a gift although a municipality also may receive a benefit therefrom. County of San Diego v. Hammond, 6 Cal. 2d 709, 721, 59 P.2d 478, 105 A.L.R. 1155; City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433. It was pointed out in Veterans' Welfare Board v. Jordan, supra, that if a constitutional object is achieved in addition to the lending of credit or payment of moneys to the local agencies, there is no violation of the constitutional provisions. In that case at page 141 of 189 Cal., at page 291 of 208 P., 22 A.L.R. 1515, it was said: "Where a separate and distinct public purpose is achieved and such public purpose is one within the constitutional powers of the Legislature to bring about, we do not feel that we would be justified in declaring that the law is unconstitutional because of the fact that as an incident to its main purpose the credit of the state is used to effectuate that purpose." So here the constitutional objective of relief of unemployment is decisive, and it is immaterial that local agencies or private individuals may also receive a benefit. The analogy of the Veterans' Welfare Board case (where funds were appropriated to veterans to buy homes as part of a resettlement project) was recognized where municipal agencies were recipients of the appropriated moneys, and the principle held controlling. County of San Diego v. Hammond, supra, 6 Cal. 2d at page 724, 59 P.2d 478, 105 A.L.R. 1155. The state could have assumed entire control of the matter of unemployment relief, or it could, as it did, call for assumption of a portion of the responsibility by the local agencies. See Reclamation Board v. Chambers, 46 Cal.App. 476, 189 P. 479.

[13, 14] The foregoing answers the objections of the respondents to the provisions of section 12 for reimbursement of funds expended in the work of preparing plans begun after July 1, 1944, and before the effective date of the act. In making the assertion that funds used to pay for such work amount to a gift of public moneys, the respondents are in effect contending that the plans resulting therefrom cannot be connected with the postwar unemployment relief program. However, if the plans the preparation of which was commenced prior to the effective date have the same object and purpose as the aftercommenced work, namely, to provide construction work for the relief of unemployment, they obviously have the same relationship to the declared purpose and in the presence of the express provision of section 12 may not be excluded from the benefits of the act. The effective date of the act is not thereby disturbed inasmuch as its provisions for allotment and reimbursement thereunder operate solely in the future. Even if it should be considered retroactive in operation, the rule which permits retroactive operation is complied with by the inclusion of a definite provision showing that to be the legislative intent. See Houston v. McKenna, 22 Cal. 550, 554; Caminetti v. Pacific Mutual Life Ins. Co., 22 Cal.2d 344, 353, 139 P.2d 908.

[15] The act does not violate section 34 of article IV of the Constitution providing that no bill making an appropriation of money, except a budget bill, shall contain more than one item of appropriation, and that item for a single and certain purpose to be expressed in the act. It contains but one item of appropriation, the item of $10,000,000, to be devoted on a matching basis solely and exclusively to a program of public works engaged in by cities and counties in the prevention and relief of unemployment anticipated upon the cessation of international hostilities. The fact that of the sum appropriated one specified part thereof may be expended for plans, another for acquisition of sites, and others for the cost of administration, does not defeat the singleness or certainty of the expressed purpose; nor does it constitute several distinct items of appropriation. The language employed in the latter respect is not language of appropriation. The appropriation was completed by the provision of section 6 setting aside $10,000,000 out of the moneys of the state treasury not otherwise appropriated. Ingram v. Colgan, 106 Cal. 113, 117, 38 P. 315, 39 P. 437, 28 L.R.A. 187, 46 Am.St.Rep. 221. As in Ryan v. Riley, 65 Cal.App. 181, 187, 223 P. 1027, 1029, there was a "setting apart from the public revenues of a certain sum of money for a specified object in such manner that the executive officers are authorized to use that

money and no more for such specified purposes." It is an appropriation from the general fund as defined in Ristine v. State, 20 Ind. 328, 338.

[16] Limitations and conditions imposed in the expenditure of the appropriated sum do not defeat the purpose of the appropriation. The fact that the amount is to be expended in installments, or for subsidiary objects looking to the execution of the primary purpose of the act, does not militate against singleness of appropriation or of object. See Regents of University of California v. Riley, 199 Cal. 506, 250 P. 182, citing State v. Sloan, 66 Ark. 575, 53 S.W. 47, 49, 74 Am.St.Rep. 106; see, also, People v. Dunn, 80 Cal. 211, 214, 22 P. 140, 13 Am.St.Rep. 118. Singleness of appropriation and of object in this case distinguishes it from Murray v. Colgan, 94 Cal. 435, 29 P. 871, and cases following it, relied upon by the respondents. Cases, such as Wood v. Riley, 192 Cal. 293, 219 P. 966; Reardon v. Riley, 10 Cal.2d 531, 76 P.2d 101, and others, were concerned with budget appropriation bills and the power of the governor to veto specific items or to modify the amount. They are not controlling here. The item of appropriation of $10,000,000 for the stated purpose of allocation to cities and counties to carry out the public works projects program to the end declared in the act is therefore one item of appropriation for the one single and certain purpose expressed in the act.

[17, 18] The respondents contend that the provisions of section 25 of the act are invalid as special legislation (Const., art. IV, § 25, subd. 33), that its provisions lack uniformity of operation (art. I, § 11), and that they constitute a delegation of power to a special commission to control county improvement or property (art. XI, § 13).

The pertinent portion of section 25 of the act applies to computation of the maximum amount to be allowed to a county based on the 1940 census, which generally is the sum of the minimum amount and the county area amount to be allocated to all local agencies within the county, including the county, less the sum of the maximum amounts to be allocated to all cities within the county. An exception was included to apply in cases of counties comprising several large urban areas where the maximum amount would be less than ten per cent of the minimum amount and county area amount to be allocated to all local agencies within the county including the county. In such case a local commission, composed as specified in the section, is to determine the maximum county allocation which shall be not less than 10 per cent of the total allocations to all local agencies within the county including the county, the balance to be divided among the cities according to a ratio based on the 1940 census. The respondents state that, using the 1940 census as a basis, the exception affects only the county of Alameda, which contains several large densely populated urban areas. They contend that there is no reasonable basis for the classification; but it is obvious that the Legislature was aware that any such county would not have an equable distribution of the funds available for allocation to all local agencies within it including the county. It is apparent that discrimination might have followed had the exception not been included to cover such cases. Under those circumstances the fact that but one county is brought within the exception is not the criterion. There is no division drawn between counties of different classes, so that the objection encountered in In re Brady, 65 Cal.App. 345, 224 P. 252, is not present. The classification extends to counties of every class where the specified situation exists. It is therefore not discriminatory in the constitutional sense. Kramer v. Reynolds, 93 Cal.App. 224, 225, 269 P. 573. Since it is founded upon reason, and is unlimited in operation, the legislative classification is neither special legislation nor lacking in uniformity of operation. Martin v. Superior Court, 194 Cal. 93, 227 P. 762.

[19] The respondents are likewise in error in assuming that the delegation to the commission of the duty to compute the amount of allocations in such cases gives it power to control the city or county improvement or property. There is no control of or interference with the improvements or property of the local agency. The commission's sole duty is to compute the amount of state funds available for matching by the local agency. It is not dealing with municipal but with state property, which the local agency may or may not have allocated to it in accordance with its voluntary decision.

It is therefore concluded that the Legislature had the power to make the appropriation for the declared purpose through the channel provided; that there is but one item of appropriation for but a single purpose, which is expressed in the act; that

the Legislature has not made gifts of public moneys to counties or municipal corporations nor imposed taxes for purely local purposes; and that there is no prohibited delegation of power, nor any local or special legislation involved. The money was appropriated for a public purpose, primarily for the benefit of the people of the state, and any incidental or secondary benefit to municipalities or private persons does not render the appropriation one for an unconstitutional purpose.

It is ordered that the peremptory writ of mandate issue commanding the respondents to proceed in the performance of the duties with which they are charged by the provisions of the act.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

EDMONDS, J., did not participate therein.



26 Cal.2d 92

BEWICK v. MECHAM.

L. A. 18813.

Supreme Court of California.

Feb. 23, 1945.

Rehearing Denied March 22, 1945.

1. Courts ⇐478

A demand for specific performance of decedent's contract by conveyance or transfer of property in administrator's or executor's possession differs from general creditor's claim against assets of decedent's estate, so that superior court has jurisdiction to decree such performance during administration of estate. Probate Code, §§ 700 et seq., 850.

2. Executors and administrators ⇐135

The statute, authorizing probate court to direct executor or administrator of decedent's estate to perform written contract of decedent specifically by conveying or transferring property to person entitled thereto under such contract, authorizes executor or administrator, under probate court's supervision, to transfer title to property in fulfillment of such contract, without joining estate beneficiaries, to whom title passed at decedent's death. Probate Code, §§ 300, 850.

3. Executors and administrators ⇐135

A statutory proceeding in probate court for specific performance of decedent's written contract by executor's or administrator's conveyance or transfer of property to person entitled thereto under contract is suited to cases of ordinary contracts, where there is no real controversy as to respective parties' obligations. Probate Code, § 850.

4. Executors and administrators ⇐135

Since Legislature's intention to change character of probate court proceeding for specific performance of decedent's written contract by executor's or administrator's transfer of property to person entitled thereto under contract does not appear by express declaration in, or necessary implication from, Probate Code section authorizing such court to grant such relief, so as to obviate necessity of suit therefor in another court of competent jurisdiction, as authorized by previous statute, Supreme Court must presume that Legislature did not intend to transform probate court proceeding into proceeding to determine controversies as to whether executor must specifically perform decedent's contract. Probate Code, §§ 850, 852.

5. Assignments ⇐37
Landlord and tenant ⇐92(2)

An assignment of writings by which a contract is witnessed transfers the contract, so that assignment of indenture of lease carried with it lessee's option therein to purchase leased land.

6. Landlord and tenant ⇐92(2)

A covenant in lease, giving lessee option to purchase leased land during or at end of term, operates for benefit of lessee, who may erect buildings or other structures on land without losing their use at end of term, and hence is "real covenant running with the land".

See Words and Phrases, Permanent Edition, for all other definitions of "Real Covenant Running with the Land".

7. Landlord and tenant ⇐92(1)

A separate reference in lease agreement to necessity of lessor's consent to assignment of lessee's option to purchase leased land prevented lessee from claiming that he could assign option without lease.

8. Contracts ⇐292½

The statute allowing court to appoint arbitrator, if one party to contract fails to do so on other party's demand, applies only where parties have agreed to submit to arbitration a controversy arising out of contract or refusal of one party to perform contract. Code Civ.Proc. §§ 1280, 1283.

9. Specific performance ⇐57

Failure of assignee of lessee's interest in lease to have arbitrator appointed by court under statute when lessor refused to appoint arbitrator, as required by lease, to determine purchase price of leased land, which lease gave lessee option to purchase, did not preclude court from fixing price, as option agreement did not contemplate that arbitrators should decide any controversy arising out of such agreement or parties' refusal to perform it. Code Civ.Proc. §§ 1280, 1283.

10. Contracts ⇐284(1)

An agreement for submission to arbitrators of question of value of property, to be determined in accordance with their own opinion or judgment after examining property, without hearing evidence, is not properly a submission to arbitration and is not subject to rules governing arbitrators.

11. Landlord and tenant ⇐92(1)

A covenant in lease, giving lessee option to purchase leased land at price to be ascertained by third persons appointed by parties, was definite enough to give rise to contract, in view of statute authorizing determination of executory consideration by disinterested third person. Civ.Code, § 1610.

12. Contracts ⇐278(1), 303(4)

Each party to contract owes duty to do everything which contract presupposes that he will do to accomplish its purpose and duty not to prevent or hinder performance thereof by other party.

13. Specific performance ⇐57

A lessor's refusal to appoint appraiser, pursuant to provision of lease giving lessee option to purchase leased realty at price to be fixed by arbitration of appraisement board, was violation of lessor's contractual obligation to take steps necessary to render such provision operative, and hence did not render contract invalid or incapable of specific performance on lessee's demand for want of certainty.

14. Contracts ⇐303(4)

A contracting party, who prevents fulfillment of a condition of his own obligation, commits breach of contract and cannot rely on such condition to defeat his contractual liability.

15. Specific performance ⇐80

Under statute providing that, where contract provision for exclusive method of ascertaining consideration becomes impossible of execution, such provision only is void, impossibility of ascertaining contract price by contractual method of arbitration or appraisal does not preclude court from giving effect to contract by itself ascertaining consideration. Civ.Code, § 1613.

16. Specific performance ⇐80

Where equitable considerations support position of one seeking specific performance of contract, consideration of which has become impossible to ascertain by method provided therein, equity court will ascertain such consideration, particularly if such party changed his position in reliance on contractual right sought to be enforced.

17. Specific performance ⇐80

The doctrine that court will not fix purchase price of land where arbitration, by which contract provides for its determination, has failed, is mainly applied only to contracts wherein mode of determining price by values on arbitration is made essential provision or condition to validity of agreement and cases in which parties can be easily placed in status quo or action for damages can be made to afford adequate remedy.

CARTER, J., dissenting on rehearing.

In Bank.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by Richard Bewick against Pearl Margaret Mechem, as executrix of the estate of J. J. Lopez, deceased, for specific performance of a contract to sell realty to plaintiff's assignor on his exercise of an option as lessee of the realty to purchase it on expiration of the lease. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, Cal.App., 147 P.2d 654.

Claflin, Dorsey & Campbell, Dorsey & Campbell, Allan Campbell, and J. R. Dorsey, all of Bakersfield, for appellant.

Harvey, Johnston & Baker, T. N. Harvey, and Carl Johnston, all of Bakersfield, for respondent.

TRAYNOR, Justice.

J. J. Lopez leased real property in the city of Bakersfield to S. S. Lombard for the operation of an automobile supply and service station or other business, for a period of ten years commencing July 1, 1929. The lessee was authorized to construct buildings and other improvements on the land and to remove them at the end of the term. The trial court found that the lessee spent $13,500 for structures on the land, relying on a provision in the lease giving him an option to purchase the land upon the expiration of the lease "at a price and terms then to be agreed on between the parties hereto, and if not agreed on then to be fixed by arbitration, each of the parties hereto selecting one arbitrator, and the two selected [sic] a third, which said arbitrators shall fix such purchase price and the terms under which the purchase may be made, but with the proviso that on the matter of terms at least one-half of such purchase price shall be payable in cash, and the remaining half to be evidenced by promissory note secured by deed of trust, and to draw not less than the legal rate of interest." Any assignment of the lease and the option to purchase was subject to the lessor's written consent. Lombard assigned to plaintiff his interest in "the indenture of lease," with the lessor's written consent. When plaintiff exercised the option to purchase the land at the end of the term the lessor refused to sell. Upon the lessor's refusal to comply with his obligation under the option agreement plaintiff appointed an arbitrator to fix the price and terms of purchase. This arbitrator with two others fixed the purchase price and the terms for the payment of that part thereof that was not payable in cash. On defendant's motion, however, the court vacated their decision on the ground that the arbitrator allegedly appointed by the lessor was not duly appointed by him. In re Bewick, 49 Cal.App.2d 287, 121 P.2d 815. Thereafter plaintiff renewed his effort to have the price and terms of purchase determined by arbitrators in the manner provided in the agreement by reappointing the arbitrator whom he had formerly appointed and demanding that defendant appoint an arbitrator. When defendant refused, plaintiff brought this action to have the court fix the purchase price and decree specific performance of the contract, and offered to pay in cash the entire purchase price fixed by the court. The trial court fixed the price at $9,000 and ordered defendant to perform the contract. Defendant, as executrix of the estate of J. J. Lopez, appeals from the judgment.

[1-4] Defendant contends that the trial court lacked jurisdiction to decree specific performance of a contract of a decedent during administration of his estate on the ground that the probate court had exclusive jurisdiction of the matter. A demand for specific performance of a contract of a decedent by conveyance or transfer of property in the possession of the administrator or executor differs from a claim of a general creditor seeking satisfaction out of the assets of the estate. Prob.Code, § 700 et seq.; In re Estate of Dutard, 147 Cal. 253, 257, 81 P. 519; Mix v. Yoakum, 200 Cal. 681, 685, 254 P. 557; Porter v. Van Denburgh, 15 Cal.2d 173, 177, 99 P.2d 265; In re Estate of Bailey, 42 Cal.App. 2d 509, 511, 109 P.2d 356; see 34 A.L.R. 385, 386; 21 Am.Jur., Executors and Administrators, § 348. Under section 850 of the Probate Code, the probate court may make a decree "authorizing and directing the executor or administrator" specifically to perform a written contract of the decedent by conveying or transferring property to the person entitled thereto under the contract. This section authorizes the executor or administrator under the supervision of the probate court to transfer title to property in fulfillment of a written contract of the decedent without joining the beneficiaries of the estate to whom the title has passed at the death of the decedent. See Prob.Code, § 300; Pomeroy, Specific Performance of Contracts, 3d Ed., § 497. "This special statutory remedy, conferring upon the probate court administering the estate jurisdiction to grant specific performance in cases where the right of petitioner in the premises is free from doubt * * * would seem to be a wise provision. It evidently tends to save the expense and delay that would follow a separate action in equity for a specific performance." In re Estate of Garnier, 147 Cal. 457, 459, 82 P. 68, 69; see 11B Cal. Jur. 200. "The proceeding is suited to

cases of ordinary contracts where there is no real controversy as to the obligations of the respective parties, * * *." Pomeroy, ibid., p. 993. Before the enactment of the Probate Code former section 1602 of the Code of Civil Procedure provided that if the probate court found that the asserted right was doubtful it must dismiss the petition without prejudice and that the claimant had six months after the dismissal in which to bring suit for specific performance in a court of competent jurisdiction. Since an intention of the Legislature to change the character of the proceeding in the probate court does not appear by express declaration or necessary implication it must be presumed that the Legislature did not intend to transform the proceeding in the probate court to facilitate the conveyance or transfer of property during the administration of the estate into a proceeding to determine controversies as to whether the executor must specifically perform a contract made by the decedent. See Los Angeles County v. Frisbie, 19 Cal.2d 634, 644, 122 P.2d 526; Prob. Code, § 852; 11B Cal.Jur. 206; see, also, Raginsky v. Lawler, 313 Ill. 441, 145 N.E. 189; Christ Church v. Beach, 7 Wash. 65, 33 P. 1053.

[5-7] Defendant contends that the assignment of the lease by Lombard to plaintiff did not carry with it the option to purchase the land. The assignment named as its subject matter "the indenture of lease." "The assignment of the writings by which a contract is witnessed is the most common mode of transferring the contract, and cannot be understood as having any other intention." Blakeman v. Miller, 136 Cal. 138, 141, 68 P. 587, 588, 89 Am.St.Rep. 120. Moreover, an option to purchase the land during or at the end of the term operates to the benefit of the lessee as such, for he may erect buildings or other structures without losing their use at the end of the term, and it is therefore settled in this state that "an option covenant contained in a lease is a real covenant running with the land." Chapman v. Great Western Gypsum Co., 216 Cal. 420, 425, 14 P.2d 758, 760, 85 A.L.R. 917; see Laffan v. Naglee, 9 Cal. 662, 678, 70 Am.Dec. 678; Hall v. Center, 40 Cal. 63; Standard Oil Co. v. Slye, 164 Cal. 435, 442, 129 P. 589; 15 Cal.L.Rev. 56; 2 Tiffany, Landlord and Tenant, § 267. The separate reference in the agreement to the lessor's consent to an assignment of the option right prevented the lessee from claiming that he could assign the option to purchase without the lease. See Mott v. Cline, 200 Cal. 434, 450, 253 P. 718; 15 Cal.L.Rev. 56.

[8-10] Defendant contends that plaintiff failed to make use of the statutory remedy under section 1283 of the Code of Civil Procedure to have an arbitrator appointed by the court when defendant refused to appoint an arbitrator and that the court could not fix a price when plaintiff had an adequate remedy to obtain the fixing of a price by arbitrators. Section 1283 of the Code of Civil Procedure allowing the court to appoint an arbitrator if one party has failed to make an appointment upon demand of the other is applicable, however, only if the parties have agreed to submit a controversy to arbitration within the meaning of section 1280 of the Code of Civil Procedure. Section 1280 requires that there be a controversy arising out of the contract or the refusal of one of them to perform the contract. It was not contemplated by the option agreement in the present case that the arbitrators should decide any controversy arising out of the option agreement or the refusal of the parties to perform. Their sole task was to determine the value of the land and to fix the purchase price accordingly and the installments for the payment of the credited part of the price. "A reference to a third person to fix by his judgment the price, quantity or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration." Palmer v. Clark, 106 Mass. 373, 389; see, also, Luedinghaus Lumber Co. v. Luedinghaus, 9 Cir., 299 F. 111, 113. There is nothing in the agreement to indicate that the arbitrators were to take evidence in a formal proceeding as a basis for their decision rather than their own opinion and judgment. "Submissions to determine values are of two kinds: First, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment; second, where they are to afford the parties a hearing and an opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion. In cases of the first class, it is usually held

that the agreement is not properly a submission to arbitration, and is not subject to the rules which govern arbitrators * * *. [California Annual Conf. of M. E.] Church v. Seitz, 74 Cal. 287, 15 P. 839, was a case of this class, and it may be considered as establishing this doctrine in this state. See, also, Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. 557, 570, 33 P. 633; Foster v. Carr, 135 Cal. [83], 86, 67 P. 43." Dore v. Southern Pacific Co., 163 Cal. 182, 189, 124 P. 817, 819. In California Annual Conf. of M. E. Church v. Seitz, supra, where the agreement of the parties was similar to the present one, the court declared that the intention of the parties determined whether the property should be evaluated by formal arbitration or informal appraisal, and quoted from Brink v. New Amsterdam Fire Ins. Co., 28 N.Y.Super.Ct. 104, 123, 5 Rob. 104, 123, as follows: "There is scarcely a day in which in commercial transactions the valuation of property or estimate of damages is not intrusted to third parties, and no one has yet dreamed of looking upon them as arbitrations, and subjected to all the formalities imposed on them * * *, with the paraphernalia of oaths, witnesses, and notices of trials. It is most frequently confined to the personal skill, knowledge, or experience, or even acquired information of appraisers." 74 Cal. at page 296, 15 P. at page 843. See, also, Gonzalez v. Gonzalez, 174 Cal. 588, 594, 163 P. 993; Rives-Strong Building, Inc., v. Bank of America, 50 Cal.App.2d 810, 814, 123 P.2d 942; 6 Williston on Contracts (1938 rev. ed.), § 1921 A; 17 Cal.L.Rev. 643; Sturges, Commercial Arbitrations and Awards, pp. 18–42. In the present case it is clear that the parties intended not a formal arbitration, but an evaluation by appraisers whom they regarded as experienced and familiar with the conditions in question.

[11] Defendant contends that the option agreement was too indefinite to give rise to a contract upon the exercise of the option, but that if there was a contract it established the exclusive method of ascertaining the price and terms of purchase. Since the plaintiff was willing to pay the entire price in cash the only question of uncertainty remaining concerned price. See Restatement: Contracts, § 370, Illustration 1. If the consideration is executory its determination may be left to a disinterested third person. Civ.Code, § 1610. The option covenant providing for the appointment of third persons to ascertain the price was therefore definite enough to give rise to a contract. The only question to be determined is whether defendant's failure to appoint an appraiser made the contract invalid or incapable of specific performance for want of certainty. See Hardy v. Hardy, 23 Cal.2d 244, 247, 143 P.2d 701; Talmadge v. Arrowhead R. Co., 101 Cal. 367, 371, 35 P. 1000; Wineburgh v. Gay, 27 Cal.App. 603, 150 P. 1003; Sarina v. Pedrotti, 103 Cal.App. 203, 284 P. 472.

[12-14] In the present case the contractual method of ascertaining the purchase price became impossible of execution, not as the result of circumstances beyond the control of the parties, but because of defendant's refusal to appoint an appraiser, thus making impossible an appraisal as contemplated by the agreement. Defendant's refusal to participate in establishing the appraisement board was a violation of her contractual obligation to take the necessary steps to make the appraisement provision of the contract operative. Each party to a contract has a duty to do everything that the contract presupposes that he will do to accomplish its purpose (Epstein v. Gradowitz, 76 Cal.App. 29, 32, 243 P. 877; see Williston, Contracts (1937 rev.ed) § 1293) and a duty not to prevent or hinder performance by the other party. Tanner v. Title Ins., etc., Co., 20 Cal.2d 814, 825, 129 P.2d 383; see Williston, op. cit., § 1293 A; 4 Cal.Jur. 10-Yr.Supp. (1943 rev.) 142. By making the appraisal impossible, defendant prevented the determination of the purchase price by the method contemplated by the contract. Defendant's obvious purpose was to make the contract inoperative and to prevent plaintiff from seeking specific performance after the price was determined by the appraisers. A party who prevents fulfillment of a condition of his own obligation commits a breach of contract (Alderson v. Houston, 154 Cal. 1, 13, 96 P. 884; Pacific Venture Corp. v. Huey, 15 Cal.2d 711, 717, 104 P.2d 641; Carl v. Eade, 81 Cal.App. 356, 358, 253 P. 750; Rest., Contracts, § 315) and cannot rely on such condition to defeat his liability. Pacific Venture Corp. v. Huey, supra; Carl v. Eade, supra; 13 C.J. 647; 17 C.J.S., Contracts, § 468, p. 966; 12 Am.Jur. 885.

[15-17] Moreover, section 1613 of the Civil Code prescribes that "Where a contract provides an exclusive method by

which its consideration is to be ascertained, which method appears possible on its face, but in fact is, or becomes, impossible of execution, such provision only is void; * * *." Under this section impossibility of ascertaining the price by the contractual method does not preclude a court from giving effect to the contract, ascertaining the consideration in place of the arbitrators or appraisers. Determination of the value of the property is a common task of courts in condemnation, partition, and other proceedings. If equitable considerations support the position of one who seeks specific performance, particularly if he has previously changed his position in reliance on the contractual right that he seeks to enforce, courts of equity will assume the task of ascertaining the consideration if it has become impossible of ascertainment by the method provided in the contract. Thus it was said in Kaufmann v. Liggett, 209 Pa. 87, 102, 58 A. 129, 134, 67 L.R.A. 353, 103 Am.St.Rep. 988: "the authorities well agree that equity will not compel an arbitration, and this upon the very good ground that the courts remain open to the parties, with better provisions for securing justice than are possessed by arbitrators, but that in cases of renewal leases the weight of authority clearly favors the view that the tenant in such a case has a quasi proprietorship—a right, merely lacking a valuation—and that the grossest inequity would be worked, should he lose his right through a failure upon the part of the arbitrators to fix a valuation. While, therefore, a court of equity will not undertake to compel an arbitration, which it cannot control, it will in such case make an appraisement itself, or direct it to be done by its own officer, and will thereafter enforce specific performance of the contract upon the terms so found." While earlier English cases followed the leading case of Milnes v. Gery, 14 Ves.Jr. 400, in holding that courts would not fix the purchase price of land if the contract provided for its determination by arbitration and the arbitration had failed, that doctrine was not adopted in this country and has in England given way to the tendency of later English decisions "to consider these stipulations for a determination of the price by third persons, rather as matters of form than of substance; to construe them in such manner that they become incidental only to the main object of the agreement." Pomeroy, Specific Performance of Contracts (3d ed.) § 151. In Coles v. Peck, 96 Ind. 333, 339, 49 Am.Rep. 161, where a lessee who had erected a building on the land sought specific performance of an option agreement authorizing him to purchase the land, the court referred to Milnes v. Gery, supra, saying: "The doctrine of that case has, however, generally been followed by the courts of the United States, only in a limited and restricted sense, and is mainly applied only to contracts for reference in which, by the form and language of the stipulation, the mode of determining the price by values, on arbitration, is made an essential provision—in fact condition—to the validity of the agreement, and to cases in which the parties can be easily placed in statu quo, or where an action for damages can be made to afford an adequate remedy." The doctrine of these cases has been followed in this state (Streicher v. Heimburge, 205 Cal. 675, 679, 272 P. 290; Glenn v. Bacon, 86 Cal.App. 58, 260 P. 559; see, also, Security Trust & Sav. Bank v. Claussen, 44 Cal.App. 730, 734, 187 P. 142), and is supported by the weight of authority. See cases collected in Pomeroy, op. cit., § 151; Young v. Nelson, 121 Wash. 285, 209 P. 515, 30 A.L.R. 572, 580; see, also, Maas Bros. v. Weitzman, 288 Mich. 625, 286 N.W. 104.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

Rehearing denied; CARTER, J., dissenting.

PEOPLE v. KANE.*

Cr. 3835.

District Court of Appeal, Second District, Division 1, California.

March 7, 1945.

Hearing Granted April 5, 1945.

See 166 P.2d 285.

1. Criminal law ⇐1144(14)

In prosecution for robbery with a deadly weapon, where court clearly instructed as to elements necessary to constitute crime charged, it must be presumed that jury understood that if any of those elements were absent defendant was entitled to an acquittal. Pen.Code, § 211.

2. Criminal law ⇐829(3, 18)

Where the court instructed that the essential elements of the offense of robbery must be proven beyond a reasonable doubt and properly covered the law on the subject of robbery and reasonable doubt, no error was committed in refusing additional instruction requested on the same subject. Pen.Code, §§ 211, 1096.

3. Criminal law ⇐561(1), 563

Whether a defendant is connected as a principal with the acts which constitute a crime must be proved beyond a reasonable doubt, although proof of the corpus delicti or crime, as such, need not be established beyond a reasonable doubt. Pen.Code, § 1096.

4. Robbery ⇐24(1)

Whether money taken by defendant from restaurant cashier was taken against the will and without the consent of cashier was related to and connected with proof of the corpus delicti only, which fact need not be proved beyond a reasonable doubt. Pen. Code, §§ 211, 1096.

5. Criminal law ⇐809, 830

Rejecting proffered instructions which are ambiguous, contain incorrect statements of the law, or which would confuse the jury, is not error.

6. Criminal law ⇐829(1)

In robbery prosecution, where the court fully and fairly instructed on the essential elements of the crime, the degree of proof required for conviction, and the doctrine of reasonable doubt, the court was not required to correct additional proposed instructions which were erroneous. Pen. Code, §§ 211, 1096.

7. Criminal law ⇐1186(4)

Where character of the evidence was such that jury could not have done otherwise than convict defendant of robbery with a deadly weapon, the conviction must stand even though court erred in failing to instruct more fully on the theory of the defense that no force was used in committing the crime, but that money in question was taken from restaurant cashier under prearrangement between defendant and cashier. Pen.Code, §§ 211, 1096; Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

George Kane was convicted of robbery with a deadly weapon, and he appeals.

Affirmed.

George Stahlman, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Justice.

The defendant was charged with robbery He was convicted by a jury of the crime of robbery of the first degree, and the jury also found that at the time of the commission of the offense charged against him he was armed with a deadly weapon as alleged in the information. From the judgment of conviction and from an order denying him a new trial, he appeals to this court.

As his sole ground for appeal, he claims that the court committed prejudicial error in refusing to give two instructions proffered by him at the trial. Because of the character of the rejected instructions, it becomes necessary to epitomize the testimony produced at the trial. In that regard the record discloses that, on October 25, 1943, Marie H. Echols was, and for some years prior thereto had been, employed as assistant manager of Eaton's Restaurant located at 3550 Wilshire Boulevard, in the city of Los Angeles. During a part of that time, the defendant was working for the Hollywood Linen Supply and the complainant would see him almost daily when he delivered linen to the restaurant at which she was employed. They talked and chatted together from time to time and called each other by their first names. According to the testimony of the

* Subsequent opinion 166 P.2d 285.

complainant, the last time she had seen the defendant prior to the commission of the offense charged was several weeks before. It was the custom of the complaining witness to go to the bank around 1 o'clock each day to deposit the restaurant's receipts, and appellant was aware of her practice in this regard. On the date charged in the information, at about 1 o'clock in the afternoon, the prosecuting witness took a money-bag containing some $2,700 from the safe at the place where she was employed, put it under her arm with her purse and, carrying the money, started to walk from the restaurant to the bank, which was located approximately five and a half blocks away from the restaurant. When she had travelled about a block and a half, according to her testimony, she was approached by the defendant, whom she recognized, notwithstanding the fact that he was wearing colored glasses and had two strips of adhesive tape over his nose. According to complainant's testimony, defendant reached for the money-bag under her arm, saying, "I'll take this". Recognizing him, she said, "Don't be foolish. I know you." Thereupon appellant produced a gun, pointed it at the complainant and said, "I'm not fooling. This is loaded. I will shoot you." She replied, "Don't be foolish. I know you." Thereupon, according to complainant, defendant struck her over the head with the gun, knocked her down, took the money, and entered a maroon colored automobile with the turtle back up and drove away rapidly. The prosecuting witness immediately reported the robbery to the police.

In the course of an investigation of the robbery, Sergeants Swan and Powers of the Los Angeles Police Department went to an apartment house at 1432 North Formosa Street, in Los Angeles, about 1:30 p. m. on the date of the robbery. Defendant and his half brother at that time were the occupants of Apartment No. 7 at the aforesaid premises. When the officers arrived at the apartment house, accompanied by the manager thereof, they went to Apartment No. 7 and searched it. They found there in a built-in dressing table approximately $2,334, in denominations of twenty, ten, five and one dollar bills. The aforesaid two officers remained in the apartment until approximately 5 o'clock, when they were replaced by Police Sergeants Brennan and Wiseman. At about 5:30 o'clock in the evening the defendant arrived at his apartment, where he encountered the last named police officers and was placed under arrest. Officer Brennan informed the defendant that their presence in the apartment was occasioned by reason of an investigation of the aforesaid robbery, to which defendant replied, "I didn't pull any hold-up", to which the officer said, "You pulled that hold-up of Eatons this afternoon. You know well what hold-up I am talking about." The defendant, however, continued to deny any complicity in the hold-up, saying, "I absolutely did not hold anybody up." At the time, Officer Brennan searched the defendant and took from his trousers pocket approximately $450. The defendant insisted that the money was his, that he had earned the same at his employment and also that it was all the money he had. Upon being asked by Officer Brennan to account for the $2,300, which had been found in the closet that afternoon, the defendant replied, "I guess I might as well tell you all about it. I pulled the hold-up and I hid the money in there. I hid the money in there, after taking out some of the money and putting it in my pocket." In response to a question by Officer Brennan as to what disposition he had made of the gun used in the hold-up, the defendant told him he had left it at the home of a Mr. Spellman. The officers took the defendant to Mr. Spellman's home and when the latter came to the door, the defendant said, "The officers have got me in the hold-up this afternoon and I want the gun that I left here with you". Mr. Spellman produced the gun and delivered it to Sergeant Wiseman, after which Sergeant Brennan took five shells from the weapon. The defendant admitted to the officers that this was the gun he had used in the hold-up.

The defendant was taken to the Wilshire Detective Bureau, where further conversation was had with him. At that time he was asked why he had "pulled the job", to which he replied, "I needed the money bad and I knew that they had quite a lot of money on week-ends from Eatons". When asked how he knew that, the defendant replied, "Well, I went down there the day before or two days before and I watched the girl taking the money to the bank, and I knew about what time she went by, and I went down there on the 25th, today, and I waited until I saw her come out and start to the bank with the money. I walked up to her and I stuck the gun on her and I

told her to give me the money". After telling the officers that the complainant refused to give him the money, defendant said, "She started to wrestle over the bag of money, so I hit her with the gun * * * The blow knocked her down to the pavement and I jerked the money-bag away from her and ran to my car and got in the car and drove away." Defendant further stated that he had the turtle back of the car raised so that it would be difficult, if not impossible, to read the license plate which was on top of the turtle back. When asked by Officer Wiseman if he did not think it was very foolish to hold up someone who knew him, the defendant answered, "Well, I didn't think she would recognize me", because, as stated by him, he had "put dark glasses on and the adhesive tape on his nose".

Testifying as a witness in his own behalf at the trial, defendant stated he had known the complainant some three years, during which time he had, as heretofore related, seen her practically every day and that he had had numerous conversations with her. He further testified that some four or five months prior to October 25, 1943, the complainant stated to him in the restaurant, "George, how about making some easy money?" to which he answered, "It looks kind of easy. We can arrange it." According to the testimony of the defendant, the complainant told him the money was insured and they could divide it equally between them. He further testified that frequently during the ensuing months they would discuss the plan for staging a hold-up. The defendant testified that they discussed how they would "make it look like a real robbery"; that he would be waiting on the corner for the complaining witness and that he would disguise himself. He testified that he communicated with the prosecuting witness on the morning of October 25th and that she said to him, "This is a nice week-end", to which he replied, "O.K., I'll meet you at Normandie and Wilshire"; that on the same afternoon he was waiting in his car when complainant walked up to him, whereupon he said, "It looks pretty safe. We might as well do it now. You give me the bag and I'll step aside and push you. We will make it look like a real robbery so I will push you now and kind of make it look like I am hitting you, and I will take the money and speed away". He thereupon "shoved her and she fell to the ground" and, as he left, the complainant screamed. The defendant admitted at the trial that he had the loaded gun in his pocket at this time, but denied that he had removed it therefrom or that he had struck the complainant with it. In explanation of his failure to tell the police of the claimed prearranged plan for the hold-up, defendant stated that he desired to "protect" the complainant and that it was only when he found out how severe the punishment for robbery was that he decided not to "protect" the complaining witness any longer.

The prosecuting witness testified in rebuttal that she had never arranged with appellant to have him hold her up and take the money away from her, and specifically denied all of the testimony given by the defendant in that regard.

As hereinbefore narrated, appellant's sole contention is that he was prevented from having a fair and impartial trial by reason of the refusal of the trial judge to give to the jury the following instructions allegedly based upon the theory of appellant's defense:

"Before you can convict the defendant in this case, you must be convinced beyond a reasonable doubt that the property taken was against the will and without the consent of Marie H. Echolls.

"If you believe from the evidence that there was an agreement or understanding between the defendant George Kane and the complaining witness Marie H. Echolls, or permission upon the part of Marie H. Echolls, that the property should be taken by the defendant George Kane, then you must find the defendant not guilty, or if you have a reasonable doubt as to whether or not this consent and permission was given by Marie H. Echolls to the defendant George Kane, then you should resolve this doubt in favor of the defendant and acquit him of the charge as contained in the information."

"You are instructed that if the complaining witness, Marie H. Echolls, in any manner instigated and encouraged the commission of the offense which amounts to consent to the wrong complained of, then you should find the defendant not guilty."

Appellant's defense was that the crime of robbery was not committed because of the existence of an agreement and understanding between him and the complainant to go through the form of robbing her and then to divide equally between them the money obtained in the simulated hold-up; that the essential elements of force and fear

required in the crime of robbery were not present because of her consent to and willing participation in the wrong complained of.

The court instructed the jury in the exact language of section 211 of the Penal Code, which defines robbery as "* * * the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

The Code definition is in simple English and requires neither explanation or amplification.

The jury was further instructed as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge'."

[1] The court having clearly stated to the jury the elements necessary to constitute the crime charged, it must be presumed that the jury understood that if any of those essential elements were absent the defendant was entitled to an acquittal. People v. Ortiz, 63 Cal.App. 662, 669, 219 P. 1024; People v. Bedoy, 80 Cal.App. 783, 785, 252 P. 1061.

[2] When, therefore, the jury was instructed that the essential elements of the offense must be proven beyond a reasonable doubt, every substantial right of the defendant was protected, because the trial judge properly covered the law on the subject of robbery and reasonable doubt and therefore no error was committed in refusing additional instructions requested by the defendant on the same subjects. People v. Wright, 26 Cal.App.2d 197, 208, 79 P.2d 102; People v. Parchen, 37 Cal. App.2d 215, 223, 98 P.2d 1045.

[3] The law does not provide that proof of the corpus delicti or crime, as such, be established beyond a reasonable doubt. People v. Alba, 52 Cal.App. 603, 605, 199 P. 894; People v. Mohr, 24 Cal.App.2d 580, 582, 75 P.2d 616. Whether a defendant in a criminal action is connected as a principal with the act or acts which constitute a crime, however, must be proved beyond a reasonable doubt, and as indicated above the jury was correctly instructed as to the doctrine of reasonable doubt.

[4] Furthermore, the refused instructions did not contain a correct statement of the law, hence were properly refused. Whether the property taken was against the will and without the consent of Marie H. Echolls was related to and connected with proof of the corpus delicti only, which fact, as above noted, need not be proven beyond a reasonable doubt. The extent and application of the doctrine of reasonable doubt is statutory. Penal Code, § 1096.

[5, 6] That it is not error for the court to reject proffered instructions which are ambiguous, contain incorrect statements of the law, or which would confuse the jury, is elementary. People v. Housman, 44 Cal. App.2d 619, 628, 112 P.2d 944; People v. Hartwell, 39 Cal.App. 24, 29, 177 P. 885; 8 Cal.Jur. 630. And having fully and fairly instructed the jury on the essential elements of the crime charged, the degree of proof required for conviction and the doctrine of reasonable doubt, the court was not called upon to correct additional proposed instructions which were erroneous. People v. Cipolla, 155 Cal. 224, 227, 100 P. 252.

[7] In view of the array of undisputed evidence which we have hereinbefore narrated in detail, it appears to us that its character was such that the jury could not have done otherwise than convict appellant of the crime charged against him. Even though it be conceded that it was error for the court not to instruct the jury more fully on the theory of the defense, we are of the opinion that the resultant verdict would not have been different and that appellant would have been convicted even though the jury had been instructed as requested by him. The conviction must therefore stand. Art. VI, sec. 4½, Constitution of California; People v. Kelso, 25 Cal.2d 848, 155 P.2d 819.

The judgment and the order denying defendant's motion for new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.

68 Cal.App.2d 400

RUSS v. RUSS.

Civ. 7094; No. 5673.

District Court of Appeal, Third District, California.

March 14, 1945.

1. Divorce ⇐286, 312

Where record on appeal from order increasing allowance for support of wife and minor child did not show proceedings on which interlocutory and final divorce decrees were based, and neither husband nor his counsel appeared at hearing of motion for increase and no objections were made thereto nor counter affidavits filed by husband, appellate court assumed that different conditions were established at hearing on such motion. Servicemen's Dependents Allowance Act of 1942, 37 U.S.C.A. § 201 et seq.; Civ.Code §§ 138, 139.

2. Divorce ⇐286, 312

Where same trial judge presided at all hearings leading to interlocutory and final divorce decrees and to subsequent order modifying final decree as to allowance for support, appellate court could not assume, on appeal from modification order and judgment, that trial judge would have altered support award without a showing of different conditions. Civ.Code, §§ 138, 139.

3. Divorce ⇐245(1), 286, 309, 312

A modification of a final divorce decree awarding support to wife and minor child rests in trial court's sound discretion, and such modification order will not be set aside without clear showing of abuse of discretion. Civ.Code, §§ 138, 139.

4. Courts ⇐42(1)

The Legislature may provide that, once a court has jurisdiction over subject matter of proceedings and over person of party affected, court may bind such person by orders made after he has left state. Code Civ.Proc. § 1015.

5. Attorney and client ⇐76(4)

Ordinarily, the authority of an attorney ends with entry of judgment except for purpose of enforcing judgment or having it set aside.

6. Divorce ⇐309

A divorce judgment, insofar as it relates to maintenance of minor children, is not final but as to those matters litigation is regarded as still pending as respects modification thereof and service on defendant husband's attorney. Civ.Code, §§ 138, 139; Code Civ.Proc. § 1015.

7. Attorney and client ⇐90

In absence of showing that defendant husband discharged his counsel of record after entry of final divorce decree, service of papers on such attorney in wife's subsequent proceedings for modification of provisions of decree for support bound defendant until his counsel was discharged or substituted. Civ.Code, §§ 138, 139; Code Civ.Proc. §§ 284, 285, 1015.

8. Divorce ⇐286, 312

Where wife's counsel, in reply to allegation in brief of husband's counsel that notice of motion for modification of divorce decree was never served on husband's counsel, stated that service of necessary papers was made on husband's counsel and that such papers bore his signature and that omission of counsel's signature on documents on file on appeal from modification order was due to error in making of transcript, and wife's counsel offered to obtain copies for appellate court, to which husband's counsel filed no reply brief, appellate court assumed that omission of showing of service was mere inadvertence in preparation of transcript.

9. Army and navy ⇐34

The Soldiers' Relief Act is designed to protect defendant in military service who does not appear by insuring appointment of attorney to represent him, but provision for such appointment does not apply when defendant has appointed his own attorney to protect his interest. Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A. Appendix § 501 et seq.

10. Divorce ⇐245(1), 309

Where wife's showing of different conditions warranted trial court, in exercise of sound discretion, to modify final divorce decree by increasing allowance for support, wife's motive in instituting proceeding to obtain such increase was immaterial.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action for divorce by Eloise Russ against John Russ. From an order and judgment entered thereon modifying a

final divorce decree granted to plaintiff by increasing the amounts allowed for maintenance of plaintiff and minor child of the parties, defendant appeals.

Affirmed.

Blaine McGowan, of Eureka, for appellant.

Hill & Hill, of Eureka, for respondent.

PEEK, Justice.

This appeal is from an order and judgment entered pursuant thereto, modifying a final decree of divorce granted to plaintiff.

By the terms of said decree defendant was ordered to pay to plaintiff $100 per month for the support and maintenance of herself and the minor child of the parties for a period of 18 months, and thereafter to pay to plaintiff $35 per month for the support of said child.

The record presented to us consists of the Notice of Motion, Affidavit for Order to Show Cause, Order Shortening Time for Service of Notice of Motion, all filed on August 26, 1943, Order Modifying Final Decree of Divorce, and Supplemental Affidavit of Plaintiff, filed on January 31, 1944. The order to show cause is the only document in the record showing service upon counsel for the defendant. An affidavit of service by mail of a copy of the order to show cause and the supporting affidavit of plaintiff shows that copies thereof were mailed, pursuant to an order of the court, to defendant, C/o Sadie Russ, Ferndale, California, who, as appears from respondent's brief, is the mother of defendant.

By the first affidavit plaintiff alleges that since the final decree, conditions and circumstances surrounding the parties and upon which the original order was based have materially changed; that defendant is now in the armed forces of the United States; that by virtue of the Servicemen's Dependents Allowance Act of 1942, 37 U.S.C.A. § 201 et seq., he can support plaintiff and said minor child with a minimum obligation on his part; that plaintiff is in need of said maintenance and support, and concludes with a request that defendant be ordered to pay to her the sum of $50 per month for her support and maintenance and $50 per month for the support and maintenance of said minor. Plaintiff's supplemental affidavit alleges that for more than one year she has paid the premiums on two insurance policies, which policies will pay to said minor the sum of $5000 at about the time she will finish high school, and will be used according to the plan of plaintiff to complete the education of said minor; that under the provisions of said policies in the event plaintiff should die they automatically would become fully paid up; that she knows of no other way she can guarantee said minor's education; that in view of the social standing, income and wealth of defendant, $5000 is a reasonable sum to expend for such purpose; that the premiums average $25 per month, and during the past year plaintiff has paid said amount in full; that she is now unemployed and is without income other than the sum of $35 per month received from defendant for the maintenance of said minor under the terms of the present order; that in recent months she has been able to work only half days earning approximately $50 per month; that her expenses are considerably over $100 per month; that she intends to enter a school for dental nurses so as to be better fitted to provide for said minor child and herself; that the tuition fee for such schooling is $175, and with the premiums on the insurance policies her monthly expenses will be approximately $125 to $150; that she has not sufficient funds to meet said expenses; that defendant is in the army and that the law provides that a divorced wife with a minor child may receive up to $72 per month from the government with a contribution from defendant of only $22; that defendant has other property in excess of $25,000 and is able to pay.

No appearance was made by defendant nor did counsel appear in his behalf at the hearing of the motion on August 31, 1943. On January 31, 1944, five months thereafter, the court made its order modifying the final decree previously made and entered April 2, 1943, and ordered defendant to pay to plaintiff the sum of $100 per month as maintenance for herself and said minor child for a period of 18 months, the first payment to be made April 1, 1942; that upon the expiration of the 18 months' period defendant to pay to plaintiff the sum of $50 per month for the support and maintenance of herself and $35 per month for the support and maintenance of the minor child; said payments to continue for the duration of the service of defendant with the armed forces of the United States; that following

the duration of the service of defendant, and thereafter during the minority of said child, he pay to plaintiff as for maintenance of said minor child the sum of $35 per month.

Appellant contends that neither the notice of motion nor the order to show cause has any legal effect for the reason that the grounds were not stated therein; that the affidavit does not show the ability of defendant to make the payments required; that it is not shown that the amount now being received by the minor child is inadequate for its support; that defendant is in the Army Air Force in the capacity of a private and stationed at San Antonio, Texas; that present counsel was counsel for defendant in the divorce proceedings only, and thereafter he had no further connection with the case until the order to show cause was served on him; that notice of motion was never served upon counsel for defendant; that no showing was made in the moving papers as to whether or not defendant was in or out of the state nor was any finding made thereon; that there are no findings as to whether or not defendant's counsel was still his attorney; that without findings to this effect the notice must fail; that the court abused its discretion in that its jurisdiction is limited to making such orders as existing conditions and circumstances require, and cannot anticipate situations or attempt to provide for future contingencies, and that the sole thought of respondent is to secure money for herself from the government of the United States under the Servicemen's Dependents Allowance Act of 1942.

[1] An examination of all of the papers on file herein shows that the motion was made upon the alleged insufficient allowance for the support of plaintiff and the minor child, change in the financial condition of the defendant, necessity for proper education of the minor, and Federal support for dependent children not available when the original order was granted. No record of the proceedings upon which either the interlocutory or final decrees were based is before us. As previously stated neither the defendant nor his counsel appeared at the hearing of the motion nor were any objections made to any of the matters concerning which defendant now complains nor were any counter affidavits filed by him in opposition to plaintiff's motion. Apparently the modification order was granted solely upon the affidavits of plaintiff.

[2-4] Under such circumstances it is impossible for this court to say that the conditions presented to the trial court in support of said order were the same as those presented at the prior hearing. In support of the order we must assume that other and different conditions were established at the hearing on August 31, 1943. Becker v. Becker, 64 Cal.App.2d 239, 148 P.2d 381; Valentine v. Valentine, 47 Cal. App.2d 438, 440, 118 P.2d 17. In addition thereto the same trial judge presided at all hearings in the present controversy, and we cannot assume that he would have altered the award in the absence of such a showing. Leupe v. Leupe, 1942, 21 Cal. 2d 145, 130 P.2d 697. A modification of an award pursuant to Sections 138 and 139 of the Civil Code rests upon the sound discretion of the trial court, and such order will not be set aside without a clear showing of an abuse of discretion. Leupe v. Leupe, supra; Prouty v. Prouty, 16 Cal. 2d 190, 105 P.2d 295.

[5] Section 1015 of the Code of Civil Procedure provides:

"When a plaintiff or a defendant, who has appeared, resides out of the State, and has * * * an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party."

The Supreme Court, in the case of Reynolds v. Reynolds, 1943, 21 Cal.2d 580, 583, 134 P.2d 251, 254, construing this portion of the section, stated:

"* * * the Legislature may provide that once the court has jurisdiction over the subject matter of a proceeding and over the person of the party affected, it may bind such person by orders made after he has left the state."

[5-7] Ordinarily the authority of an attorney ends with the entry of judgment except for the purpose of enforcing it or having it set aside. 3 Cal.Jur. 668. Nevertheless a judgment of divorce in so far as it relates to the maintenance of minor children is not final. As to those matters the litigation will be regarded as still pending. Rosher v. Superior Court, 1937, 9 Cal.2d 556, 71 P.2d 918. In such cases the court is primarily interested in whether a party has an attorney of record, whether any change in attorneys has been made as provided in Section 284 of the Code of Civil Procedure, and whether notice thereof has been given as provided in Section 285 of that Code. As there is no showing

herein that defendant discharged his counsel of record, it follows that service of papers upon said attorney bound the client until such counsel was discharged or substituted out of the case in the manner provided by law. Scarpel v. East Bay Street Rys. 1940, 42 Cal.App.2d 32, 115 P.2d 862.

[8] Counsel for defendant alleges in his brief that notice of motion was never served upon him. In reply, counsel for plaintiff states that service of every necessary paper was made upon defendant's counsel and that the same bears his signature as of August 26, 1943; that said statement by defendant's counsel is in all probability an inadvertance, which counsel would undoubtedly correct in his reply brief; that such omission of counsel's signature on the documents on file herein was undoubtedly due to an error in making up the the transcript, and concludes with an offer to obtain copies of the same for the benefit of this court. As counsel for defendant filed no reply brief we are left with no answer to plaintiff's statement. Under such circumstances we will assume in support of the order, and in accordance with the offer of proof and statement of plaintiff's counsel that the omission of the showing of service of copies of all papers was mere inadvertance in the preparation of the transcript.

[9] Appellant's final contention that the modification order is in violation of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.A.Appendix § 501 et seq., is without merit. In the previously cited case of Reynolds v. Reynolds, wherein a similar question was raised, the court said:

"This section is designed to protect a defendant in military service who does not appear, by insuring the appointment of an attorney to represent him. It does not apply, however, when, as in the present case, the defendant has appointed his own attorneys to protect his interest."

[10] If the showing made by plaintiff sufficiently warranted the trial court, in the exercise of its sound discretion, to modify the final decree, and we conclude it did, what may or may not have motivated plaintiff in instituting this proceeding is of no concern to this court.

The order and judgment appealed from are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

HOPPER v. BULAICH.*

Civ. 14451.

District Court of Appeal, Second District, Division 1, California.

March 9, 1945.

Rehearing Denied April 6, 1945.

Hearing Granted May 7, 1945.

1. Municipal corporations ⇐822(1)

In action for injuries to pedestrian who fell at night into ditch excavated by defendant in public street, wherein evidence showed that excavation as required by ordinance was guarded by barriers and warning lights at time accident occurred, instruction that there was no ordinance prohibiting excavation from being left open at night was proper.

2. Municipal corporations ⇐822(2)

In action for injuries to pedestrian who fell at night into ditch excavated by defendant in public street, instruction which predicated negligence per se on violation of ordinance and permit was properly refused, where jury impliedly found that pedestrian was contributorily negligent and that there was no causal connection between alleged violation and injury.

3. Municipal corporations ⇐822(5)

In action for injuries to pedestrian who fell at night into ditch excavated by defendant in public street, instruction that pedestrian may assume that street is free from obstructions and need not keep his eyes fixed on street or look far ahead for defects, but that pedestrian must use reasonable care, was properly refused as inapplicable, where pedestrian admitted that he had knowledge of sufficient facts to have put reasonably prudent person on inquiry.

4. Municipal corporations ⇐818(2)

In action for injuries to pedestrian who fell at night into ditch excavated by defendant in public street, evidence of theft of pigeons from premises whereto pedestrian was going was properly admitted for purpose of showing that there had been some trouble with mischievous children in neighborhood and that owner of the premises lit red lanterns the night before the accident and that lanterns were not out through any negligence of defendant.

WHITE, J., dissenting.

* Subsequent opinion 164 P.2d 483.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Charles Hopper against Nick Bulaich to recover for injuries sustained when plaintiff fell into an open ditch then in course of excavation by defendant in a public street. From a judgment for defendant, plaintiff appeals.

Affirmed.

Arthur E. Briggs, of Los Angeles, and Perry G. Briney, of San Pedro, for appellant.

Parker & Stanbury and Harry D. Parker, all of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff sought by the instant action to recover damages for personal injuries which he alleged he sustained when he fell into an open ditch then in course of excavation by defendant in a public street. From a "judgment on verdict in open court" in favor of defendant, plaintiff prosecutes this appeal, urging that the trial court erred (1) in giving and refusing to give certain instructions to the jury and (2) in admitting in evidence testimony of previous acts of third persons.

The ditch into which appellant fell was two feet wide and eight feet deep and was being excavated by respondent under a contract with the County Surveyor of Los Angeles County for the installation of a sanitary sewer along 101st Street near the town of Lennox. At the time the accident occurred, the ditch was about 1160 feet long and extended easterly along 101st Street from Hawthorne Avenue to a point about 90 feet west of Freeman Avenue, and for about 75 feet at its easterly end was open and uncovered and was located about three feet north of the southerly boundary of the street which was also the north boundary line of the property of Mr. Berry. For about five weeks prior to the 14th day of November, 1942, appellant had been calling for Mr. Berry and transporting him to the North American Aviation Plant at Inglewood where both men were employed. On Thursday morning, November 12, 1942, appellant drove his car through 101st Street to the corner of Freeman where he picked up Mr. Berry at a gate in front of his home. Appellant was unable to drive westerly on 101st Street to Hawthorne Boulevard because of the excavation in 101st Street so he turned around about 100 feet west of the Berry place and returned east to Freeman Avenue in order to get out of 101st Street. On Saturday, November 14, 1942, appellant did not drive into 101st Street, which street he had found closed west of the Berry place on the previous Thursday, but parked his car on Freeman Avenue to the east and in front of Mr. Berry's house. Appellant testified that he had no knowledge that the work he had seen in 101st Street two days previously had in the interim proceeded easterly alongside of Mr. Berry's property or that there was an open ditch along said property. It was about 5:30 in the morning when he parked his automobile in front of the Berry house on Freeman Avenue; that it was very dark and there was a very heavy fog; that he encountered no barriers and saw no lights and could not see the ditch. After parking his car, appellant walked westerly along 101st Street near Mr. Berry's north fence on a course parallel with the ditch and between the ditch and the fence until he had proceeded some 28 feet along the open ditch, or a total of 118 feet west from Freeman Avenue, at which point appellant fell into the ditch, sustaining the injuries complained of.

There was evidence introduced on behalf of respondent that certain barriers had been erected near the east end of the open ditch and that red lanterns had been placed every forty feet along 101st Street to give notice of the existence and location of the excavation and that some of these lanterns were lighted and others were not lighted at the time the accident occurred.

Appellant specifies as error the giving of the following instruction by the trial court: "The court instructs you that there was no County Ordinance or law or regulation at the time of this accident prohibiting the excavation ditch in question from being left open at night, or in other words requiring the ditch to be covered at night." In this connection appellant argues that Ordinance No. 3597 (New Series) of the County of Los Angeles, which was in effect at the time of the accident, makes it a misdemeanor to dig a ditch in a highway without obtaining a permit therefor, and also gives authority to the county road commissioner to impose conditions upon the permittee which are necessary for the safety of persons using the highway; further, that it is "clear from the evidence that respondent had no permit to open a ditch and leave it open after sundown, and when he did so he carried on excavation work

without a permit", which amounted to negligence per se.

Said ordinance required only that a permit be obtained before excavation in a highway be made and left it within the discretion of the county road commissioner as to what conditions should be imposed to protect persons using such highway while the work was in progress. It contained no express provision prohibiting the excavation from being left open or uncovered at night, but by section 83, thereof, it provided in the event the permit did "not specify what lights, barriers, warning signs or other measures must be erected by the permittee, the permittee shall place and maintain warning lights at each end of such excavation or obstruction and at distances of not more than fifty feet along such excavation or obstruction from sunset of each day to sunrise of the next day, until such excavation is entirely refilled and resurfaced or such obstruction is removed, and every said person shall place and maintain barriers not less than three feet high at each end of said excavation or obstruction at all times until such excavation is entirely refilled or such obstruction is removed."

[1] As heretofore stated, the record discloses evidence that the excavation was guarded by barriers and warning lights at the time the accident occurred, in accordance with the requirements of section 83, supra, of the county ordinance; therefore the instruction objected to was a fair statement of existing facts and was not prejudicial to appellant's cause.

Appellant next cites as error the refusal of the trial court to give the following instruction (Plaintiff's No. 4):

"You are instructed that Ordinance No. 3597 (New Series) passed by the Board of Supervisors of the County of Los Angeles, State of California, on May 28, 1940, was in effect at all times involved in this action, and required every person before making any excavation, obstruction, or other work of any nature in, over, along, across or through any highway first to make application in writing to and obtain a permit from the Road Commissioner of said County to make such excavation, obstruction, or other work; and said ordinance further provided that 'In any permit issued by him the Commissioner may specify what lights, barriers, warning signs or other measures designed to protect the travelling public must be erected by the permittee;' that the defendant herein, Nick Bulaich, made such application and obtained such permit, and that in both said application and in said permit were written the term and condition of said permit, to-wit: 'No excavation authorized by this permit shall be left open between sunset and sunrise without first securing written permission from the Road Commissioner.' If you find from the evidence that the defendant to this action conducted himself in violation of said ordinance and permit, you are instructed that such conduct constituted negligence per se as a matter of law. However, in this connection, the violation of law is of no consequence unless it was the proximate cause of, or contributed in some degree as a proximate cause, to the injury found by you to have been suffered by plaintiff."

Appellant contends that the foregoing instruction "contains a correct statement of the law * * * and that the jury should have been informed that there was such an ordinance requirement in this case instead of being refused such instruction and being given practically identically opposite instructions (objected to under our first objection) that there was no ordinance requiring the excavation to be covered."

This instruction attempts to predicate negligence per se upon the violation of the county ordinance and also on the violation of the permit issued by the road commissioner. As heretofore stated, the record does not disclose a violation of any of the express terms of the ordinance, and according to the wording of the instruction itself, appellant's theory seems to be that the violation, if any, consisted in failure of respondent to obtain permission in writing from the road commissioner to leave the excavation ditch uncovered between sunset and sunrise.

The witness Mead, construction inspector for the county engineer, testified that he was inspector on the excavation job every day from shortly before eight o'clock in the morning until between half past four and five o'clock every afternoon; that his "duties were to see that the job was put in according to plans and specifications and fulfilled all the requirements of the contract. * * * As part of our duties we are supposed to look after the safety of the public * * *." That on Friday, November 13th, at 4:30 in the afternoon he observed that "there was a barricade ahead of the ditch, on the end of the ditch, and there was red lights approximately 50 feet

down the side"; that the lanterns were lighted when he left the job on Friday night; and that he did not at any time while he was on the job notify or require the contractor to cover the ditch over at night.

[2] The jury impliedly found that appellant was guilty of contributory negligence because the evidence clearly shows that at least two days before the accident occurred he had actual notice of the progress of the excavation project easterly from Hawthorne Boulevard toward Freeman Avenue. The jury also impliedly found that there was no causal connection between any possible violation of the ordinance referred to and the injuries sustained by appellant. In this state of the record the refusal to give the instruction complained of was proper.

[3] Appellant's third citation of error is the refusal of the court to give his instruction No. 6: "You are instructed that a pedestrian has the right to assume that the street is free from obstructions and in a reasonably safe condition to travel thereon and he need not keep his eyes fixed on the street or look far ahead for defects which should not exist, but such right is subject to the qualification that the pedestrian must use reasonable care; and if you find that the plaintiff used such ordinary care then you will find that plaintiff was not guilty of contributory negligence."

There was no error in refusing to give this instruction, which is obviously inapplicable to the facts disclosed by the record. While appellant claims he did not have an exact knowledge of the progress made in excavating the ditch, he admitted he had knowledge of sufficient facts to have put a reasonably prudent person on inquiry. With some knowledge of the existing danger, appellant failed to use ordinary care when he parked his car on Freeman Avenue and proceeded to walk in the dark and fog until he fell into the ditch.

[4] Finally, appellant urges error on the part of the trial court in admitting evidence of the theft of pigeons from the coops maintained on Mr. Berry's premises. The purpose of such testimony, as stated by respondent's counsel, was "to show that there has been some trouble with mischievous children in the neighborhood, with their pigeon coops, on some previous occasions, and we expect to show that he lit those lights (the red lanterns) the night before (the accident) and observed that they were lit, and the testimony according to the officers was that the lights were out when they arrived. We propose to show that they were not out through any negligence on the part of the defendant."

The evidence as to whether the red lanterns were lighted at the time of the accident was conflicting and it cannot be said that it was prejudicial to appellant's cause to permit this evidence to be introduced upon the theory that mischievous boys might have tampered with the lights while attempting to break into the Berry premises to get some of the pigeons.

The instant cause was fairly and fully tried and no errors appear in the record.

The judgment is affirmed.

DORAN, J., concurs.

WHITE, Justice (dissenting).

I dissent.

Sec. 82 of Ordinance No. 3597 (New Series) of the County of Los Angeles in effect at the time of the happening of this accident authorizes the Road Commissioner of said county, in any permit issued by him, to specify what lights, barriers, warning signs "or other measures designed to protect the traveling public must be erected by the permittee." In the permit issued to the defendant herein it was specifically provided that "No excavation authorized by this permit shall be left open between sunset and sunrise without first obtaining written permission from the Road Commissioner." That the excavation was left open on the night in question was fully established by the evidence, as was the fact that the defendant contractor did not receive permission in writing from the County Road Commissioner to leave the excavation open between sunset and sunrise. In my opinion, plaintiff was entitled to have his Instruction No. 4 given to the jury. Whether defendant's violation of the terms of the permit issued pursuant to the ordinance was the proximate cause of the accident was a question of fact to be determined primarily by the jury under proper instructions. Who can say that, had application been made to the Road Commissioner, he would have authorized the defendant to leave the excavation open at night time, and who can say what the verdict of the jury might have been had they been admonished that under his permit the defendant was not authorized to leave said

excavation open between sunset and sunrise? The prejudice to plaintiff which accrued from the court's refusal to give the foregoing instruction was intensified and accentuated by the giving of an instruction quoted in the majority opinion whereby the jury was advised that "There was no County Ordinance or law or regulation at the time of this accident prohibiting the excavation ditch in question from being left open at night, or, in other words, requiring the ditch to be covered at night." This instruction was in direct contradiction of the evidence and exhibits, which showed that the Road Commissioner, in the exercise of powers conferred upon him by the aforesaid County Ordinance, issued the permit for the excavation here in question upon condition that such excavation should not be left open at night without written permission from the Commissioner and that no such written permission was ever given.

I am also of the opinion that it was error for the court to admit evidence of the theft of pigeons from the premises of Mr. Berry. Such testimony served only to confuse the jury and left them to surmise and conjecture as to whether the "mischievous boys", who allegedly stole the pigeons, had tampered with and extinguished the lights around the excavation.

For the foregoing reasons, it is my opinion that the judgment should be reversed and the cause remanded for a new trial.

Rehearing denied; WHITE, J., dissenting.



68 Cal.App.2d 399

O'BRIEN v. HANNON.

Civ. 14622.

District Court of Appeal, Second District, Division 3, California.

March 14, 1945.

1. New trial ⇐159

Where notice of motion for new trial was served and filed on August 12, 1943, the motion was denied by operation of law on October 11, 1943, without further order of the court, in view of court's failure to pass on the motion. Code Civ.Proc. §§ 12a, 660.

2. Appeal and error ⇐345(1)

Where motion for new trial was denied by operation of law on October 11, 1943, because of court's failure to pass on the motion, but court made an order on October 19, 1943, denying the motion, notice of appeal filed on November 16, 1943, was not within the 30 days after denial of motion for new trial by the court or by operation of law, and appeal would be dismissed. Code Civ.Proc. §§ 12a, 660, 939; Rules of Appeal, rule 3(a).

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by E. O'Brien against Eugenie B. Hannon. From a judgment dismissing the action, plaintiff appeals.

Appeal dismissed.

Geo. P. Cook, of Los Angeles, for appellant.

John J. McMahon, of Los Angeles, for respondent.

PARKER WOOD, Justice.

This is a purported appeal from a judgment of dismissal.

[1, 2] The record does not show that there was a notice of entry of judgment. A notice of motion for a new trial was served and filed on August 12, 1943. The motion was heard and taken under advisement by the court on September 14, 1943. The court made an order on October 19, 1943, denying the motion for a new trial. The power of the court to pass on a motion for a new trial expires sixty days after filing of the notice of intention to move for a new trial, and if such motion is not determined within said period of sixty days, or within said period as extended by the provisions of Section 12a of the Code of Civil Procedure, the effect shall be a denial of the motion without further order of the court. Code Civ.Proc. § 660. The motion for a new trial therefore was denied by operation of law on October 11, 1943. When a motion for a new trial is denied the time for appeal from the judgment does not expire until thirty days after the motion has been denied by the court or by operation of law. Code Civ.Proc. § 939; Rules on Appeal, rule 3(a). Notice of appeal was filed on November 16, 1943. It appears therefore that the notice of appeal was filed more than thirty days after the motion was denied. The appeal was

not taken within the time prescribed by law and, since the filing of a notice of appeal within the time allowed by law is essential in order to confer jurisdiction upon this court (Lancel v. Postlethwaite, 172 Cal. 326, 331, 156 P. 486), the appeal should be dismissed.

It is to be noted that a further question as to jurisdiction is involved herein. The amount sought by the complaint is $525.05 "besides interest" from 1935, which amount is not within the jurisdiction of the superior court. The complaint asks further, however, that it be adjudged that undesignated assets of the estate of defendant's deceased husband which were distributed to her in 1936, by reason of her alleged fraud, be held in trust for the benefit of plaintiff's assignor. The question thus presented as to whether the action was in equity and for that reason jurisdiction was conferred upon the superior court need not be determined, since the appeal was not taken in time.

The appeal is dismissed.

DESMOND, P. J., and SHINN, J., concur.



68 Cal.App.2d 366

EUBANKS v. MILTON G. COOPER & SON, Inc.

Civ. 3165.

District Court of Appeal, Fourth District, California.

March 13, 1945.

1. Damages ⇐62(4)

Where ranch owner's offer to return ranch to cropper after evicting him therefrom was conditional, exacted expenditure by cropper of substantial sum, not contemplated by cropping agreement, to save growing crops, and was made too late to effect recovery thereof from effects of lack of cultivation and water as result of owner's neglect, cropper was not obligated to take over crops in order to minimize his damages from owner's breach of cropping agreement by such eviction.

2. Appeal and error ⇐930(1)

In reviewing evidence supporting jury's verdict, appellate court must accept as correct all substantial evidence tending to uphold verdict and consider evidence in aspect most favorable to prevailing party, and, when evidence is conflicting, court will presume that evidence supporting verdict is true.

3. Appeal and error ⇐216(2)

A party injured by instruction, which is correct so far as it goes and deficient merely because of its generality, may complain thereof on appeal only if he requests more specific charge or other qualifying instructions and such request is denied by trial court.

4. Appeal and error ⇐882(12)

A defendant, whose given instructions in support of his cross-complaint were basically identical with plaintiff's instructions challenged by defendant, is estopped from claiming on appeal that plaintiff's instructions were erroneous.

5. Appeal and error ⇐1003

The fact that testimony of defendant's witnesses appears to appellate court to be more convincing, of greater weight, and more fully corroborated than that of plaintiff's witnesses, does not justify reversal of jury's implied finding for plaintiff after trial court's denial of defendant's motion for new trial on ground of excessiveness of verdict.

6. Appeal and error ⇐1004(1)

In cropper's action against ranch owner for breach of cropping agreement, jury's verdict, awarding plaintiff $9,000 damages, was not so excessive as matter of law as to permit appellate court to order new trial on ground that verdict was purely result of passion and prejudice.

7. Appeal and error ⇐971(2)
Evidence ⇐498½

In cropper's action against ranch owner for breach of cropping agreement, plaintiff's qualification to testify as to reasonable market value of crops lost because of breach was within sound discretion of trial court, whose ruling thereon will not be disturbed on appeal, in absence of showing of manifest abuse of discretion and actual want of substantial evidence to support decision.

8. Appeal and error ⇐930(2), 1031(6)

The appellate court will presume that trial court's instruction to jury to disregard improper question to witness was followed and that no prejudice to appellant resulted from such question.

9. Appeal and error ⇐930(1)

In cropper's action against ranch owner for breach of cropping agreement by eviction of plaintiff from ranch, where fact of defendant's ownership of other ranches came before jury in connection with defendant's experience in farming and proof of his several accounts offered in evidence, as well as for other material purposes, appellate court will not presume, on appeal from judgment on jury's verdict for plaintiff, that jury was influenced by such fact or prejudiced against defendant thereby.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by E. L. Eubanks against Milton G. Cooper & Son, Inc., for breach of a cropping agreement, in which defendant filed a cross-complaint to recover damages for plaintiff's breach of the agreement and moneys advanced to plaintiff by defendant. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. H. Stammer and Galen McKnight, both of Fresno, for appellant.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for respondent.

GRIFFIN, Justice.

Action for damages for breach of cropping agreement. Defendant corporation, by written agreement dated January 7, 1943, granted plaintiff the right to enter upon a certain ranch owned by it in Fresno County for the purpose of growing crops thereon during the cropping season of 1943. The contract provided generally: (1) That plaintiff shall furnish labor, materials and all costs of operation and furnish all necessary work, including the harvesting of crops; (2) the plaintiff agrees to farm the premises in a good farmerlike manner and keep them clear of noxious weeds; (3) that in the event of the violation of any of the provisions of the contract by plaintiff, defendant, at its option, may have the right to perform any work necessary and charge the cost to the account of plaintiff, or defendant may terminate the agreement; (4) the title to the crops growing and to be grown shall remain in defendant and it shall have the right to sell said crops, and out of the proceeds of the vineyard and orchard crops pay plaintiff 50 per cent thereof; out of the proceeds of the cotton crop 80 per cent; and from the alfalfa or other field crops 60 per cent. Defendant is authorized thereby to deduct any monies advanced by it.

Plaintiff, in his complaint, alleges that after the execution of the agreement he entered upon the property, planted, cared for and commenced the production of crops; that growing on the 236 acres involved were 17 acres of grapes, 6 acres of nectarines, and 40 acres of alfalfa. Plaintiff claims to have planted 37 acres of tomatoes, 2½ acres of cucumbers, and about 97 acres of cotton. Defendant claims that by actual survey there were only 221.48 acres in the entire ranch; that less acreage was actually planted in comparison with that claimed by plaintiff; and claims particularly that there were only 27.81 acres of tomatoes set out.

The complaint further alleges that on June 17, 1943, contrary to the terms of the agreement, defendant took exclusive possession of all of the property except the portion planted to cotton, and wrongfully prevented plaintiff from entering thereon, from further caring for or bringing to maturity the crops growing thereon, and from further performing said agreement; that thereafter, defendant corporation negligently and wrongfully failed to properly irrigate and care for the tomatoes and cucumbers growing thereon and proximately caused the destruction thereof; that plaintiff, at all times, was an experienced farmer and specialized in growing and selling cucumbers, and until the breach of the agreement by defendant he carried on all of the farming operations provided for in the agreement in a good and farmerlike manner; that during such time all of the crops were in a healthy and thriving condition and that he kept and performed all of the covenants and agreements on his part to be performed until the defendant prevented further performance thereof; that, except for the breach of the agreement by defendant, plaintiff would have cared for and brought to maturity all of

the crops growing on the land; that as the proximate result of the breach of the agreement by defendant plaintiff was damaged; that the tomatoes would have been of the reasonable net market value of $22,200, and after deducting all expenses and after distributing to the defendant corporation its distributive share, plaintiff was thereby damaged in the sum of $13,320; that if plaintiff had not been wrongfully prevented from caring for and harvesting the cucumber crop, that acreage would have produced in the year 1943 cucumbers of the reasonable net market value of $2,000, and that after deducting defendant corporation's distributive share, he was thereby damaged in the sum of $1,200; that as a result of the loss of the grape crop his distributive share would have been $1,860; that by reason of the loss of the crop of nectarines he was damaged in the net sum of $1,346.25; that in the loss of the alfalfa crop, his net damage would have been $1,320. The total amount prayed for was $19,046.25.

Defendant corporation, by way of answer, denies generally the allegations of the complaint, admits that plaintiff planted 2½ acres of cucumbers and 30 acres of tomatoes, and alleges generally that the plaintiff was not farming the premises in a good and farmerlike manner and was not controlling or keeping them free from grasses and other noxious weeds; that on June 17, 1943, defendant corporation decided to take over certain portions of the crops under the provisions of the contract and to do the work which it believed to be necessary to their preservation; that it did so over plaintiff's objections; that it employed plaintiff's foreman and continued to care for a portion of the crops for approximately three weeks; that plaintiff came on the ranch every day but performed no work except caring for the cotton; that at the end of three weeks defendant requested plaintiff to resume the farming of the entire premises but that plaintiff refused to do so and that he thereby abandoned all the crops except a part of the cotton which he later harvested and sold; that thereafter defendant continued with and completed the farming and harvesting of all the crops except the tomatoes which defendant believed to be in such a condition that production of a profitable crop was impossible. The cotton crop was harvested by plaintiff.

By way of cross-complaint defendant corporation claimed that it had been damaged in the sum of $14,969.06 for failure of plaintiff to fully comply with the terms of the agreement and for monies advanced to and for the benefit of plaintiff.

After trial the jury returned a verdict in plaintiff's favor in the net sum of $9,000 by way of damages.

It is defendant's position upon this appeal that under the circumstances disclosed by the evidence the amount of the verdict was so outrageous and unconscionable as to suggest at first blush that the verdict was a result of passion and prejudice; that the measure of damages to which plaintiff's evidence was directed was not the proper measure of damages; that the verdict allowed to plaintiff a profit upon the abandoned tomatoes out of all reasonable proportion to the profit he could have made if the contract had been performed on both sides; that in any event, plaintiff was under a duty to minimize his loss, if any, and that he refused to do so when the opportunity was afforded to him by defendant; that the amount of the verdict was the result of errors at law committed by the trial court in the admission of evidence and instructions to the jury; and that there was prejudicial misconduct on the part of plaintiff's counsel.

Defendant concedes that there was a sharp conflict in the evidence as to which party breached the contract; whether plaintiff farmed the premises in a good and farmerlike manner; whether the crops were choked with noxious grasses; whether the cucumber crop was entirely lost because of improper care; and whether the tomatoes were so neglected that it was impossible to produce a crop that could be marketed at a profit. It is further conceded that on these issues the jury resolved the conflict in favor of plaintiff. The evidence on the question whether the defendant forcibly excluded plaintiff and forcibly prevented him from harvesting the crops is likewise in dispute.

There is evidence that on June 17, 1943, Mr. Cooper suddenly made demands on plaintiff that he turn over the place to him, with the exception of the cotton land.

Plaintiff testified that Cooper said "* * * that he (Cooper) was taking the place over"; that "I (Eubanks) didn't have any right in there any more, for me to get out * * * that I told him he didn't

have to do that, that he could buy me out; otherwise, he would have to take it over my dead body"; that "I (had) taken my gun out that morning and I told him he wasn't taking over"; that Cooper said "I can't say anything, you got a gun"; that he, Eubanks, went to see his lawyer, returned and informed Cooper "that we would settle that in court". He then testified that three weeks after Cooper took over the property Cooper asked plaintiff to take the land back because "he had too much to do"; that he didn't know anything about farming himself "* * * couldn't handle it", and that "he (Cooper) had ruined the tomatoes and cucumbers" and let the grass grow over all the place; that Cooper expected plaintiff to bring back the crops to where they were, because it would cost him $1,500 to clean out the grass; that Cooper, as a condition to taking back the property, wanted to put a younger man in charge of the alfalfa, vines and fruit trees; that Cooper refused to advance any more money in the care of the tomatoes.

[1] Cooper denied this conversation. There is evidence, if believed by the jury, in opposition to defendant's claim that plaintiff was obligated to take over the crops in order to minimize the damages, that the offer to return the property was conditional, and exacted the expenditure of a substantial sum of money by plaintiff not contemplated by the agreement, and also that the offer was made at a time too late to effect a recovery of the crops for lack of cultivation and water, and as a result of defendant's neglect. Under these circumstances, the rule as to minimization of damages is not applicable.

In Valencia v. Shell Oil Co., 23 Cal.2d 840, 147 P.2d 558, 561, it is said:

"The duty to minimize damages does not require an injured person to do what is unreasonable or impracticable, and, consequently, when expenditures are necessary for minimization of damages, the duty does not run to a person who is financially unable to make such expenditures. * * * The essence of the rule denying recovery for losses which could have been prevented by the reasonable efforts and expenditures of plaintiff is that his conduct rather than that of defendants proximately caused such losses."

In Sobelman v. Maier, 203 Cal. 1, 262 P. 1087, 1090, it is said (quoting from Fountain v. Semi-Tropic Land & Water Co., 99 Cal. 677, 34 P. 497):

"If, however, the breach be of a covenant, the nonperformance of which will render it impossible for the other party to perform, or will frustrate the whole purpose of the contract on his part, * * * he may decline to proceed in performance and sue for damages, in which case he may recover all loss occasioned by the breach —including profits he would have made if the contract had been performed." Sutherland on Damages, Vol. 1, p. 113 (1st ed.) announces the same rule. See, also, Holt Mfg. Co. v. Thornton, 136 Cal. 232, 235, 68 P. 708.

[2] We are well aware that there is substantial evidence contrary to plaintiff's testimony. When reviewing the evidence in support of a verdict, an appellate court must accept as correct all substantial evidence tending to uphold the verdict and must consider the evidence in the aspect most favorable to the prevailing party; when the evidence is conflicting the court will presume that the evidence in support of the verdict is true. De la Motte v. Rucker, 55 Cal.App.2d 226, 130 P.2d 444.

Plaintiff's instructions on the measure of damages were proper under sec. 3300 of the Civil Code. Cederberg v. Robison, 100 Cal. 93, 34 P. 625; Paul v. Williams, 64 Cal. App.2d 696, 149 P.2d 284; Shoemaker v. Acker, 116 Cal. 239, 244, 48 P. 62.

[3] Defendant's main complaint concerning plaintiff's instructions is that they should have also covered the question of the claimed duty of plaintiff to minimize his damages. Defendant offered no instruction on this subject. Where a general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, the injured party may complain on appeal only in case he requests that the charge be made more specific or asks for other qualifying instructions, and his request is denied. Western States Gas & Electric Co. v. Bayside Lumber Co., 182 Cal. 140, 187 P. 735; Bloomberg v. Laventhal, 179 Cal. 616, 178 P. 496; 24 Cal.Jur. 796, sec. 74; McFate v. Zuckerman, 130 Cal.App. 172, 19 P.2d 532.

[4] In addition thereto, it may be said that many of the instructions offered by defendant in support of its cross-complaint and given by the court were basically identical with plaintiff's challenged instructions. Under the elementary rule of law, defendant should be estopped from now claiming that plaintiff's instructions on that

subject were erroneous. Collins v. Graves, 17 Cal.App.2d 288, 61 P.2d 1198.

[5, 6] Plaintiff testified fully on the question of claimed damages. After reciting in detail his several years of experience as a tomato grower and general farm worker, as well as his familiarity with the west coast market in the sale of the several products involved, he testified that if defendant had permitted him to carry out the contract and complete the harvesting of the respective crops, the net profits to him on the tomatoes would have been $16,914; cucumbers $862.50; grapes $1,903.71; nectarines $139.05; alfalfa hay $1,744.64; making a total of $21,563.90, and that after deducting the amount he owed for advancements made by defendant in the sum of $2,025.02, there was a total amount due him by way of damages in the sum of $19,538.88. This estimate of damage was predicated on the number of plants per acre planted, the average market value, tonnage per acre, and the prevailing market price in San Francisco, San Diego and local markets. Plaintiff testified that he was thoroughly familiar with the particular market price of the various products in 1943, at the time in question, and that the price he figured was based upon his knowledge of that market.

Defendant produced several witnesses who, in effect, testified that it was impossible to produce the amount of tonnage of crops on the acreage specified, that there was no market for tomatoes at the time in question or, if so, the market value of these particular crops at the time here suggested was of such a small amount that it would be impossible for the plaintiff to produce the volume of crops testified to by him, or to obtain the amount of claimed revenue therefrom, and that therefore plaintiff suffered no damages or, if any, such damages were only nominal.

Defendant concedes that the tomato and cucumber crops were a net loss, but argues that there was only due to plaintiff from the grape crop, nectarines and alfalfa the sum of $1,915.66, and that its total advancements exceeded that amount, which would leave a balance in defendant's favor. It is also contended that in addition thereto defendant should be allowed damages for failure of plaintiff to carry out the contract. These issues were resolved against the defendant by the jury. It was fully instructed on those issues. It was told that such damages allowable, if any, must be over and above any monies advanced by defendant for the benefit of plaintiff and that the damages awarded must be for the net loss to plaintiff.

In support of the argument that the verdict is excessive, counsel for defendant have pointed out several cases wherein the gross value of the loss of 45 acres of tomatoes was fixed at $2,489.87, Shimbori v. Coelho, 18 Cal.App.2d 641, 64 P.2d 479; and Paul v. Williams, supra, where the partial loss of 40 acres of tomatoes was found to be $2,054.50. The cited cases are factually different and do not necessarily establish a gauge which must prevail as against the facts in the instant case. 8 Cal.Jur. 838, sec. 91. It is true that there is very little, if any, corroborating evidence supporting plaintiff's testimony as to the prospective net yield of the crops or of the market value thereof. However, plaintiff's testimony was full and complete on the subject. The testimony of defendant's witnesses, in this respect, from the record, appeared to us to be more convincing, of greater weight, and possessed of much more corroboration than that of plaintiff's. However, this is not the test to be applied by an appellate court to justify a reversal of the implied finding of the jury. The trial court, as a thirteenth juror, considered all of these questions on a motion for new trial, as well as the excessiveness of the verdict. That is the proper forum in which to first press that issue and the trial judge, guided by different rules, should there be governed by the facts, weight of the evidence, the justice of the case, and allow only such damages as are commensurate therewith, notwithstanding the verdict of the jury. Appellate courts are prone to uphold the discretion thus reposed in trial judges in so doing. The amount of the award was over $10,000 less than the damages testified to by plaintiff, after deducting the amount advanced by defendant. The amount of the verdict was within the evidentiary limits and the trial court approved that amount on a motion for new trial. While we are firmly convinced that the evidence would have fully supported an order of the trial court granting a new trial on the issue of damages, it cannot be said, as a matter of law, that the verdict of the jury was purely the result of passion and prejudice such as to permit this court to order a new trial based upon that ground. Scott v. Times-Mirror Co., 181 Cal. 345, 366, 184 P. 672,

12 A.L.R. 1007; Swain v. Fourteenth St. R. R. Co., 93 Cal. 179, 28 P. 829; Hickey v. Coschina, 133 Cal. 81, 65 P. 313; Wilson v. Fitch, 41 Cal. 363, 386.

[7] The question of the qualification of plaintiff to testify as to the reasonable market value of the crops in issue was a matter within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown. The decision of the trial court upon the qualification of the witness to testify on that question is like any other question of fact to be determined by the trial court and will be reversed only where there is an actual want of substantial evidence to support it. Johnson v. Western Air Express Corporation, 45 Cal. App.2d 614, 114 P.2d 688; Valdez v. Percy, 35 Cal.App.2d 485, 96 P.2d 142; People v. Jones, 67 Cal.App.2d 531, 155 P.2d 71.

[8, 9] Defendant's claim of misconduct on the part of counsel for plaintiff is predicated mainly upon the fact that counsel for plaintiff endeavored to show that defendant company was the owner of other extensive ranch holdings, and secondly that from 1936 on he had put off every man on the land here involved that had gone upon it. Objection was made to a question touching upon this last complaint. The court sustained the objection and instructed the jury to disregard the question. It will be presumed that the court's instruction to the jury to disregard the question was followed and that no prejudice resulted. Ades v. Brush, 66 Cal.App.2d 436, 152 P.2d 519; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 607, 111 P.2d 346. The fact that the defendant was the owner of other extensive ranch holdings came before the jury in connection with the activities of Mr. Cooper's own experience in farming and in proof of his several accounts offered in evidence, as well as for other material purposes. It will not be presumed that the jury was influenced by the size of defendant's other holdings or that any prejudice was engendered by reason of defendant's extensive operations. While the jurors may have entertained such a thought in their own minds in rendering the verdict, it is difficult for us to say, as a matter of fact or law, that they were so influenced.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

68 Cal.App.2d 421

HOFFMAN v. ANDREWS et al.

Civ. 14658.

District Court of Appeal, Second District, Division 1, California.

March 15, 1945.

Hearing Denied May 10, 1945.

Workmen's compensation ⇐1787

Where Industrial Accident Commission had held plaintiff and defendants jointly and severally liable as employers for injuries to employee, the superior court had power to issue order, pendente lite, enjoining defendants from taking any action to relieve themselves of liability for satisfaction of the judgment of the Industrial Accident Commission and to fasten judgment on plaintiff alone. St.1937, p. 302, § 5808; Const. art. 20, § 21.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Isadore M. Hoffman against Willedd Andrews and others to enjoin defendants from proceeding with any other levy or execution against plaintiff for the satisfaction of a judgment or claim of Andy McGehean. From an order, pendente lite, enjoining defendants from proceeding with execution, the defendants appeal.

Affirmed.

Willedd Andrews, of Los Angeles, for appellants.

Joseph Friedman, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal from an order enjoining and restraining defendants from "proceeding with the execution, and from proceeding with any other levy or executions against plaintiff for the satisfaction of the judgment or claims of Andy McGehean against Isadore M. Hoffman," who is respondent in the within appeal.

In a proceeding before the Industrial Accident Commission, in due form, the plaintiff herein and the defendants herein were held jointly and severally liable as employers for injuries suffered by Andy McGehean, in whose favor the award of the commission was made.

The action herein is one in equity in which plaintiff alleges in substance that de-

fendants falsely and fraudulently conspired to relieve themselves of liability for the satisfaction of the judgment of the Industrial Accident Commission and fasten the same upon plaintiff, alone. The merits of that action are not involved herein. Plaintiff, however, obtained an order, pendente lite, enjoining defendants from taking any action to satisfy the judgment of the Industrial Accident Commission, and it is from such order that defendants seek to be relieved by the within appeal.

It is contended by appellants "that the Superior Court of the State of California is without power to take any action upon a Writ of Execution based on a Commission award of the Industrial Accident Commission of the State of California, as the Superior Court of the State of California is not mentioned in the Workmen's Compensation Law as one of the courts having jurisdiction to review or interfere with the awards of the Industrial Accident Commission, their execution or enforcement.

"The appellants further claim that an execution upon a judgment of the Superior Court based upon an award of the Industrial Accident Commission may be stayed, quashed or recalled only by an order of the Industrial Accident Commission pursuant to the California State Labor Code, Section 5808, St.1937, p. 302, the Court of Appeals of the State of California and the Supreme Court of the State of California, and appellants claim and vigorously assert that the Superior Court of the State of California does not have jurisdiction to stay, quash or recall such Writ of Execution."

It should be noted at the outset that the Industrial Accident Commission is not a party to the action; no attack is made on the award; the Commission is a total stranger to the action. Section 5808 of the California State Labor Code, relied on by appellant, is entirely foreign to an action in equity in the Superior Court, hence any reference to the provisions of said section is beside the issue. There is nothing in the Labor Code that, in any way or to any extent, purports to divest the Superior Court of its equity jurisdiction. Nor indeed do the provisions of Sec. 21 of Article XX of the Constitution authorize such legislation. The validity of an action in equity such as the one here considered, in effect, has been upheld. Gamble v. Superior Court, 39 Cal. App. 661, 179 P. 717.

That the Superior Court had power to issue the order complained of, there can be no question.

For the foregoing reasons the order appealed from is affirmed.

YORK, P. J., and WHITE, J., concur.



68 Cal.App.2d 407

BOERICKE et al. v. WEISE et al.

Civ. 12689.

District Court of Appeal, First District, Division 1, California.

March 15, 1945.

Rehearing Denied April 14, 1945.

Hearing Denied May 10, 1945.

1. Corporations ⇐283(3)

The statute empowering superior court to determine validity of corporate director's election was enacted to provide summary method for testing director's title without recourse to quo warranto. Civ.Code, § 315.

2. Corporations ⇐283(3)

Statutory action to determine validity of corporate director's election is equitable in nature and court will administer complete relief in order to prevent multiplicity of actions. Civ.Code, § 315.

3. Corporations ⇐283(3)

The statute authorizing judicial determination of validity of corporate director's election may be invoked by shareholder who seeks to uphold election as well as one who challenges it. Civ.Code, § 315.

4. Corporations ⇐194

Since repeal or amendment of certain bylaws at directors' meeting did not affect provision authorizing president to direct any person to serve notices of stockholders' meeting in case of secretary's inability to act, notices were valid, though sent out by president's secretary rather than corporation's assistant secretary-treasurer.

5. Corporations ⇐194

Notices, though reciting that stockholders' meeting was called by "directors", substantially complied with bylaws requiring

call at request of holders of one-third of stock, where meeting was called by corporation's president with approval of two other directors who owned together almost 49.9 per cent of stock. Civ.Code, §§ 312, 314.

6. Corporations ⇐194

Substantial compliance with mode of calling stockholders' meetings prescribed by statutes or bylaws is sufficient. Civ.Code, §§ 312, 314.

7. Corporations ⇐54

Refusal of stockholders at special meeting to ratify amendment of bylaws by directors had effect of repealing amended bylaws. Civ.Code, § 301.

8. Corporations ⇐54, 56

Bylaws adopted by directors are subject to alteration or repeal by shareholders. Civ. Code, § 301.

9. Corporations ⇐298(5)

A directors' meeting was invalid where less than a quorum was present after disregarding presence of former directors not included on new board previously elected at valid meeting of stockholders.

10. Appeal and error ⇐1008(1)

In action to determine validity of stockholders' meeting, whether plaintiff stockholders who had acquiesced temporarily in decisions of subsequent directors' meeting were estopped to challenge validity of directors' meeting was question of fact for trial court. Civ.Code, § 315.

11. Corporations ⇐201

In action to determine validity of stockholders' meeting, evidence supported findings that plaintiff stockholders were not estopped to challenge validity of subsequent directors' meeting. Civ.Code, § 315.

12. Estoppel ⇐54

Where all parties to transaction are laboring under mutual mistake of law, acts in reliance thereon do not as matter of law create an estoppel.

13. Equity ⇐65(1)

In statutory action to determine validity of corporate directors' election, clean hands doctrine applies. Civ.Code, § 315.

14. Equity ⇐65(1)

In statutory action to determine validity of corporate directors' election, whether plaintiff stockholders were barred by clean hands doctrine is primarily a question of fact. Civ.Code, § 315.

15. Equity ⇐65(2)

A party coming into court of equity with unclean hands relating to transaction before the court will be denied relief.

16. Equity ⇐65(2)

To warrant denial of relief under clean hands doctrine, unclean hands must relate to transaction before the court, which cannot proceed to try parties' general morals.

17. Equity ⇐65(2)

In action to determine validity of corporate directors' election, clean hands doctrine did not bar relief on theory that plaintiff stockholders' purpose was to oust defendants from the business and to breach a voting trust agreement, since those matters did not relate to primary question concerning validity of stockholders' meeting. Civ.Code, § 315.

18. Appeal and error ⇐843(2)

Issue as to validity of a voting trust agreement by stockholders, to be irrevocable for one year, was not moot merely because the year had elapsed, since agreement, if valid, constituted a contract and trustee might have action for breach thereof.

19. Corporations ⇐198

A voting trust agreement to be irrevocable for one year, empowering trustee to demand indorsement of stock certificates to be held in trust, was not invalid merely because not consummated by delivery of stock to trustee.

20. Equity ⇐65(2)

Where parties to action to determine validity of corporate directors' election were also parties to a voting trust agreement, they would all be barred from securing affirmative relief in connection therewith if agreement were for an illegal purpose.

21. Appeal and error ⇐1172(1)

So much of a judgment as invalidated a voting trust agreement because not submitted to Corporation Commissioner, whose approval is not expressly required by Corporate Securities Act nor by statute permitting voting trusts, would be reversed where respondents offered no argument in support thereof. Civ.Code, § 321a; St.1917, p. 673, as amended.

Appeal from Superior Court, City and County of San Fancisco; Theresa Meikle, Judge.

Action by Arthur T. Boericke and others against J. Harold Weise, Gillette Lane, and others, to determine the validity of a stockholders' meeting and for other relief, wherein the named defendants filed a cross-complaint to enforce a voting trust agreement. From a judgment for plaintiffs, the named defendants appeal.

Affirmed in part and reversed in part.

Emil G. Buehrer, of San Francisco, for appellants.

George H. Hauerken and Alden Ames, both of San Francisco, for respondents.

PETERS, Presiding Justice.

Arthur T. Boericke, Charles C. Boericke, W. M. Breckenfeld and L. G. Gelinas, stockholders owning 212 of the 405 outstanding shares of Boericke & Runyon Company, brought this action under section 315 of the Civil Code against the corporation, J. Harold Weise, Gillette Lane and Margaret Burns, who own between them 51 shares of the corporate stock, to have determined the validity of an election of the board of directors at a stockholders' meeting of May 11, 1943. Margaret Burns, who owns 45 shares of the corporate stock, subsequently joined with plaintiffs, and the corporation put in but a pro forma appearance. The real and only defendants are Weise and Lane, who own but 6 shares of stock between them. The prayer of the complaint is that the court decree that the stockholders' meeting of May 11, 1943, was valid, and that the board then elected was validly elected; that a directors' meeting of August 14, 1943, was void; that Weise is a director of the company but not president; and that Lane is not a director, secretary, nor general manager.

The answer of Lane and Weise challenges the validity of the stockholders' meeting of May 11, 1943, and alleges such meeting was void and that the board of directors then elected was improperly elected. The result, so it is alleged, is that the proper board of directors was the board elected prior to May 11, 1943, so that the meeting of this old board on August 14, 1943, was a proper meeting. It is also alleged that, regardless of the validity of the May 11, 1943, meeting, the plaintiffs have recognized and acknowledged the old board and are estopped to challenge its actions. It is also alleged that under date of July 30, 1943, some of the plaintiffs joined in a so-called voting trust agreement, and by cross complaint defendants seek to have this voting trust enforced. By the prayer to their pleading defendants asked the court to dismiss the action, and sought a decree determining that the meeting of May 11, 1943, was void; that the meeting of directors of August 14, 1943, was a valid meeting; that the voting trust was valid and binding, and that until July 30, 1944, Weise could vote the stock of all signatories to that agreement.

The trial court found the facts substantially as they are alleged in the complaint, holding that the stockholders' meeting of May 11, 1943, was duly and regularly called and held, and that a new board of directors was then validly elected; that the meeting of the old board of directors on August 14, 1943, was not duly called and held, and the persons then present were not the members of the board of directors of the company; that the voting trust was void and illegal. Judgment was entered accordingly, and from this judgment defendants Weise and Lane appeal.

[1, 2] This action was brought under section 315 of the Civil Code. That section provides that: "Upon the filing of an action therefor by any shareholder, the superior court shall have the power to try and determine the validity of any election or appointment of any director of any domestic corporation. * * * The court may determine the person entitled to such office or may order a new election to be held or appointment to be made, and direct such other relief as may be just and proper." The section goes on to provide that upon filing the complaint the court shall fix a day for hearing which shall be within five days, unless for good cause a later day is fixed. This section has been in our law for many years. It was enacted in order that courts might have power to proceed in a summary manner to test the title of directors to office without recourse to the slow and cumbersome proceeding of quo warranto. Ballentine and Sterling, Jr., California Corporation Laws, 1938 Ed., p. 107, § 99. The remedy provided by the section is inherently equitable in nature. DeGarmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1. The action being equitable, the court will administer complete relief and adjust the case in all of its

branches in order to prevent multiplicity of actions. Whitehead v. Sweet, 126 Cal. 67, 58 P. 376.

[3] The first contention of appellants is that under the section the trial court has no power to pass upon the validity of an election at the suit of one seeking to uphold the election; that its power can only be invoked by one who challenges the validity of an election. The contention is without merit. Section 315 is a remedial statute. It obviously was intended to confer upon the superior court the power to determine in a summary proceeding whether or not a particular director or the entire board was or was not properly elected or appointed in order that the corporation can properly function. To hold that the section only confers power to hear cases where a stockholder challenges an election, but cannot hear an action where a stockholder desires to uphold a challenged election, would be to so limit the section as to partially defeat its obvious purpose. There is nothing in the wording of the section to support appellants' position and no case is cited by them to support this contention. A reading of the section, and a consideration of its obvious purpose, demonstrates that the section is not so limited. It confers complete power to pass upon the "validity" of an election, and that means at the request of one who is seeking to uphold the election as well as one who is contesting it.

The facts giving rise to the present controversy are as follows: Boericke & Runyon Company was incorporated in California many years ago to manufacture and sell drugs. Its founder was Dr. William Boericke, now deceased. Upon his death approximately three-fourths of the stock of the company descended to his sons, respondents Dr. Charles C. and Arthur T. Boericke, and to Dr. Garth W. and W. Fay Boericke. Dr. Charles claims to have the proxy of Dr. Garth, who resides in the east and who owns 68 shares, but otherwise Dr. Garth is not a party to this action. Fay likewise is not a party, being in business in the Philippines and having been interned by the Japanese during all periods here involved. The remainder of the stock is held by employees and retired employees.

For many years prior to the dates here involved respondent Arthur Boericke had been president and general manager of Boericke & Runyon Company, and appellant Weise had been the legal adviser to the company and to several of the members of the Boericke family. Appellant Lane, for some time prior to the dates here involved, was the president and general manager of the Eopa Company, a wholly owned subsidiary of Boericke & Runyon Company.

The minutes of a board of directors' meeting of April 15, 1943, state that in April of 1943 Boericke & Runyon Company, then still under the management of Arthur Boericke, was suffering substantial losses. The same minutes disclose that the subsidiary, the Eopa Company, under the management of Lane, was producing substantial profits. At this meeting Lane, who had just purchased five shares of the company's stock, was elected to the board of directors. Sometime after this meeting, and prior to April 24, 1943, Lane worked out a proposed plan of operation for the Boericke & Runyon Company. This plan was submitted to a special meeting of the board of directors originally called for April 22, 1943. At that time the meeting was adjourned, there not being a quorum present, and the adjourned meeting was held on April 24, 1943. Directors Lane and Weise were present, as were directors Burns and Breckenfeld. Directors Charles and Arthur Boericke were absent. These six then constituted the board of directors. Lane's plan, which called for drastically limiting the powers of Arthur Boericke as president and general manager, by requiring most of his acts to be countersigned by the secretary-treasurer or assistant secretary-treasurer, was considered. The then treasurer was Breckenfeld, age 78, and the proposed plan contemplated the appointment by him of an assistant. The plan required the amendment of the bylaws of the company, and the minutes of this meeting show that the bylaws were then amended. The secretary-treasurer Breckenfeld immediately appointed Lane as assistant secretary-treasurer. Charles Boericke, although not present, signed the minutes of this meeting. However, neither he nor Arthur was satisfied with the Lane plan. On April 25, 1943, the very next day after the meeting, Dr. Charles wrote to Weise expressing his and Arthur's displeasure. In this letter he stated that he wanted Weise to act as a moderator between Arthur and Lane, and to work out some modified plan whereby Arthur could still retain a position of importance in the company. He stated that he wanted a modification of the resolutions approving Lane's proposed plan and that he had the power, through the

stock he owned or controlled, to accomplish this by calling a stockholders' meeting and electing a new board, and stating he intended to do this unless a plan could be worked out giving Arthur some control over the company.

[4] No acceptable counterplan was suggested. On April 27th Arthur, with the consent of Dr. Charles, decided to call a stockholders' meeting to elect a new board of directors. Arthur, who was president, general manager, director and a substantial stockholder, requested the secretary, Breckenfeld, to call a meeting of the stockholders. Breckenfeld was ill and unable to send out such notices. Purporting to act under Art. IX, Par. 5, of the bylaws of the company, Arthur appointed his secretary Jeanne Hodges to send out the notices to all stockholders calling a meeting for May 11, 1943, for the purpose of electing a new board of directors. Breckenfeld agreed with Arthur that Jeanne Hodges was a proper person to send out the notices. It is this meeting, held on that day and at which a new board was elected, that appellants challenge as invalid, and which respondents contend and the trial court found was valid. The main ground of attack is that Arthur had no legal right to appoint Jeanne Hodges to send out the notices, but should have notified Lane as assistant secretary-treasurer to perform these duties. The point is without merit. Art. IX, Par. 5, of the bylaws of the company expressly required the secretary of the company to send out all notices, but, if he was unable to act, then it is provided that "such notices may be served by any person thereunto directed by the President." This paragraph of the bylaws was not one of those expressly repealed or amended at the meeting of April 24, 1943. The amended bylaws consolidated the positions of secretary and treasurer, with the new consolidated officer having the duties and functions originally conferred on the secretary and treasurer. The amended bylaws also created the new position of assistant secretary-treasurer to be appointed by the secretary with the full duties and powers of the secretary. According to Lane's plan of reorganization, it was contemplated that this officer would be a check on Arthur as president and general manager. The amended bylaws, in the section consolidating the secretary-treasurer position, contains a provision that "any other provisions of the bylaws of this Corporation in conflict therewith are hereby rescinded." That provision obviously refers to the provisions of the old bylaws setting up the two separate offices of secretary and treasurer. There is no comparable provision in the amended bylaws where such amendments refer to the duties of the assistant secretary-treasurer. All that appears there is the provision that "Section 2 of Article IX of the original bylaws of this Corporation is hereby repealed and rescinded." Section 2 of Art. IX is the section giving the president the right to perform certain acts without first securing the consent of anyone. Art. IX, Par. 5, of the bylaws conferring upon the president the power to appoint any person to serve the notices calling a stockholders' meeting if the secretary could not act, was not repealed. This being so, when Arthur as president asked Breckenfeld to send out the notices and was informed that he was physically unable to do so, Arthur then, under the old and amended bylaws, had an alternative as to who should send out the notices. Under the amended bylaws he could have selected the assistant secretary-treasurer, but under the old bylaws, he could direct "any person" to send out the notices. The notices if sent out by either method would have been valid. These notices sent out by Jeanne Hodges were therefore valid notices.

[5, 6] Appellants also attack the notices of the meeting because it is recited therein that the special meeting of the stockholders "is called by the Directors." Actually the board had not formally called the meeting, but it was called by Arthur Boericke as president, after consultation with his brother Dr. Charles, and with full approval of director Breckenfeld. Thus three of the directors who owned a total of 202 shares of the 405 outstanding acquiesced in the calling of the meeting. Article IV, Par. 1, of the bylaws requires the directors to call special meetings of the stockholders at the request of stockholders holding one-third of the capital stock. The notices were specific as to the time, place and purpose of the meeting, and complied with sections 312 and 314 of the Civil Code. All the stockholders received seasonable and actual notice of the meeting. It is obvious, therefore, that these notices substantially complied with the requirements of the bylaws relating to the calling of stockholders' meetings. Substantial compliance with the prescribed mode is all that is required. Fletcher, Cyclopedia of Corporations, Perm. Ed., Vol. 5, p. 12, § 1998. It follows that the no-

tices of the meeting and the meeting held pursuant thereto were valid.

[7, 8] The meeting was held on May 11th as noticed. Arthur owning 79 shares, Dr. Charles owning 73 shares, Margaret Burns owning 45 shares and Jeanne Hodges owning 5 shares were present in person, and, in addition, Dr. Charles had the proxy of Dr. Garth Boericke to vote his 68 shares. Thus a total of 270 out of the total 405 shares were present. Neither Weise nor Lane was present, although both had received actual and seasonable notice of the meeting. The minutes of this meeting recite that the stockholders refused to ratify the action of the board of directors in amending the bylaws at the April meeting. The amended bylaws were thus repealed. Bylaws adopted by directors are always subject to alteration or repeal by the shareholders. Civ.Code, § 301; California Corporation Laws, 1938 Ed., by Ballentine and Sterling, Jr., p. 80, § 71. The stockholders, by appropriate action, then amended the bylaws by reducing the board of directors from 6 to 5, and then elected a new board. The minutes recite that Lane "had verbally declined to serve on the Board, preferring to devote his full time to the best interests of The Eopa Company," and it is also recited that director Miss Burns had severed her connections with the company. The new board then elected consisted of Arthur and Charles Boericke, Weise, Breckenfeld and Jeanne Hodges. The new board met immediately, accepted Breckenfeld's resignation as secretary, elected Arthur president, Dr. Charles as vice-president and secretary-treasurer, and Jeanne Hodges as assistant secretary-treasurer. As a result of these actions Arthur was restored to his former position, and Lane's connection with the company was largely severed.

Thereafter, and until August of 1943, appellant Weise participated in the company's affairs and attended meetings of the new board of dierctors. It was not until August 14th that he first contended that the notices for the meeting of May 11, 1943, were invalid. The evidence shows that between May and August all the parties concerned were discussing ways and means by which the company could be put on a paying basis. On July 21, 1943, Dr. Charles wrote to Lane that Dr. Garth Boericke intended to come out from Philadelphia to discuss the problem, and asking Lane what he would do if placed in complete charge, and asking if Arthur could be fitted into Lane's plans.

The next major step taken by the parties hereto was the execution of a voting trust dated July 30, 1943, but not fully signed until August 14th. The agreement was signed by Breckenfeld, Burns, Gelinas, Lane, Garth and Charles Boericke. Arthur did not sign. By this agreement Weise was named trustee. The trust was to be irrevocable for a period of one year, and provided that during that year the trustee could vote the stock of the signatories, and that the trustee was empowered during that period to demand of the signatories their certificates of stock endorsed in blank to be held by him in trust.

Sometime between July 30th and August 10th Weise testified he had lunch with Dr. Garth and Arthur. The losses of the company were discussed, and the possibility of Arthur resigning as president and general manager and becoming a salesman was suggested. Under date of August 10, 1943, Arthur addressed a letter to the board of directors discussing the losses of the company and stating that he thought the company could be put on its feet within a year, and offering, if the stockholders thought this period too long and so desired, to resign.

On August 13, 1943, Weise and Breckenfeld as directors decided to call a special meeting of the board of directors for the next day. Weise was then of the opinion that the election of the new board on May 11, 1943, was invalid, and so he caused the notices for this meeting to be served on the members of the board of directors as such membership existed prior to May 11th. This meant that no notice was served on director Jeanne Hodges, and notices were served on Margaret Burns and Lane who were no longer directors if the election of May 11th was valid. Neither Dr. Charles nor Arthur was present. They were out of the city and had no actual notice of the proposed meeting. Notices, however, were apparently left at their offices after 5 o'clock on the afternoon of August 13th.

The old board met on August 14, 1943, Margaret Burns, Breckenfeld, Weise and Lane being present. Inasmuch as Burns and Lane were not directors, since the election of May 11th was valid, it is apparent that only two directors—Weise and Breckenfeld—were present, and the bylaws required three to constitute a quorum.

At this meeting Weise formally informed the "old" board that in his opinion the election of the "new" board on May 11th was

invalid and that the "old" board was then the only proper board of directors. The old board then "accepted and adopted the legal opinion of Mr. Weise." The old board then considered Arthur's letter of August 10th, interpreted it as an offer to resign, and accepted such resignation. Weise was then elected president, Breckenfeld's offer to resign the position of secretary-treasurer was accepted, Lane elected to that position, and certain amendments to the bylaws were adopted. Lane was then employed as general manager for an indefinite period under a written contract providing for 50 per cent of the profits as his compensation. Weise was put on a retainer basis as attorney for the company.

[9] The trial court found that this meeting of August 14th was invalid. This finding necessarily follows from the finding that the meeting of May 11th was valid. If the May meeting was valid, the August meeting was obviously invalid.

After the meeting of August 14th Arthur and Charles acquiesced for a short period in what had there been done. They turned over control of the company to Lane. They testified that they so acquiesced because they had confidence in the attorney for the company, Weise, and when he represented that the meeting of May 11th was invalid they believed him. Arthur, laboring under the erroneous impression that the August meeting was valid, on August 20th posted a notice notifying the employees he had resigned as president and general manager, and stating that Weise was now president and Lane general manager. Lane took over the management of the company pursuant to his contract approved at the invalid August meeting. About a month thereafter Dr. Charles and Arthur became dissatisfied with the way Lane was operating. They went to Weise and asked him to represent them. He refused, they hired their present counsel, and this action was instituted.

It is apparent that the trial court's conclusions that the stockholders' meeting of May 11th was valid and the directors' meeting of August 14th invalid were correct under the facts and the law, unless for some reason respondents are estopped from challenging the validity of the August 14th meeting. Appellants pleaded and attempted to prove such an estoppel, but the trial court found against them on this issue. Appellants base their claim of estoppel on the evidence that the meeting of August 14th was held after respondents, with the exception of Arthur, had entered into a voting trust agreement which allowed Weise to vote their stock for one year. They also point out that discussions were had with Lane prior to August 14th looking toward his employment as general manager of the company. Emphasis is placed on the fact that on August 10th Arthur offered to resign. Their theory is that the August 14th meeting merely ratified plans already approved by everyone. Considerable reliance is placed by appellants on the fact that for a short period after the August meeting respondents acquiesced in what was there done.

[10-12] It is apparent that whether there was an estoppel was a question of fact. The trial court has found against appellants on this issue. Those findings are supported. Both Arthur and Dr. Charles testified that their acquiescence was based on the legal advice given the corporation by Weise that the May 11th meeting was invalid. The trial court so found. It is apparent that when everyone to a transaction is laboring under a mutual mistake of law, acts performed in reliance on such mutual mistake do not, as a matter of law, create an estoppel.

[13, 14] The appellants also urge that respondents do not come into court with clean hands, and for that reason should be denied relief. There can be no doubt that this proceeding is equitable in nature and that the "clean hands" doctrine is applicable. DeGarmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1. Whether plaintiffs are within the application of the maxim is primarily a question of fact. Pon v. Wittman, 147 Cal. 280, 81 P. 984, 2 L.R.A., N.S., 683.

It is appellants' thought that respondents did not come into court with clean hands because, so it is contended, they brought this action, not to establish the validity of the election, but to oust the defendants from the business, and to breach the voting trust agreement, all because, according to appellants, they refused to carry on some purportedly illegal business transactions.

[15, 16] The question as to whether there has been a breach of the voting trust agreement is not involved in this action. This is an action to determine primarily who are the directors entitled to control Boericke and Runyon Company. Although the validity of the voting trust may properly be passed upon in this proceeding, mat-

ters which relate solely and exclusively to the rights of the stockholders between themselves, or between themselves and third persons, are not involved. Of course if a party comes into a court of equity with unclean hands relating to the transaction before the court, he will be denied relief. But in determining that issue the trial court can properly consider only whether the moving party has clean or unclean hands in relation to the matters properly before the court. The trial of the issue relating to clean hands cannot be distorted into a proceeding to try the general morals of the parties. To warrant denial of relief the unclean hands must relate to the transaction before the court.

[17] In the present case the primary question was whether the May 11th meeting was valid. No question of clean hands at all is raised in reference to that issue. If the May 11th meeting was valid, the August 14, 1943, meeting was invalid. The facts now being discussed have no relation at all to those two issues. If the August 14th meeting was invalid, respondents owed a duty to themselves and to the other stockholders to have it determined whether the acts performed at that meeting were valid or invalid. It may be that Lane has a cause for complaint against Dr. Charles, or even Arthur, but his rights, if any, against them as individuals are not involved in this action. It is apparent, therefore, that there is nothing in the record to justify the contention that in relation to the issues before the court the respondents had unclean hands.

[18, 19] This leaves for consideration only the holding that the voting trust was invalid. The record shows that on December 22, 1943, the trial judge caused to be entered a minute order to the effect that judgment should be rendered in favor of respondents on the questions relating to the May and August meetings, but that judgment should be entered determining that the voting trust was valid. On January 6, 1944, the trial judge caused to be entered an amended minute order, correcting the prior one "nunc pro tunc." In this amended minute order the trial court directed that judgment be entered decreeing the voting trust to be invalid. By findings entered the next day the trial judge found that the voting trust had not been submitted to the corporation commissioner and that it was not in the best interests of the company. In her conclusions of law she found the voting trust to be invalid because (1) it was not submitted to the corporation commissioner; (2) because it was never consummated by delivery of the stock to the trustee and (3) the purpose of the voting trust was illegal. The judgment decreed the voting trust to be invalid.

The respondents have offered no argument in their briefs to support this portion of the judgment. They do contend the issue is moot because the year provided in the agreement has elapsed. This argument of respondents is without merit. The issue is by no means moot inasmuch as the agreement, if valid, constituted a contract and Weise may or may not have an action for breach of contract. DeGarmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1. The holding that the voting trust was not consummated because the stock was not delivered to the trustee does not determine that the voting trust was illegal. The voting trust was a contract. If valid, it became binding when it was executed. The delivery of the stock was to be a future act dependent upon demand by Weise. The evidence shows Weise made such a demand but respondents countered with notices of rescission. We do not pass on the issue whether the agreement was rescinded. The trial court made no findings on that issue and the evidence is not in condition for us to make such findings. The point is that the delivery or nondelivery of the stock is a false factor on the issue of the validity of the agreement.

[20] The finding that the voting trust was for an illegal purpose is totally unsupported by any evidence. Moreover, if it were for an illegal purpose both appellants and respondents were parties to such purpose and both would be barred from securing affirmative relief in connection therewith.

[21] This leaves for consideration only the finding that the voting trust was not approved by the state corporation commissioner. Appellants contend that the law contains no requirement for such approval. Respondents have not seen fit to even discuss the question in their brief, and when the point was called to counsel's attention on oral argument counsel offered no argument to support the conclusion and made no offer to brief the point. A reading of the voting trust discloses that it expressly provides that all stock pledged in the instrument should be withheld from sale and no

provision was made for the issuance of voting trust certificates, or any form of document that could be sold or hypothecated. Section 321a of the Civil Code permits voting trusts but is silent as to whether approval of the commissioner must be secured. A reading of the Corporate Securities Act, St.1917, p. 673, as amended discloses no express provision requiring approval of voting trust agreements of this kind.

In view of respondents' attitude in reference to this phase of the appeal, and inasmuch as they have offered no argument at all in support of this portion of the judgment, it may be assumed that this portion of the judgment has been abandoned. Certainly, it is not incumbent on this court to make an exhaustive research to support this portion of the judgment when counsel have not seen fit to argue the point at all.

The portion of the judgment determining that the voting trust was invalid (Par. 6) is reversed; the balance of the judgment is affirmed; both sides to bear their own costs on this appeal.

KNIGHT and WARD, JJ., concur.

26 Cal.2d 139

CHAMBERS v. DUVALL et al.
L. A. 18904.

Supreme Court of California.

March 13, 1945.

1. Taxation ⇐754

The section of the Political Code specifying certain facts to be included in deed to be given purchaser at a tax sale, rather than prescribing the form of tax deed as indicated by the former section, does not effect a change in substance of such section, but denotes, in view of the absence of a prescribed form, that substance rather than the form should be the criterion in determining the validity of such a deed. St. 1939, p. 1274, § 2; p. 1326, § 3480; Pol. Code, § 3785b.

2. Taxation ⇐758

Recital, in deed conveying to third person land sold to state for delinquent taxes, that "property was duly assessed for taxation" in specified year, was in compliance with statute requiring such deed to set forth "the year of sale to the state", since Legislature had in mind the year the property was duly assessed for taxation. St. 1939, p. 1326, § 3480.

3. Taxation ⇐762

Recital, in deed conveying to third person land sold to state for delinquent taxes, that all taxes levied and assessed against the property prior to the year of execution of deed have been paid and discharged, was in compliance with statute requiring that such deed set forth that the property had been redeemed. St.1939, p. 1326, § 3480.

4. Taxation ⇐816

In action to quiet title to land based on tax deed, where defendants alleged that deed was void on ground of various irregularities in sale proceedings and on ground of irregularities in recitals in deed, but no question of lack of notice or other element of due process affecting defendants' rights were involved nor rights of third parties had intervened, and defects were cured by validating statute, holding that deed was void was error. St.1943, p. 1993, § 2.

In Bank.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Lovell C. Chambers against James A. Duvall and others to quiet title to realty. From an adverse judgment, plaintiff appeals.

Reversed.

Prior opinion, 150 P.2d 535.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, amici curiae on behalf of appellant.

Herbert C. Kelly, of San Diego, for respondent.

SHENK, Justice.

The plaintiff brought an action to quiet title to real property based on a tax deed. The defendants alleged ownership in themselves. The trial court found that the tax deed was void on its face, and entered judgment for the defendants. The plaintiff appealed.

At the trial the plaintiff introduced the tax deed and rested. The defendants claimed the invalidity of the tax sale proceedings by reason of various asserted irregularities such as that the tax rate in the year involved produced more revenue than the budget requirement, resulting in an excessive rate; that the assessment roll and delinquent assessment roll failed to show the road district in which the land involved was located; that the amount stated in the delinquent list should have been reduced by the amount of the school tax and the penalties thereon; that the published delinquent list constituted a separate folded section and therefore a supplement to rather than an integral part of the newspaper; and that the tax deed was void on its face because not in compliance with the requirements of section 3480 of the Revenue and Taxation Code, St.1939, p. 1326. The trial court based its judgment on the last mentioned alleged irregularity.

Prior to the commencement of the action the plaintiff requested that a corrected deed be executed and delivered to him. His first request was denied on the ground that the deed received by him was in full compliance with the code requirements. He then commenced a proceeding for the writ of mandate to direct the issuance of a corrected deed. That proceeding was held in abeyance pending the outcome of

the present action. On August 29, 1944, after the trial court in the present action had rendered a judgment against the plaintiff and the District Court of Appeal had affirmed it (150 P.2d 535), the tax collector issued a corrected deed which is presented to this court on an application to take additional evidence pursuant to section 956a of the Code of Civil Procedure. It will be unnecessary to consider the application further in view of the determination herein on the principal question presented. That question is whether the trial court correctly held that the tax deed delivered to the plaintiff was incurably defective and therefore void.

Prior to the adoption of the Revenue and Taxation Code in 1939, Stats. 1939, ch. 154, section 3785 of the Political Code provided the form of deeds on the sale of delinquent property to the state and on a transfer by the state to a purchaser at a delinquent tax sale. The Revenue and Taxation Code does not prescribe the form of deeds, but does specify certain recitals of fact to be included in the deeds in addition to the usual provisions of an instrument conveying real property. After the adoption of the Revenue and Taxation Code, on the advice of the attorney general's office, county officials continued to use the forms prescribed by section 3785 of the Political Code.

The plaintiff's tax deed is dated July 29, 1941, and follows the old form. In addition to the usual provisions of a deed it recites that:

(a) The real property described was duly assessed for taxation in the year 1935;

(b) Jas. A. Duvall was the assessee;

(c) Thereafter and on July 29, 1941, the property was duly sold to L. C. Chambers for nonpayment of delinquent taxes legally levied in 1935 which were a lien upon the property;

(d) The total amount for which the property was sold was $8.87;

(e) All taxes levied and assessed against the property prior to 1941 have been paid and discharged.

Then follows a granting clause "in pursuance of the statute in such case made and provided."

Section 3480 of the Revenue and Taxation Code provides that the deed shall recite:

(a) The year of sale to the state;

(b) That, for the year of sale to the state, the property was duly assessed for taxation and the tax legally levied;

(c) The name of the assessee in the year of sale to the state;

(d) The name of the purchaser at the tax sale and the fact and date that the property was sold to him for nonpayment of delinquent taxes which were a lien on the property;

(e) The amount for which the property was sold to the purchaser;

(f) That the property has been redeemed;

(g) That the property is conveyed to the purchaser according to law.

The defendants' contention was and is that the deed to the plaintiff did not contain the first specification of section 3480, namely, "(a) The year of sale to the State."

When the Legislature adopted the Revenue and Taxation Code in 1939 it also provided in section 2 that "The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments."

[1-3] The requirements for recitals in the deed specified by section 3480 of the Revenue and Taxation Code appear to be substantially the same as those specified in the form of deed prescribed by former section 3785b of the Political Code. Section 3480 does not prescribe the form of the deed to be given the purchaser at a tax sale. It merely specifies certain facts to be included in the deed. The first recital of fact, designated as "(a)," is couched in the statutory language, "The year of sale to the State." Recital "(b)" requires a statement "That, for the year of sale to the State, the property was duly assessed for taxation and the tax legally levied." Recital "(c)" requires the name of the assessee in the "year of sale to the State." If the words "year of sale to the State" be deemed to mean the year "in which" the sale was made to the state, those words would have no relevancy to the subject matter intended to be recited. Subsection (b) of section 3480, and the corresponding recital in the form of deed prescribed by former section 3785b, afford the clue to what the Legislature had in mind, namely, the year the property "was duly assessed for taxation." This is the only meaning which would give effect to the language of

section 3480, intended, as declared by the Legislature, as a continuation of existing law requiring a statement of the year the property was duly assessed for taxation. No change in substance was effected by the Legislature in listing the recitals to be contained in the deed rather than in prescribing the form of deed. The absence of a prescribed form denoted that substance rather than form should be the criterion. That this significance of the words "year of sale to the State" is correct is further indicated by the fact that in 1943, Stats. 1943, p. 1934, the Legislature amended section 3480 to substitute for the recital of "the year of sale to the State," the recital of "the year the property was assessed for taxation." The amendment was clearly intended to eliminate the uncertainty. The deed introduced by the plaintiff recites that in the year 1935 "the property was duly assessed for taxation." Since the pertinent facts prescribed by section 3480 are included in the deed in substance the recitals therein are in compliance with the requirements of that section. The same result follows when the recital in the deed that "all taxes levied and assessed against said property prior to the year 1941 have been paid and discharged," is compared with the recital (f) listed in section 3480 "that the property has been redeemed." The former is a more explicit statement of the facts. The latter is a conclusion from the facts stated. In substance the recitals may be said to be the same. The cases relied on by the respondents, such as Henderson v. DeTurk, 164 Cal. 296, 128 P. 747, and Carter v. Chevalier, 100 Cal.App. 567, 280 P. 706, to the effect that the legislative requirement of the form of deed renders form substance, are therefore not pertinent.

[4] Furthermore, in 1943, Stats. 1943, p. 1993, the Legislature enacted a validating and ratifying statute, by which it provided that every act and proceeding theretofore taken relative to the preparation, computing or fixing the budget or tax rate, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy, were thereby confirmed validated and declared legally effective. By section 2 of the act its operation was limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements under which the acts validated were taken, and to the validation of acts and proceedings to the extent permitted under the state and federal Constitutions.

In the present case the irregularities relied on by the defendants, including the claimed irregularities in the recitals of the deed, were such as the Legislature could cure by ratifying statute. No question of lack of notice or other element of due process affecting the defendants' rights is involved. No rights of third parties had intervened. See Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531. The plaintiff was entitled to a deed conforming to the statutory requirements. The deed relied on by the plaintiff in the present action and the corrected deed issued to him after entry of judgment were attempts to comply with the statutory requirements in recognition of that right. In any event, the defects were cured by the 1943 act.

There is therefore no support for the trial court's holding that the deed was void. Other points do not require discussion.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.



26 Cal.2d 144

WEBER et al. v. SUPERIOR COURT OF YOLO COUNTY.

Sac. 5662.

Supreme Court of California.

March 15, 1945.

1. Appeal and error ⇐492

Where superior court denied heirs' prayer for preliminary injunction to enjoin beneficiary from selling under deed of trust, and thereafter made an order preserving status quo pending termination of heirs' appeal from denial of injunction, subsequent commencement of action by beneficiary for purpose of obtaining receivership to insure production, preservation, and harvesting and sale of crops pending the appeal, did not violate the status quo order, and hence did not support an

order adjudging beneficiary in contempt for commencing such subsequent action.

2. Pleading ⇐49

The prayer for relief does not necessarily establish the character of an action.

3. Pleading ⇐49

A prayer for relief beyond obvious purpose of complaint and not warranted by the facts alleged may be disregarded as respects character of the action.

4. Injunction ⇐204, 219

Party bound by injunction must be able to determine from its terms what he may and may not do, and cannot be held guilty of contempt for violating injunction that is uncertain or ambiguous.

5. Injunction ⇐229

An order adjudging a party guilty of contempt for violating provisions of injunction is in excess of court's jurisdiction unless there is a violation of terms of the injunction or temporary stay.

6. Contempt ⇐67

An order made in contempt proceeding may be reviewed and annulled upon certiorari if it is in excess of jurisdiction, since such order is not appealable.

In Bank.

Proceeding by Frank Weber and another to review an order of the Superior Court of Yolo County adjudging the petitioners guilty of contempt because of the commencement of an action in Sacramento County which the respondent court concluded was in violation of a "status quo" order made by such court in a pending action to enjoin a sale under a trust deed.

Order annulled.

Thomas B. Leeper, of Sacramento, in pro. per., and for petitioners.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for respondent.

GIBSON, Chief Justice.

Petitioners, attorney and client, were adjudged guilty of contempt because of the commencement of an action in Sacramento County which respondent Superior Court of Yolo County concluded was in violation of a "status quo" order made by it in a pending action to enjoin a sale under a trust deed.

Petitioner Weber, who was the payee of the note and beneficiary of the trust deed, and later became the administrator with the will annexed of the estate of one trustor, entered into possession of the trust property pursuant to the consent of the surviving trustor and in accordance with a trust deed provision authorizing possession for the purposes of managing the property and applying the proceeds of crop sales on the indebtedness. After the death of the surviving trustor, Weber encountered difficulties with her heirs and filed a notice of default and intention to sell under the deed of trust. The heirs commenced an action in respondent court for an accounting to determine the amount, if any, still owing to Weber and praying that the threatened sale be enjoined pending such accounting. Following the hearing of an order to show cause, a preliminary injunction was denied on condition that Weber deposit a cash bond to secure the payment of any indebtedness found to be owing by Weber either as administrator or as an individual. Weber met this condition and would have been free to proceed with the noticed sale but for a subsequent order by which the court, on motion, ordered that Weber be "restrained from selling the real property * * * and that the status quo of the subject-matter of the litigation be preserved and maintained pending the determination of said appeal."

Petitioners challenge the jurisdiction of the court to make this latter order. They contend, in effect, that having refused to issue a preliminary injunction, the court was without power to direct the stay and that its order is therefore void and may not constitute the basis of a contempt proceeding for any subsequent violation thereof. See Pierce v. City of Los Angeles, 159 Cal. 516, 114 P. 818, and American Trading Co. v. Superior Court, 192 Cal. 770, 222 P. 142. Respondent court replies that it had jurisdiction to order a temporary stay pending appeal to preserve the status quo. See City of Pasadena v. Superior Court, 157 Cal. 781, 109 P. 620, 21 Ann. Cas. 1355; United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, Ann.Cas. 1916E, 199; and Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617; Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 242 P. 725.

[1-3] We find it unnecessary to determine this issue. Assuming, without deciding, the court properly ordered the stay

pending appeal, we are of the view that the subsequent commencement of the Sacramento County action did not violate the status quo order and it will not therefore support an order adjudging petitioners in contempt. The complaint in that action, filed against the heirs individually and in their representative capacities, sets forth the facts as to the execution of the note and trust deed and Weber's entry into possession with the consent of the then surviving trustor, and then alleges that he sold a crop raised on the property but the defendant heirs notified the buyer not to pay the sale price to Weber and threatened the buyer with suit if the price was so paid; that as a result the buyer still holds the purchase money; that defendants have threatened to claim the selling price of any future crop; that they drove one tenant off the property; that by reason of defendants' conduct Weber has been unable to get another tenant; that unless a receiver is appointed to handle and farm the property or to rent it out on a share basis, nothing will be realized therefrom to pay taxes, upkeep or principal or interest on the trust deed indebtedness (then due for about nine years, with a five-year default in interest payments); that because of all these circumstances, Weber theretofore recorded a notice of default and election to sell; that prior to the advertised sale of the ranch the defendants commenced an action in the Superior Court of Yolo County (respondent herein) to enjoin the sale; that a preliminary injunction was denied; that defendants noticed an appeal therefrom "and said Superior Court made another order preserving the status of said property pending said appeal and during said appeal plaintiff is powerless and prevented from selling said property under said deed of trust"; and that for the reasons alleged it is necessary to appoint a receiver to take charge of the property, including the farming, harvesting and sale of the crops in order to preserve the property and facilitate payment of the trust deed indebtedness.

The complaint in the Sacramento County action clearly shows its main purpose was to obtain a receivership to insure the production, preservation, harvesting and sale of the crops pending the appeal in the Yolo County action. It was alleged that such receivership became necessary because defendants' interference prevented continued leasing of the ranch. Nowhere in the complaint is there any allegation indicating that a foreclosure of the deed of trust was contemplated. On the contrary, the filing and pendency of the Yolo County action is set forth with particularity and it is further alleged that "plaintiff is powerless and prevented from selling said property under said deed of trust" because of the existence of the status quo order made by respondent in that action. The latter allegation furnishes ample proof that the Sacramento County action was not filed with any intention of thereby attempting to sell the property in violation or contempt of the status quo order. While the body of the complaint is thus free of any averment looking to a foreclosure and sale under the deed of trust, the prayer, in addition to requesting an accounting and receivership, did ask for such foreclosure and sale. This request in the prayer is not in accord with the allegation, referred to above, that the existence of respondent's status quo order "prevented" a sale under the deed of trust. Furthermore, the prayer for relief does not necessarily establish the character of an action. As stated in Standard Brands of California v. Bryce, 1 Cal.2d 718, 721, 37 P.2d 446, 447, "The subject-matter of an action and the issues involved are determinable from the facts pleaded, rather than from the title or prayer for relief." See, also, Luckey v. Superior Court, 209 Cal. 360, 366, 287 P. 450; Sullivan v. Compton, 61 Cal.App.2d 500, 502, 143 P.2d 357; Morgan v. Veach, 59 Cal.App.2d 682, 692, 139 P.2d 976; Hutchason v. Marks, 54 Cal.App.2d 113, 114, 128 P.2d 573. If a plaintiff prays for relief beyond the obvious purpose of the complaint and not warranted by the facts alleged, the prayer may be disregarded. Bank of California v. Superior Court, 16 Cal.2d 516, 526, 106 P.2d 879; Canby v. Council of City of Los Angeles, 114 Cal. App. 94, 96, 299 P. 732; Wakefield v. Wakefield, 16 Cal.App. 113, 116, 116 P. 309; Hart v. Walton, 9 Cal.App. 502, 511, 99 P. 719.

[4-6] It is well established that "the acts constituting the contempt must be clearly and specifically prohibited by the terms of the injunction," and that the "party bound by an injunction must be able to determine from its terms what he may and may not do; he cannot be held guilty of contempt for violating an injunction that is uncertain or ambiguous." Brunton

v. Superior Court, 20 Cal.2d 202, 205, 124 P.2d 831, 833. Unless there is a violation of the terms of the injunction or temporary stay, an order adjudging a party guilty of contempt for violating its provisions is in excess of the court's jurisdiction. Brunton v. Superior Court, supra; Hotaling v. Superior Court, 191 Cal. 501, 506, 217 P. 73, 29 A.L.R. 127; Hutton v. Superior Court, 147 Cal. 156, 81 P. 409. As there is no appeal from an order made in a contempt proceeding, it may be reviewed and annulled upon certiorari if it is in excess of jurisdiction. Taylor v. Superior Court, 20 Cal.2d 244, 246, 125 P.2d 1; Brunton v. Superior Court, supra. We are satisfied that petitioners did not violate the status quo order, and that respondent therefore exceeded its jurisdiction in adjudging them in contempt.

The order adjudging petitioners in contempt is annulled.

SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



26 Cal.2d 130

INDUSTRIAL INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 19149.

Supreme Court of California.

March 9, 1945.

Rehearing Denied April 5, 1945.

1. Workmen's compensation ⇐208

An employee may be under general and special employer at same time, and where independent contractor's employee comes under control of other party to contract, either by terms thereof or during course of its performance, a dual employment relationship exists.

2. Workmen's compensation ⇐235

The right to control and direct alleged employee's activities or manner and method of performing his work gives rise to employment relationship, whether such right is exercised or not.

3. Workmen's compensation ⇐208

A general and special employer relationship exists, if each employer has some power of direction and control over employee, though not necessarily complete.

4. Workmen's compensation ⇐1414, 1422, 1432

Where evidence does not disclose express agreement either affirming or denying claimed special employer's right to control manner and method of doing injured employee's work, existence or nonexistence of such right must be determined by reasonable inferences from circumstances shown.

5. Workmen's compensation ⇐1432

Evidence warranted inference by Industrial Accident Commission that general construction contractor at least shared right to control and direct manner in which truck driver in another's general employ was to do work of hauling concrete aggregate in connection with contractor's job, so as to justify award of compensation against contractor and its insurance carrier, as well as truck owner, for injuries sustained by such driver while repairing truck on highway.

6. Workmen's compensation ⇐1349

In proceeding by general construction contractor's compensation insurance carrier to annul Industrial Accident Commission's award of compensation for injuries sustained by truck driver while performing services for contractor, burden was on petitioner to establish that such driver was independent contractor or employee of such a contractor rather than general contractor's special employee.

7. Workmen's compensation ⇐1719

Whether employee's injury occurred in course of his employment is fact question to be determined in light of circumstances of particular case.

8. Workmen's compensation ⇐617

Generally, employee is in "course of employment" when he does reasonable things which his contract with employer expressly or impliedly permits him to do.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

9. Workmen's compensation ⇐617

Any reasonable doubt as to whether act being performed by employee when in-

jured was contemplated by employment should be resolved in employee's favor, in view of policy of liberal construction of Workmen's Compensation Act in employee's favor.

10. Workmen's compensation ⇐617

Injuries sustained by truck driver while repairing truck, used in course of his special employment by general construction contractor, after delivering load of sand for such employer and starting back to place of construction job for another load, occurred within period of such special employment at place where employee might reasonably be, so as to justify award of compensation against such contractor.

11. Workmen's compensation ⇐1432

Evidence warranted Industrial Accident Commission's finding that truck driver, injured while repairing truck being used in course of his special employment by general construction contractor, was performing service growing out of or incidental to such employment, and hence engaged in act impliedly permitted by special employer, so as to authorize award of compensation against such employer, as well as truck owner, though such owner authorized driver to repair truck.

12. Workmen's compensation ⇐208

An injured employee's right to compensation by special employer does not depend on such employer's actual exercise of control over employee, as right to such control may show special employment.

13. Workmen's compensation ⇐1183

Where injured employee, following his general employer's application for adjustment of his compensation claim, filed answer stating circumstances surrounding injury, requesting Industrial Commission to find that general employer wilfully failed to carry workmen's compensation insurance on date of injury, and praying for any other or further relief within circumstances, commission acquired jurisdiction of proceeding, though initiated by general employer without employee's consent.

14. Workmen's compensation ⇐1195

In general employer's proceeding before Industrial Accident Commission for adjustment of injured employee's compensation claim, claimant's special employer and its insurance carrier were properly joined as parties defendant on petitioner's application. St.1937, p. 292, § 5307.

15. Workmen's compensation ⇐1198

The fact that one employer cannot object to injured employee's failure to proceed against second employer, jointly and severally liable with other employer for workman's compensation, does not mean that an employer or employee can object to joinder of such employers as parties defendant.

In Bank.

Proceeding by the Industrial Indemnity Exchange to annul the Industrial Accident Commission's award of compensation under the Workmen's Compensation Act in favor of John Campellone, employee, against petitioner as insurance carrier for J. S. Metzger & Son, Inc., special employer, and the Gagnon Company, Inc., general employer.

Award affirmed.

Prior opinion, 149 P.2d 745.

Herlihy & Herlihy, of Los Angeles, for petitioner.

Everett A. Corten, R. C. McKellips, and Fred G. Goldsworthy, all of San Francisco, for respondents.

GIBSON, Chief Justice.

Respondent Industrial Accident Commission made an award of compensation in favor of John Campellone against petitioner, the workmen's compensation insurance carrier for J. S. Metzger & Son, Inc., and against the Gagnon Co., Inc., jointly and severally. The award followed findings by the commission that Campellone sustained personal injuries arising out of and occurring in the course of his employment as a truck driver by the Gagnon Company, as general employer, and by Metzger & Son, as special employer, and that the Gagnon Company was uninsured while Metzger & Son was insured by petitioner on the date of said injuries. By this proceeding, petitioner seeks to annul the award against it. No question is here raised, however, as to the validity of the award against the Gagnon Company.

The principal attack on the award raises the question whether there was substantial evidence to support the findings that Campellone was employed by Metzger & Son as a special employer, and that he received his injuries in the course of such employment.

Metzger & Son was the general contractor on a construction job at Indio, Cali-

fornia, and arranged with John A. Fox, a truck broker, to supervise the hauling or the operation of trucks in connection with the work. Fox was at the same time supplying trucks or supervising their operations on two other construction jobs in the vicinity. The Gagnon Company, learning from Fox that hauling work was available in the vicinity of Palm Springs, acquired a truck and hired Campellone to drive it and to keep it in repair.

On or about November 25, 1942, Campellone drove the truck to Palm Springs, having been instructed by the Gagnon Company to "see Fox to find out where the truck was to work." Campellone, upon being informed by Fox that there were three jobs available, chose to use the truck in connection with the Metzger job. Fox advised him that the truck would be used to haul concrete aggregate from a crusher at Whitewater to the Bell and Whittier Ranches, and directed him to Whitewater with instructions to "see somebody there." The following day, the Gagnon Company was informed by Fox that it would be paid directly by Metzger & Son, and that credit arrangements would be made for gas and oil. Fox agreed to "watch the operation of the truck" for the Gagnon Company.

Campellone commenced work on November 26, 1942, and continued working until he was injured on November 29th. Little supervision was exercised over the men at work. The trucks would pull under a steam shovel, receive their loads, pull out to a scale where weight tickets were made out, and proceed to their destinations where the weight tickets were signed and the loads dumped. Campellone testified that he merely followed the other trucks; that he never received specific instructions from Metzger & Son either to start or stop loading; that an employee of the latter did instruct him where to dump loads; and that on one occasion an employee of Metzger & Son told him they had enough sand and did not want any more at the time, that they needed crushed rock, and that such rock was available at Cabazon. Fox testified that he directed Campellone to Whitewater on the instructions of Metzger & Son; that the latter's superintendent told him to direct the trucks where to load and unload, and that he gave those instructions to Campellone; that at various times the superintendent personally gave similar instructions to Campellone and to the truck drivers in general; and that among such instructions was the direction to load at Cabazon when the drivers had previously been directed to load elsewhere. Campellone was paid by the Gagnon Company and the Gagnon Company was paid by Metzger & Son after the latter deducted amounts for gas and oil.

On November 29th, the Gagnon Company's truck was damaged while sand was being unloaded at the Whittier Ranch. The driver, Campellone, headed back to Cabazon for another load and decided to repair the truck to prevent sand from spilling. He was injured while making the necessary repairs on a public highway.

Petitioner argues that the Gagnon Company occupied toward Metzger & Son the relation of an independent contractor, and that therefore the relationship between Metzger & Son and Campellone was that of a general contractor and the employee of an independent subcontractor. On the other hand, respondent contends the evidence discloses that Metzger & Son had the right to control the activities of the injured workman, and that it accordingly supports the finding that a special employment relationship existed between the parties.

[1-3] It cannot be disputed, and respondent commission found, that the injured workman was employed by the Gagnon Company. But an employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor comes under the control and direction of the other party to the contract, a dual employment relationship is held to exist. National Auto Ins. Co. v. Industrial Acc. Com., 23 Cal.2d 215, 143 P. 2d 481; Guarantee Ins. Co. v. Industrial Acc. Com., 22 Cal.2d 516, 139 P.2d 905; Independence Indemnity Co. v. Industrial Acc. Com., 203 Cal. 51, 262 P. 757. The right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not, gives rise to the employment relationship. Riskin v. Industrial Acc. Com., 23 Cal.2d 248, 144 P.2d 16; Guarantee Ins. Co. v. Industrial Acc. Com., supra; Press Pub. Co. v. Industrial Acc. Com., 190 Cal. 114, 210 P. 820. And, although in distinguishing between an employment and an independent contractor relationship it has been said that "The test of 'control', * * * means 'complete

control' " (Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 811, 159 P. 721, 723; S. A. Gerrard Co. v. Industrial Acc. Com., 17 Cal.2d 411, 414, 110 P.2d 377), it is settled that "a general and special employer relationship is present if there exists in each some power, not necessarily complete, of direction and control * * *." National Auto Ins. Co. v. Industrial Acc. Com., 23 Cal.2d 215, 219, 143 P.2d 481. See, also, Diamond Drill Contracting Co. v. Industrial Acc. Com., 199 Cal. 694, 260 P. 862; Famous Players Lasky Corp. v. Industrial Acc. Com., 194 Cal. 134, 228 P. 5, 34 A.L.R. 765.

[4, 5] In the present case the evidence does not disclose an express agreement either affirming or denying the right of the claimed special employer to control the manner and method in which the work was performed by the injured workman. The existence or nonexistence of the right must, therefore, be determined by reasonable inferences drawn from the circumstances shown. Riskin v. Industrial Acc. Com., 23 Cal.2d 248, 144 P.2d 16; Guarantee Ins. Co. v. Industrial Acc. Com., 22 Cal. 2d 516, 139 P.2d 905. The respondent commission could reasonably infer from the evidence before it that Metzger & Son at least shared the right to control and direct the manner in which the work was to be done. The Gagnon Company had not previously engaged in the trucking business, and Campellone was not one of its regular employees. It did not know, and apparently did not care, for whom the work would be performed or where the performance would take place. The Gagnon Company gave no instructions to the injured employee other than to report to Fox; no one was present at the time and place of performance to direct Campellone other than the representatives of Metzger & Son, including Fox, who the commission justifiably found acted as an agent for Metzger & Son. From the evidence it could be inferred that the Gagnon Company intended Metzger & Son to share in the control of its employee. The fact that Metzger & Son had control of the premises upon which the work was to be performed, that such work was part of a larger undertaking under its control, that its contract with the Gagnon Company did not contain detailed provisions as to the work to be performed, that it was present at the time and place of performance, and that it actually directed some of the activities of the injured workman, supports the inference that it contemplated directing the manner in which the work was to be done.

If the evidence before the commission was also subject to the inference that Metzger & Son did not have the right to control and direct the activities of the injured workman, we cannot say as a matter of law that the opposing inference drawn by the commission is incorrect. Riskin v. Industrial Acc. Com., 23 Cal.2d 248, 144 P. 2d 16; Guarantee Ins. Co. v. Industrial Acc. Com., 22 Cal.2d 516, 139 P.2d 905.

[6] Moreover, if Campellone was performing services for Metzger & Son at the time of his injury, the burden of proof rested on petitioner to establish that Campellone was an independent contractor or the employee of an independent contractor rather than a special employee of Metzger & Son. Riskin v. Industrial Acc. Com., supra; Drillon v. Industrial Acc. Com., 17 Cal.2d 346, 110 P.2d 64; Hillen v. Industrial Acc. Com., 199 Cal. 577, 250 P. 570.

Petitioner next contends that Campellone's injury did not occur in the course of his special employment by Metzger & Son. It argues that the service being performed at the time of injury, namely the repair of the truck, did not benefit Metzger & Son; and that since the Gagnon Company expressly engaged Campellone to keep the truck in repair, it alone had the right of direction and control at the time of injury. It further argues that there has been no showing that Campellone suffered injury as the result of the direction and control of Metzger & Son, and that such a showing is necessary to establish a right to compensation against a special employer.

[7-11] Whether an employee's injury occurred in the course of his employment is a question of fact to be determined in light of the circumstances of the particular case. San Bernardino County v. Industrial Acc. Com., 217 Cal. 618, 20 P.2d 673; Griffin v. Industrial Acc. Com., 19 Cal.App. 2d 727, 66 P.2d 176. It is generally said that " 'an employee is in the "course of his employment" when he does those reasonable things which his contract with his employer expressly or impliedly permits him to do.' " Hartford A. & I. Co. v. Industrial Acc. Com., 202 Cal. 688, 691, 262 P. 309, 310, 58 A.L.R. 1392; State Comp. Ins. Fund v. Industrial Acc. Com., 194 Cal. 28, 33, 227 P. 168. In view of the policy of

liberal construction in favor of the employee, any reasonable doubt as to whether the act performed at the time of injury was contemplated by the employment should be resolved in favor of the employee. Matthews v. Naylor, 42 Cal.App. 2d 729, 109 P.2d 978; Employers' Liability Assur. Corp. v. Industrial Acc. Com., 37 Cal.App.2d 567, 99 P.2d 1089. The employee in the present case was, at the time of injury, engaged in repairing a truck used in the course of his special employment. The repairs undertaken were occasioned by an accident in the course of such employment and were such as would facilitate the performance of the employee's services therein. Since the repairs were being made after Campellone had delivered a load of sand at the Whittier Ranch and had started back to Cabazon for another load, the injury occurred within the period of his special employment and at a place where he might reasonably be. The fact that the Gagnon Company authorized the employee to make repairs does not necessarily establish that it retained the exclusive right of control over the repairs to the truck. The commission could reasonably find that Campellone was performing a service growing out of or incidental to his employment and was therefore engaged in an act impliedly permitted by his special employer.

[12] In arguing that the injury did not arise out of or occur in the course of an employment by Metzger & Son, petitioner cites cases which state that in order to establish the legal relation of special employer and special employee so as to entitle the employee to compensation, it must appear that he suffered injury "as the result of" or "in consequence of" the "direction and control" of the special employer. Stacey Bros. Gas Const. Co. v. Industrial Acc. Com., 197 Cal. 164, 169, 239 P. 1072, 1074; Famous Players Lasky Corp. v. Industrial Acc. Com., 194 Cal. 134, 136, 228 P. 5, 6, 34 A.L.R. 765; see, also, Independence Indemnity Co. v. Industrial Acc. Com., 203 Cal. 51, 55, 262 P. 757; Diamond Drill Contracting Co. v. Industrial Acc. Com., 199 Cal. 694, 697, 250 P. 862. Such expressions, however, do not represent the law insofar as they imply that the right to compensation depends upon an actual exercise of control by the special employer. This court has recently held that either the right to control or the exertion of control may show a special employment. Guarantee Ins. Co. v. Industrial Acc. Com., 22 Cal.2d 516, 519, 139 P.2d 905; National Auto Ins. Co. v. Industrial Acc. Com., 23 Cal.2d 215, 219, 143 P.2d 481. As we have said heretofore, the evidence is sufficient to permit an inference that Metzger & Son had at least the right of control.

[13-15] Petitioner also challenges the jurisdiction of the commission to make the award in this case on the ground that the proceedings before it were initiated by the general employer without the consent and against the wishes of the injured employee. While the commission's power to make an award in such circumstances would appear to find support in Independence Indem. Co. v. Industrial Acc. Com., 2 Cal.2d 397, 41 P.2d 320, we do not find it necessary to determine that question in this case. Following the application by the Gagnon Company for adjustment of the claim, Campellone filed an answer setting forth the circumstances surrounding his injury, requesting the commission to find that the Gagnon company willfully failed to carry workmen's compensation insurance on the date of injury, and praying for "any other or further relief within the circumstances." Clearly, upon the filing of that answer, the commission acquired jurisdiction of the proceeding. Nor can there be any doubt of the propriety of the joinder of Metzger & Son and petitioner as party defendants on the application of the Gagnon Company. By section 5307 of the Labor Code, St.1937, p. 292, the commission is expressly authorized to "Provide for the joinder in the same proceeding of all persons interested therein, whether as employer, insurer, * * * or otherwise." Although one employer cannot object if the injured employee does not proceed against a second employer who is jointly and severally liable with him (see Hartford A. & I. Co. v. Industrial Acc. Com., 8 Cal.2d 589, 591, 67 P.2d 105), it does not follow that an employer or employee can object to the joinder of such persons.

The award is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ. concur.

26 Cal.2d 119

MILLER v. MILLER.
S. F. 16963.

Supreme Court of California.
March 6, 1945.

Rehearing Denied March 29, 1945.

1. Divorce ⇐165(3)

The court has inherent power to set aside final divorce decree obtained by fraud.

2. Divorce ⇐165(3)

If husband's affidavit on application for final divorce decree that all requirements in interlocutory decree had been complied with was false in any respect or in any amount required by interlocutory decree, such falsity would warrant setting aside final decree based on affidavit.

3. Divorce ⇐165(5½)

Where interlocutory divorce decree required husband to pay "all reasonable and necessary medical and dental care and treatment" of child and it was not disputed that child was sick during year preceding entry of final decree and required medical care, husband, who obtained final divorce decree on false affidavit that all requirements in interlocutory decree had been complied with, could not assert that all bills for such services and care were not reasonable at least in part.

4. Divorce ⇐165(5½)

Evidence warranted order setting aside final divorce decree obtained by husband on false affidavit that all requirements in interlocutory decree had been complied with, particularly where at least one of unpaid bills had been imposed on husband when interlocutory decree was entered, which bill remained unpaid when he obtained entry of final decree upon representation that he had paid all charges imposed by interlocutory decree.

5. Army and navy ⇐34

The Soldiers' and Sailors' Civil Relief Act does not confer an absolute right to a stay, but rights of all concerned must be considered, and in each case trial court must determine whether serviceman's rights will be adversely affected by fact of his service. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

6. Army and navy ⇐34

Where issue on wife's motion to vacate final divorce decree was alleged fraud of husband in stating falsely in his affidavit in support of his application for final decree that he had fully complied with all requirements of interlocutory decree, which affidavit was made after husband entered the army, denial of continuance under Soldiers' and Sailors' Civil Relief Act was not an abuse of discretion. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

7. Divorce ⇐165

On wife's motion to vacate final divorce decree on ground that husband's affidavit in support of his application for final decree was fraudulent, denial of husband's application for three weeks' continuance was not an abuse of discretion, where there was no showing that husband who at the time was in an army camp in another state would have been available at such later date or that counsel would thereby be aided in his investigation.

8. Army and navy ⇐34

The showing that one in military service is required to make under Soldiers' and Sailors' Civil Relief Act for a stay is much less than is required from a litigant requiring a limited continuance independently of the act. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A. Appendix, § 521.

9. Appeal and error ⇐966(1)
Continuance ⇐7

An application for a continuance is addressed to sound discretion of trial court, and abuse of discretion must be shown to justify a reversal of its decision.

10. Continuance ⇐19

The inability of a party to attend on the court does not ipso facto require granting of application for a continuance particularly where showing justifies conclusion that injustice will be as likely to follow from granting of continuance as from its refusal.

11. Appeal and error ⇐82(3), 870(2)

Appeals from orders denying continuances of motion to vacate final divorce decree under Soldiers' and Sailors' Civil Relief Act and for a limited period, respectively, were intermediate in nature and hence not appealable but were reviewable

upon appeal from order vacating final decree.

12. Appeal and error ⇐790(2)

An appeal from order granting plaintiff costs and counsel fees on appeal would be dismissed as moot where plaintiff in her brief abandoned all rights under that order.

CARTER and SCHAUER, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Marion M. Miller against Loren F. Miller for divorce. From orders vacating a final divorce judgment denying continuances and granting costs and counsel fees, defendant appeals.

Order vacating final decree affirmed, and appeals from other orders dismissed.

Prior opinion 150 P.2d 262.

Campbell, Hayes & Custer and Robert E. Hayes, all of San Jose, for appellant.

Francis N. Foley and J. A. Branson, both of San Mateo, for respondent.

GIBSON, Chief Justice.

On December 8, 1941, plaintiff procured an interlocutory decree of divorce from defendant. The decree provided that defendant, a schoolteacher, should pay to plaintiff $40 a month for her support and maintenance and $20 a month for the support and maintenance of the minor child of the parties, custody of whom was awarded to plaintiff. The decree further provided that defendant was to pay for all reasonable and necessary medical and dental care and treatment of the child. At the time of entry of the interlocutory decree, the child was two years of age and suffered from asthma. On January 18, 1943, *defendant* procured entry of the final decree upon presentment of an affidavit averring that he had fully complied with the provisions of the interlocutory decree and was not in default thereof. This affidavit was executed in Oregon where defendant was then stationed in the Army of the United States. In June, 1943, plaintiff moved to set aside the final decree on the ground that it had been procured by fraud in that at the time of its entry defendant, contrary to his affidavit, was in default in the payments required by the interlocutory decree. On June 21, 1943, less than six months after its entry, the trial court granted the motion and set aside the final decree for fraud in its procurement. Defendant has appealed from the vacating order.

[1-4] There can be no question as to the inherent power of the court to set aside the final decree if obtained by fraud. Plaintiff's affidavit in support of the motion to vacate and her testimony upon the hearing tend to establish that at the time defendant filed the affidavit for entry of the final decree, wherein he recited that "all the requirements [of the interlocutory decree] have been fully complied with * * * and he is not in default in any thereof," defendant was aware that he was in default in the sum of $30 for her support and maintenance and in default in excess of $1,200 for the child's medical care and treatment. Because the interlocutory decree did not provide that the installments for plaintiff's maintenance were payable in advance, defendant urges that when the final decree was entered on January 18, 1943, he was not in default therein in the sum of $30, as urged by plaintiff. Assuming the correctness of this contention, it would avail defendant nothing if his affidavit were false in any other respect, i. e., if he were shown to be in default with respect to the payment of the bills for the child's medical care and treatment. In this latter respect, the plaintiff testified that the child had asthma and had been hospitalized a great part of the time, spending in excess of two weeks in an oxygen tent because of pneumonia; that accumulated medical and hospital bills in excess of $1,200 remained unpaid; that in the interim between entry of the two decrees many of these bills had been forwarded to defendant, some of them before he was inducted into the Army; that included among the bills was a doctor's bill for $83 which existed at the time the divorce action was tried and the payment of which was then imposed on the defendant.

The issue before the court on the motion to vacate the final decree involved the truth or falsity of defendant's affidavit theretofore offered in support of his application for entry of that decree. In other words, the issue was whether defendant as required by the interlocutory decree, had paid for "all reasonable and necessary medical and dental care and treatment" of the child. It is not disputed that the child was sick of asthma and pneumonia during

the year preceding entry of the final decree and required the care of doctors and hospitalization. Manifestly, it may not be successfully asserted by defendant that all bills for such services and care were not reasonable at least in part. As remarked by the trial court, if defendant's affidavit was false in any amount, no matter how small, with respect to its recital of payments, it would warrant setting aside the final decree based thereon. In our opinion, the showing here made warranted the relief granted, particularly when at least one of the unpaid bills had been imposed on defendant when the interlocutory decree was entered and remained unpaid when he obtained entry of the final decree upon the representation that he had paid all charges imposed on him.

This brings us to a consideration of the correctness of the trial court's disposition of two procedural matters or issues that arose upon the hearing of plaintiff's motion to vacate the final decree. When the motion came on for hearing defendant's counsel presented a petition, signed and verified by defendant's mother, in which she alleged that defendant was then in the Army and stationed at a camp in Mississippi. The petition was filed under the Soldiers' and Sailors' Civil Relief Act of 1940, 54 U.S. Stats. 1178, 1181, § 201, 50 U.S.C.A. Appendix, § 521, and prayed that "all further proceedings * * * be stayed" on plaintiff's motion to set aside the final decree. The cited section of the Soldiers' and Sailors' Civil Relief Act provides that "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

The case of Boone v. Lightner, 319 U.S. 561, 565, 63 S.Ct. 1223, 1226, 87 L.Ed. 1587, while recognizing that the act is to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation, declares that it "cannot be construed to require continuance on mere showing that the defendant was in * * * the military service. Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays, says 'unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense *is not materially affected by reason of his military service.*' The Act of 1940 was a substantial re-enactment of that of 1918 * * *. The legislative history of its antecedent shows that this clause was deliberately chosen and that judicial discretion thereby conferred on the trial court instead of rigid and undiscriminating suspension of civil proceedings was the very heart of the policy of the Act." (Italics added.)

[5] Congress has determined that it is not necessary in order to protect the rights of those in military service to grant to them the absolute right to a stay; that the rights of all concerned, those in the service and civilian litigants, must be considered; and that the rights of those in the service would be adequately protected by the trial judges, who, in each case, could determine whether the service man's rights would be adversely affected by the fact of his service. Johnson v. Johnson, 59 Cal.App.2d 375, 383, 139 P.2d 33.

[6] Under all the circumstances of this case we cannot say that the trial court abused its discretion in denying a continuance under the Soldiers' and Sailors' Civil Relief Act. When it denied the continuance, the court had before it plaintiff's sworn affidavit reciting defendant's default under the interlocutory decree. In the face of this prima facie showing that defendant had perpetrated a fraud upon the court in theretofore procuring entry of the final decree upon the representation that he had "fully complied" with the interlocutory decree, the court exercised a sound discretion when it concluded to proceed with the hearing. Such fraud, if established, would not only vitiate the final decree but would have a material bearing upon the future rights and obligations of the parties and of the minor child. Moreover, the wrong complained of by plaintiff, viz., defendant's execution of an assertedly false affidavit, was committed *after* defendant had entered the Army. His military service in another state did not prevent him from procuring the final decree. Having thus set in motion *after* his entry into the Army the chain of circumstances giving rise to the proceeding

to vacate, the trial court in the exercise of a sound discretion could reasonably reject defendant's plea for an indefinite postponement of an investigation of those circumstances.

It is not shown that defendant was prejudiced because the hearing was held in his absence. As stated above, the sole issue to be determined by the trial court was the truth or falsity of his affidavit presented in support of the entry of the final decree. If it was false in any material respect the decree based thereon must fall because of the fraud so practiced upon the court. Plaintiff, as shown above, testified to the illness of the child in the interim between entries of the two decrees and she further testified in detail as to the accumulated medical and hospital bills resulting therefrom, naming the doctors and hospitals who had performed services and rendered care. She also testified, as already related, that one of the unpaid bills had been incurred before entry of the interlocutory decree and had been then imposed upon defendant These matters could be verified by counsel who represented defendant at all stages of the hearing. All necessary witnesses were available and subject to counsel's interrogation, and the presence of defendant was not indispensable to any investigation as to the nature and scope of the medical services performed or the reasonableness of the charges therefor. Thus, under all the circumstances here present and particularly in the absence of a showing of prejudice resulting from defendant's absence, it was not error for the trial court to deny a continuance under the Soldiers' and Sailors' Civil Relief Act of the hearing on plaintiff's motion to vacate the final decree obtained by defendant after he entered the Army upon the representation that he had "fully complied" with "all" requirements of the interlocutory decree and was "not in default in any thereof."

[7-10] For the reasons already stated, we likewise find no abuse of discretion in the trial court's action denying defendant's application for a three-week continuance independent of the Soldiers' and Sailors' Civil Relief Act. There was no showing that defendant would have been available at such later date nor was there any showing that counsel would be thereby aided in an investigation of the nature and scope of the medical services rendered to the child or the reasonableness of the charges therefor. The showing that one in the military service is required to make under the cited act for a stay is much less than is required from a litigant requesting a limited continuance independently of the act. Johnson v. Johnson, 59 Cal.App.2d 375, 392, 139 P. 2d 33, 42. As pointed out in the Johnson case: "The rules applicable to the granting of continuances, amply supported by citations to the many cases, are set forth in 5 Cal.Jur., p. 968, § 5, as follows: 'However, it is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court it apprised of all the circumstances of the case and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable, and not an arbitrary discretion, its action will not be disturbed. It follows that an abuse of discretion must be shown to justify a reversal of the judgment because of a ruling on such matters. Thus it has been held that the sickness of a party to an action, preventing his attendance on the court, does not ipso facto require the court to grant an application for a continuance, made on his behalf; especially where the showing before the court fully justifies the conclusion that injustice will be as likely to follow from the granting of the continuance as from its refusal. Nor does the absence of a party always furnish ground for a continuance.' "

But, even if we assume, without deciding, that the trial court abused its discretion and erred in denying counsel's request for a limited continuance, it would serve no useful purpose to now reverse the vacating order for that reason alone. If, as defendant urges, he is not in default in any payments under the interlocutory decree he can as effectively make such showing on a renewed application for entry of the final decree as he can upon a retrial of the issue of his default raised by plaintiff's motion to vacate the final decree heretofore procured to be entered by him upon his representation that he was not in default.

[11, 12] The purported appeals from the two orders denying continuances of the motion to vacate under the Soldiers' and Sailors' Civil Relief Act and for a limited period, respectively, are dismissed inasmuch as the orders are intermediate in nature and nonappealable. They are reviewable, and have been here reviewed, upon

the appeal from the order vacating the final decree. The appeal from an order granting plaintiff costs and counsel fees on appeal is dismissed as moot inasmuch as plaintiff in her brief has abandoned all rights under that order. The order vacating the final decree is affirmed.

SHENK, EDMONDS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. It appears from the record in this case that a charge was made in the affidavit in support of plaintiff's motion to set aside a final decree of divorce that defendant falsely stated in his affidavit in support of his motion for the final decree that he had complied with all of the terms of the interlocutory decree; that decree declared that plaintiff was entitled to a divorce. Without passing on the question of whether a final decree of divorce may be set aside for fraud where that charge is based upon an allegedly false statement in the supporting affidavit for the final decree that the payments for support and medical care ordered by the interlocutory decree had been made, it is clear that defendant in this case is entitled to the relief authorized by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, § 521. That act reads:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." In the instant case we may assume that proper medical expenses were incurred on behalf of the minor child of plaintiff and defendant prior to the time defendant filed his affidavit for a final decree; that pursuant to the interlocutory decree defendant was obligated to pay those expenses; and that plaintiff presented evidence to the effect that defendant was aware of those obligations, and also was in default in the sum of $30 in payments for the support of plaintiff, which evidence would be sufficient to support a finding that defendant knowingly made a false affidavit. *But that is not the whole story.* Defendant should have had an opportunity to meet that charge. *He is the only person who can rebut the charge that he knew that medical expenses had been incurred;* and the charge that he was in default $30 on the support claim. Therefore, it is vitally necessary that he have that opportunity. Plaintiff's evidence is very weak on the subject of whether defendant *knew* of the medical bills. She testified to nothing more than *her conclusion that some of the bills had been sent to defendant by the creditors.* She did not call any of the creditors to relate how, when, or under what circumstances the bills were sent to defendant or how they were addressed if sent by mail. Defendant might well by his testimony show that he had no knowledge or notice of such claims when he made the affidavit, thus completely exonerating him from any fraud. How under those circumstances can it be said that defendant's ability to conduct his defense is not, in the language of the Soldiers' and Sailors' Civil Relief Act, "materially affected." Fraud is a serious charge, and the lower court by accepting plaintiff's evidence of fraud on defendant's part has in effect, found defendant guilty of perjury, without affording him any opportunity to be heard. And that result is reached *without achieving any benefit or advantage to either plaintiff or defendant.* Plaintiff is fully able to enforce the obligation imposed by the interlocutory decree even though the final decree stands. She loses absolutely nothing by having the determination of the issue postponed. On the other hand defendant suffers the serious and grave consequences of having a solemn and binding finding of fraud and perjury entered against him without being accorded an opportunity to be heard in his own defense because of his absence in military service. Certainly that is one of the very things that the Soldiers' and Sailors' Civil Relief Act was designed to avoid.

It must be remembered that the basis for denying a final decree of divorce upon the ground of the failure of the movant to comply with the terms of the interlocutory decree is that the movant has *willfully* failed to comply with the decree, is in *contempt* of court, and that for those reasons *equity* will not act to grant the final decree. For illustration, it is said in Weeks v. Superior Court, 187 Cal. 620, 622, 203 P. 93,

94, after stating that under section 132 of the Civil Code, either party may obtain a final decree after a year has expired;

"But that does not mean that a party to the action may have a final decree entered when to do so would be a *flagrant abuse of the principles of equity and of the due administration of justice.* * * * No party to an action can, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of *contempt* to its legal orders and processes." (Italics added.) Applying equitable principles in the instant case we have seen that defendant has been deprived of his day in court. He is *not in contempt* inasmuch as the evidence does not show ability to pay on his part, and certainly he should be entitled to show that he was unable to pay the medical expenses if such was the fact. Having shown that, there would have been no fraud on his part in obtaining the final decree of divorce. If the movant for the final decree is not able to make the payments required by the interlocutory decree, he is not in contempt and may have a writ of mandate to compel the entry of a final decree notwithstanding his default in such payments. Isakson v. Superior Court, 130 Cal.App. 180, 19 P.2d 840.

Conceding that the granting or denial of a motion to postpone the hearing of a matter in the trial court is ordinarily within the discretion of the trial judge, and that his ruling on such a motion will not be reversed unless it clearly appears that there has been an abuse of such discretion, I doubt if it can be said with any degree of fairness that such abuse does not clearly and affirmatively appear in every case where, as here, a person absent in the armed service of the United States is charged with perpetrating a fraud upon a court, and his testimony is necessary to refute such charge of fraud, and he is denied an opportunity to appear and offer evidence in his own defense. To say that he is not prejudiced by such a ruling is, to my mind, a perversion of the plainest principles of equity and justice. This is not a case where the defense can be adequately presented by evidence from sources other than from the party himself. He is, in effect, charged with perjury. He alone can refute the charge. The court refuses to postpone the hearing to permit him to do so, and then finds him guilty as charged. Obviously, such a ruling is not the result of the exercise of a judicial discretion as that term has been defined in the decisions of this court. It is clearly arbitrary and unreasonable and should not be permitted to stand.

In my opinion the order vacating the final decree should be reversed.

SCHAUER, J., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



68 Cal.App.2d 387

PETERSEN v. DEVINE et al.

Civ. 14542.

District Court of Appeal, Second District, Division 3, California.

March 14, 1945.

1. Negligence ⇐141(12)

In automobile collision case, jury were properly instructed that they could not apply doctrine of comparative negligence.

2. Automobiles ⇐246(26, 60)

In automobile collision case, court properly gave instruction placing burden of proof of contributory negligence upon defendant and stating that defense would be made out if it was proved by preponderance of evidence that plaintiff was negligent, and that such negligence contributed in some degree as a proximate cause of injuries.

3. Automobiles ⇐246(21, 26)

In action for injuries sustained when rear of plaintiff's automobile was struck by defendant's automobile, instructions stating imminent peril doctrine, stating issues in case, including contributory negligence, and stating that one who stops or suddenly decreases speed on highway should give a hand signal to driver immediately to rear correctly stated the law.

4. Automobiles ⇐239(2)

In automobile collision case, defense of contributory negligence was sufficiently pleaded in absence of any objection thereto.

5. Automobiles ⇐245(81)

In action for injuries sustained when rear of plaintiff's automobile was struck by defendant's automobile traveling in same direction, evidence that plaintiff stopped or slowed down in middle of highway to see if pedestrians wanted a ride, although there was a wide shoulder to right and plaintiff was aware that defendant's automobile was following him, was sufficient for jury on issue of contributory negligence.

6. Automobiles ⇐246(58)

In action for injuries sustained when rear of plaintiff's automobile was struck by defendant's automobile traveling in same direction, where evidence established that plaintiff's automobile could have been seen by defendant for a considerable distance, instruction with regard to giving of hand signal was not improper on ground that signal would not have enabled defendant to avoid accident. Vehicle Code, §§ 544, 546, St.1935, pp. 185, 186.

7. Trial ⇐214

The court should instruct as to each principle of law which may be applied properly to any material set of facts reasonably deducible from evidence.

8. Trial ⇐252(2)

Instructing jury on theories which might be based upon circumstantial evidence is proper.

9. Automobiles ⇐246(48)

In action for injuries sustained when rear of plaintiff's automobile was struck by defendant's automobile traveling in same direction, instruction upon doctrine of sudden peril was proper under evidence that plaintiff slowed down suddenly or stopped altogether, and that another automobile was approaching from opposite direction.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Daniel C. Petersen against Andy Devine and others to recover for personal injuries sustained in an automobile collision. Judgment for the defendants, and the plaintiff appeals.

Judgment affirmed.

Wolfson, Swetow & Essey, of Los Angeles, for appellant.

Forest A. Beets, of Los Angeles, for respondents.

SHINN, Justice.

This is an action for personal injuries sustained by plaintiff when the rear end of his automobile was struck by a car driven by defendant traveling in the same direction. Judgment upon a verdict for defendant was entered and plaintiff appeals. Plaintiff was driving on the highway a few miles south of Lone Pine, Inyo County. He overtook a man and a child walking northerly along the edge of the highway, slowed down or stopped in order to give them a ride, which they declined, when his car was struck by that of defendant which approached from the rear. They were on a two-lane highway marked in the center by white lines. Plaintiff's contentions are that the verdict was not justified by the evidence and that the jury were erroneously instructed. We shall notice first the argument which is directed to the giving of five instructions on contributory negligence and in this connection will have occasion to refer to portions of the evidence.

[1-3] It is insisted by plaintiff that there was no evidence which would have warranted the jury in finding that plaintiff was in any respect guilty of contributory negligence, and that the giving of the instructions was prejudicially erroneous. The first instruction complained of instructed the jury that they could not apply the doctrine of comparative negligence. The second one placed the burden of proof of contributory negligence upon the defendant and stated that the defense would be made out if it was proved by a preponderance of evidence that plaintiff was negligent and that such negligence contributed in some degree as a proximate cause of the injuries. The third instruction stated the imminent peril doctrine, but without indication that it might apply to the conduct of one party more than to that of the other. The fourth instruction stated the issues in the case, among them the issue of contributory negligence, and the fifth one stated the requirement that one who stops or suddenly decreases speed on a highway shall give a hand signal to a driver immediately to the rear. All of these instructions were correct statements of the law.

The accident happened in daylight hours. Plaintiff testified that as he was driving

north he observed the defendant's car behind him "quite far back, maybe half a mile or so"; that as he got within 100 feet or 100 yards "or something like that" of the man and child he honked his horn to see if they wanted a ride, but the man motioned with his hand, indicating for him to go ahead; that he, plaintiff, did not lean out of the car and that he had traveled a little way past the pedestrians when his car was struck from behind, and that he might have taken his foot off the throttle and decreased his speed to see whether he "was going to make a stop or not," and he testified, "I wasn't going to make a stop. He gave me the sign to go ahead and it seemed something hit me * * *." He testified further that the highway was level, that if there were any dips in it he did not see them, and that he gave no signal of his intention to slow down or stop. Defendant testified that he was driving at 40 miles an hour and had followed plaintiff for four or five miles, gradually drawing closer to him; that the road south of the impact was "dippy, sort of like a roller coaster but not as severe," and that "this continues for a mile, a mile and a half or two or three miles"; that as he came over one dip, he saw plaintiff going into another one and as he, defendant, went into the next dip, he would lose sight of plaintiff, who would appear at the top of the next dip; that as he, defendant, came out of dip No. 1, plaintiff was starting into dip No. 2, and that as he came out of dip No. 2, he saw plaintiff's car either parked in the middle of the highway or going very slowly; that he saw the man and little girl standing at the side of the road and that in order to drive past plaintiff's car he would have had to drive over the middle line; that at this time plaintiff's car was about 60 feet away when he first noticed it; that he then observed another car coming south within 200 feet of plaintiff's car and that he either had to hit that car head on or hit plaintiff's car; that he was going approximately 45 miles an hour when he struck plaintiff's car; that plaintiff was leaning over, facing the pedestrian and they were talking to each other, and that the point of impact was where the pedestrian was standing. The pedestrian, Mr. Leahy, testified that when he heard plaintiff's car, he motioned over his left shoulder for the car to proceed on; that he had seen defendant's car approximately a half or three-quarters of a mile down the highway and saw it next immediately before the crash and he testified, "It looked like it was going across the road towards me. That was my impression of it"; that the Petersen car was then going north on the right-hand side of the road. He testified that he did not believe plaintiff was leaning toward him and that he did not notice any other cars at that time going either north or south. This is the substance of the testimony quoted in plaintiff's brief and of which it is said, "From the foregoing evidence, which we believe thoroughly reflects the entire situation, we submit that the verdict is contrary to the evidence and that there is no evidence of contributory negligence on the part of the appellant."

[4] The further contention is made that the defense of contributory negligence was not sufficiently pleaded. It does not appear that objection was made to the sufficiency of the pleading of this special defense and it appears to us to be sufficient.

[5] We are of the opinion that the evidence was not such as to preclude a finding of contributory negligence. In the view of the evidence which tends to support the verdict, it would appear that defendant had been driving with plaintiff's car in view ahead of him for four or five miles and at a speed not greatly in excess of that of plaintiff, who testified that he had been driving about 35 miles per hour. Plaintiff testified that the last time he looked, defendant's car was perhaps a half mile or a mile behind him. From the circumstances of the accident it would appear that the car of defendant was not a great distance away, and that plaintiff made no effort to ascertain how far away it was, just before he slowed down or stopped. His car was in the middle of the highway or close to it when it was struck and plaintiff had made no effort to pull to the right into a safer position. It was shown by the photographs in evidence that there was a wide shoulder to the right, and it did not appear that plaintiff could not have driven onto it either in front of or behind the pedestrians.

The Owens Valley country is one of long distances. The highway in question is well surfaced and is conducive to swift travel. This fact was one which plaintiff should have taken into consideration before bringing his car to a stop or suddenly decreasing its speed. If the jury had believed that plaintiff, in the exercise of ordinary care, should have looked behind to see what was to the rear, immediately before he slowed down or stopped, or that, fail-

ing to do so, he should have pulled off the paved portion of the highway, we could not say as a matter of law that such belief would have been unjustified.

[6] In this same connection we may consider the further claim that it was error to instruct the jury in the language of sections 544 and 546 of the Vehicle Code, St.1935, pp. 185, 186, which require the giving of a hand signal to the driver of a vehicle immediately to the rear before stopping or suddenly decreasing speed on the highway. Plaintiff's argument assumes that the jury accepted as literally true the testimony of defendant to the effect that he was driving at 45 miles per hour and that when he came out of a dip in the highway he suddenly discovered plaintiff's car stopped on the highway only 60 feet away. It is claimed that under these circumstances the failure to give a signal could not have been a proximate cause of the accident, for the reason that defendant would not have observed the signal in time to avoid the accident. If the rate of speed, the distance, and the abrupt dips in the highway, as estimated and described by defendant, had been demonstrated facts, it could have been argued with much force that the instruction should not have been given, for the reason that the failure to give a signal could not have been a proximate cause of the accident. But we think it is clear that the jury could not have accepted defendant's testimony that plaintiff's car was hidden from his view until he was within about 60 feet of it. The most convincing evidence as to the condition of the highway consisted of photographs, which clearly portrayed the vicinity of the accident immediately to the north and to the south and also the skid marks left by defendant's car. It is not questioned that the pictures truly depict the highway in the vicinity of the collision. They conclusively prove that plaintiff was seriously mistaken when he testified that the highway was level, and that defendant was equally in error in testifying, in effect, that plaintiff's car was hidden from view until he approached within 60 feet of it. The pictures showed dips in the highway but they were not by any means as extreme as defendant's testimony would indicate. Upon the contrary, it clearly appeared that a car at the point of the accident would have been in view of a driver for several hundred feet as he approached from the south. Unless the jury disregarded the photographs altogether, they must have believed that plaintiff's car was in sight of defendant for considerably more than 60 feet immediately before the accident.

[7, 8] It is the duty of the court to instruct as to each principle of law which may be applied properly to any material set of facts reasonably deducible from the evidence. The jury could have accepted the circumstantial evidence in preference to that of either of the parties and it was proper to instruct them on theories which might be based upon the circumstantial evidence. It would have been reasonable to believe that defendant had ample time to stop his car after plaintiff slowed down and that he might have done so if he had realized that plaintiff was about to slow down or stop. The failure to give the signal might have been a proximate cause of the accident, depending upon the view the jury took of the facts. The court had to take into consideration that the jury might believe that the accident did not occur in the exact manner described by either of the parties. These instructions on contributory negligence would have been improper only in case a finding of contributory negligence would have been unsupported by the evidence. Such a finding would have had substantial support.

[9] We conclude that it was not error to instruct upon the doctrine of sudden peril. Plaintiff's testimony was that he decreased his speed slightly, if at all. This is contradicted by the mere fact that the collision occurred. There was evidence to indicate that plaintiff slowed down suddenly, if he did not stop altogether. In this situation, especially where the driver gives no signal, drivers of cars which are following closely are placed in a position of immediate danger. Defendant's danger was the more imminent because the approach of the car from the north prevented his turning onto the left half of the highway. In view of the evidence which we have related, and the reasonable inferences that might be drawn therefrom, we think it was proper to give the instruction on imminent peril.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

68 Cal.App.2d 143

ERTMAN v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12774.

District Court of Appeal, First District, Division 2, California.

March 22, 1945.

Hearing Denied April 19, 1945.

1. Mandamus ⇐164(3)

Where a verified petition for writ of mandate alleged that order granting a new trial was dated, filed and entered on 14th day of October, 1943, by a deputy clerk and the allegation was not denied in the return, appellate court properly assumed that the filing was admitted.

2. Mandamus ⇐164(4)

In mandamus proceeding, the return is accepted as true unless controverted by the petitioner. Code Civ.Proc. § 1091.

3. Mandamus ⇐164(4)

Where return in mandamus proceedings showed that writ was denied because petitioner had another adequate remedy and return was not controverted, appellate court was entitled to assume the truth of the return. Code Civ.Proc. § 1091.

4. Trial ⇐404(1)

Remarks made by judge during course of trial do not control court's finding.

On petition for rehearing.

Petition denied.

Prior opinion, see 155 P.2d 908.

Abraham Setzer, of San Francisco, for appellant.

Morris Oppenheim, of San Francisco, for respondent.

PER CURIAM.

[1] In his petition for a rehearing appellant criticizes the statement in the opinion that the order signed by the judge on October 6 was "filed" on October 14 by the clerk of the court. Appellant states that such order "was never filed anywhere." We took the recital from the verified petition of appellant for a writ of mandate where he alleged that the order granting a new trial "was dated, *filed* and entered on the 14th day of October, 1943, by a deputy clerk." This allegation was not denied in the return and we may assume that it may be taken as admitted. Appellant refers to some conflicting testimony taken in another proceeding, but that is not important here. We are concerned only with these conceded facts—that, whatever the paper may be called, a submission slip, an order, or a memorandum, it was signed by the judge within time and was either entered or filed on October 14th when the judge was out of the State. In any event the matter is apparently concluded by Cox v. Tyrone Power Enterprises, 49 Cal.App.2d 383, 395–397, 121 P.2d 829. Under the authority of Willis v. Superior Court of Mendocino County, 214 Cal. 603, 7 P.2d 303, it is ordinarily true that an order granting a new trial is effective when signed by the trial judge without regard to the date of its filing or entry. This rule was followed and broadened in Hackel v. Los Angeles Ry. Corp., 31 Cal.App.2d 228, 88 P.2d 178. However in this case the judge's instruction to his clerk to file the order on October 14 unless the judge directed him otherwise raises a question as to whether the order was, or was intended to be, effective before its filing. If not effective before filing it was argued that it never became an effective order because of the judge's absence from the state on that day. People v. Ruef, 14 Cal.App. 576, 626, 114 P. 48, 54. This question we found it unnecessary to decide because of our holding that we were bound on this appeal by the trial court's determination that the remedy by appeal from the municipal court was "a plain, speedy, and adequate remedy." Code Civ. Proc. § 1086. It may be suggested that, if it became necessary to decide that question, it might be held that the order became absolute at the moment that Judge Kaufman was leaving the state with the intention of not returning before October 14, because at that moment he put it out of his power to do the judicial act of directing his clerk not to file the order, People v. Ruef, supra; and the direction to file it on October 14 thereby became unconditional.

[2] Appellant criticizes the statement that he took an appeal to the superior court from the order granting a new trial. He says that though such fact was alleged in the return no proof was offered and he cites section 462 of the Code of Civil Procedure to the effect that affirmative allegations in the answer are deemed controverted. That is not the rule in mandamus proceedings. The return is accepted as true

unless controverted by the petitioner. See § 1091, Code Civil Procedure; 16 Cal.Jur. 868; McClatchy v. Matthews, 135 Cal. 274, 67 P. 134.

[3, 4] For this reason we reaffirm that it is proper to assume that the writ of mandate was denied because the trial court found that the petitioner had another adequate remedy. References to remarks made by the judge during the course of the trial are not controlling. This rule is so well settled that citation of authority is unnecessary.

The petition for a rehearing is denied.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.



68 Cal.App.2d 449

RHEA v. MILLSAP.

Civ. 14570.

District Court of Appeal, Second District, Division 1, California.

March 19, 1945.

1. Judgment ⇐375

A trial court has inherent power to set aside a judgment obtained through fraud committed upon it and such right is not derived from statute nor limited to time therein specified. Code Civ.Proc. § 473.

2. Divorce ⇐165(3)

Where a reconciliation was effected between husband and wife after rendition of interlocutory divorce decree and subsequent thereto a final divorce decree was entered but wife did not immediately seek to have the decrees vacated because she was lulled into sense of security by husband's statement that reconciliation made decrees ineffective, and husband continued to conduct himself as though divorce decrees had not been entered, trial court had jurisdiction on petition of wife to set aside final divorce decree on ground of fraud.

3. Divorce ⇐165(3)

Where reconciliation was effected between husband and wife after rendition of interlocutory divorce decree and subsequent thereto final divorce decree was entered but wife did not immediately take steps to vacate the decrees because she was lulled into sense of security by statements of husband who thereafter married another, the question of innocence and good faith of the second wife was not material in determining right of first wife to have final decree vacated for fraud.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action for divorce by Fayetta Lenora Rhea against Robert Stephen Rhea, wherein H. C. Millsap, special administrator of the estate of Robert Stephen Rhea, deceased, was substituted as defendant and the plaintiff filed a petition to set aside the final and interlocutory divorce decrees and to dismiss the divorce action, and wherein an order to show cause was served on Vivian Rhea, second wife of the deceased. From a decree setting aside the interlocutory and final divorce decrees, Vivian Rhea appeals.

Affirmed.

Robert J. Sullivan, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

YORK, Presiding Justice.

The facts which form the basis of the instant litigation appear to be briefly as follows:

On or about March 3, 1940, Robert Stephen Rhea and respondent Fayetta Lenora Rhea were married at Covington, Kentucky; that on September 2, 1941, said respondent filed suit for divorce against Robert Stephen Rhea and the interlocutory decree therein was entered October 3, 1941. Thereafter, during the month of June, 1942, "Fayetta Lenora Rhea and Robert Stephen Rhea, had a reconciliation of their differences, and agreed to resume marital relations, and pursuant thereto and in accordance therewith they did resume marital relations * * * and continued to live together as husband and wife at all times thereafter until about January 1, 1943, when the said Robert Stephen Rhea, as a Second Lieutenant in the Air Force of the United States Army was ordered to service in the Arctic Circle." Being unaware of the reconciliation of the parties to the divorce action, respondent's attorney made application to the trial court for the entry

of the final decree of divorce which was duly entered on October 13, 1942. On October 17, 1942, said attorney advised respondent of his action by letter, enclosing a copy of said final decree. Respondent testified that upon receipt of this communication, Robert Stephen Rhea took it to an attorney in San Francisco, who told him to disregard it; that it was unnecessary to do anything about the final decree of divorce as long as they were reconciled. On December 30, 1942, Lieutenant Rhea signed an authorization for an allotment of $100 per month to respondent (Plaintiff's Exhibit 15) and on the same day executed a change of beneficiary designating his wife, Mrs. Faye Rhea, and his mother, Mrs. Dorothy Black, as beneficiaries of his National Service Life Insurance (Plaintiff's Exhibit 14).

Respondent testified further that in the latter part of December of 1942, Lieutenant Rhea told her he expected to get his orders for overseas duty and it was agreed between them that respondent should come to Los Angeles to stay with her sisters while her husband was away; that she, Lieutenant Rhea and one of her sisters drove from San Francisco to Los Angeles arriving at the latter place around 11 o'clock in the morning of January 1, 1943; that they went to the apartment of another sister at 420 South Union Avenue; that Lieutenant Rhea did not stay there "because my sister just had the one bedroom in the apartment, and so he left about 2:00 o'clock to go down to a hotel room, and he said he would come back and call for me, and I was to stay and wait for him." That he telephoned her three days later and that she did not hear from him again until January 14, 1943, when he telephoned her from Seattle and told her he had been married. On February 13, 1943, respondent received a telegram from his commanding officer notifying her of Lieutenant Rhea's death.

Immediately after learning of Lieutenant Rhea's remarriage, respondent consulted her attorney and was advised that the final decree of divorce should be set aside so long as she and her husband had been living together. Accordingly, on February 16, 1943, respondent filed her petition to set aside the interlocutory and final decrees and to dismiss the divorce action, and an order to show cause therein was served upon Vivian Rhea, the second wife, who filed her answer thereto. Thereafter, an order was made substituting as defendant in the divorce action H. C. Millsap, special administrator of the estate of Robert Stephen Rhea, deceased, whereupon respondent filed a second petition to set aside the final and interlocutory decrees and to dismiss the divorce action, and another order to show cause was served on said Vivian Rhea.

The matter came on for hearing, and the trial judge made complete findings of fact from which he drew the following conclusions of law:

"1. That it should be ordered, adjudged and decreed that the entry of the final decree of divorce herein on or about the 13th day of October, 1942, was the result of a fraud committed and practiced upon the court itself, in this, that at the time of the signing and entry of said final decree of divorce it was represented to the Court that there had been no reconciliation of plaintiff and defendant Robert Stephen Rhea, and that plaintiff and defendant Robert Stephen Rhea were living separate and apart; that the aforesaid representations were unwittingly made by the attorney for the plaintiff at a time when he himself believed that there had been no reconciliation of plaintiff and defendant * * * and that (they) were living separate and apart, whereas in truth and in fact when the representations aforesaid were made by said attorney, plaintiff and defendant Robert Stephen Rhea had had a reconciliation and at said time they had become reconciled and were living together as husband and wife and continued to live together as husband and wife until on or about January 1, 1943; that said attorney would not have made the representations aforesaid or requested the entry of said final decree of divorce if at said time he had known that plaintiff and defendant Robert Stephen Rhea had become reconciled and were then living together as husband and wife, and likewise the Court would not have signed and entered said final decree of divorce if it had been disclosed to the Court at said time that plaintiff and defendant Robert Stephen Rhea had become reconciled and were then living together as husband and wife, and by reason of all the matters and things aforesaid a fraud was committed and practiced upon the Court and by reason thereof said final decree of divorce should be and is hereby vacated and set aside.

"2. That it should be further ordered, adjudged and decreed that the final decree of divorce entered herein was entered

through mistake, inadvertence, fraud, surprise and excusable neglect as well as the fraud practiced upon the Court as found in the findings on file herein and hereinbefore adjudged, and that it should be and is hereby vacated and set aside as of the date of entry thereof, to-wit, October 13, 1942, and that the interlocutory decree of divorce should be and is hereby vacated and set aside and that the above entitled action should be and the same is hereby dismissed.

"3. That it should be further ordered, adjudged and decreed that the said Fayetta Lenora Rhea do have and recover of and from Vivian Rhea, also known as Vivian Ahlers, the costs and disbursements incurred herein * * *."

From the judgment which was thereafter entered pursuant to said conclusions of law, Vivian Rhea prosecutes this appeal, and as well from the order denying her motion to vacate the judgment and for the entry of a new and different judgment under sections 663 and 663a of the Code of Civil Procedure.

While appellant's opening brief urges that the instant proceeding under an order to show cause to set aside the interlocutory and final decrees of divorce was improper and not within the jurisdiction of the trial court, her closing brief concedes that three of the cases cited by respondent are in point, to-wit: Aldrich v. Aldrich, 203 Cal. 433, 264 P. 754; Tomb v. Tomb, 120 Cal. App. 438, 7 P.2d 1104, and Raps v. Raps, 20 Cal.2d 382, 125 P.2d 826.

[1] In the Aldrich case it was held that a trial court has inherent power to set aside a judgment obtained through a fraud committed upon it, and its right to do so is not derived from section 473 of the Code of Civil Procedure, nor limited to the time therein specified; and that the defendant in such a case has a remedy in a new equitable proceeding to set aside the judgment on the ground of fraud but notwithstanding that fact a motion to set the same aside in the original action is proper.

In Tomb v. Tomb, supra, 120 Cal.App. at pages 441, 442, 7 P.2d at page 1105, it is stated:

"It is a well-recognized principle that a court of general jurisdiction has the inherent power to set aside a judgment obtained through fraud practiced upon the court. McKeever v. Superior Court, 85 Cal.App. 381, 259 P. 373; McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 45, 40 A.L.R. 1110. * * *

"In the case now under consideration the court had jurisdiction to set aside the interlocutory and final decrees, being satisfied that they were obtained through fraud practiced by the husband. * * * The fraud alleged in the motion to set aside the interlocutory and final decrees is that the husband by the said reconciliation led respondent to believe that no further proceedings would be taken in the divorce action, and then took advantage of that situation and without the knowledge of respondent and without informing the court that there had been a reconciliation between him and his wife secured first the interlocutory decree and thereafter secured the final decree."

In Raps v. Raps, 20 Cal.2d 382, 387, 125 P.2d 826, 829, the Supreme Court held that "The affidavits presented by Elias Raps on the hearing of the motion alleged facts sufficient to establish that the plaintiff Rose Raps had surreptitiously secured the entry of the divorce decrees after there had been a reconciliation between the spouses. In granting the motion the court necessarily determined that the decrees were obtained by means of extrinsic fraud practiced upon the husband and the court and that they should be vacated. The order was within the jurisdiction of the court on the facts presented. Britton v. Bryson, 216 Cal. 362, 14 P.2d 502; McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110."

It was held in McGuinness v. Superior Court, 196 Cal. 222, 229, 236, 237 P. 42, 48, 40 A.L.R. 1110, that the facts therein presented a case of extrinsic fraud where it appeared that after the entry of the interlocutory decree of divorce, the parties resumed marital relations and during said time the husband obtained a final decree of divorce without the knowledge of the wife. The Supreme Court there stated: "We are therefore satisfied that, notwithstanding the fact that the divorce action has abated in so far as any further trial or determination of the issue as to the marital relations of the parties to it is concerned (through the death of the husband), the court retained its inherent power and jurisdiction to conduct the investigation into the integrity of its records which the plaintiff's motion suggests and which the court of its

own motion is proposing to undertake." See, also, Britton v. Bryson, 216 Cal. 362, 369, 14 P.2d 502.

In the case of Gump v. Gump, 42 Cal. App.2d 64, 69, 108 P.2d 21, 24, appellant argued that the relief granted, vacating a final decree of divorce, was improper, because "though the action purported to be in equity, it sounded in law and should have been treated as a motion made under section 473, Code of Civil Procedure, to set the decree aside." The court there held that a suit in equity may be prosecuted to vacate a judgment procured by extrinsic fraud, even though there may be available the remedy by motion under section 473, Code of Civil Procedure.

In the instant proceeding the trial court found upon substantial evidence that a reconciliation was effected between Robert Stephen Rhea and Fayetta Lenora Rhea about the months of June or July, 1942, and that subsequent thereto a final decree of divorce was entered and a copy thereof sent to the respondent, but that said respondent "Fayetta Lenora Rhea took no steps to have it vacated and set aside until sometime in January or February, 1943, and the reason that said Fayetta Lenora Rhea did not take any steps prior to that time was because of the fact that she was lulled into a sense of security by statements said Robert Stephen Rhea made to her that the aforesaid reconciliation made said interlocutory decree of divorce ineffective for any purpose and that said final decree of divorce was likewise ineffectual for any purpose, and in that connection the court further finds that subsequent to the entry of said final decree of divorce, and after knowledge of the entry thereof and the receipt of a copy of said final decree of divorce, said Robert Stephen Rhea continued to conduct himself as though said interlocutory decree of divorce had been vacated and said final decree of divorce had not been entered. * * * that any lack of diligence on the part of said Fayetta Lenora Rhea to have said final decree of divorce set aside was due to the conduct and statements of said Robert Stephen Rhea as hereinbefore found and not otherwise."

[2] Applying the foregoing principles of law to the facts presented herein, it is obvious that the trial court had jurisdiction under the procedure followed by respondent to render the judgment appealed from.

[3] The question of the innocence and good faith of appellant is not material, because as so aptly stated by the Supreme Court in Nelson v. Nelson, 7 Cal.2d 449, 452, 60 P.2d 982, 983, "While it is regrettable that defendant had remarried in the interim, this fact, standing alone, cannot serve to deprive plaintiff of the relief to which she is entitled. Moreover, this fact was before the court below and was undoubtedly weighed by it in determining the cause. It is unfortunate that one of two apparently innocent persons must suffer by reason of defendant's fraud."

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concur.



68 Cal.App.2d 424

Ex parte SCHUBER.

Cr. 1908.

District Court of Appeal, Third District, California.

March 15, 1945.

1. Criminal law ⇐239

Where transcript of proceedings before committing magistrate was not sufficient to establish offense of committing a lewd and lascivious act, defendant should have been discharged. Pen.Code, §§ 288, 872.

2. Criminal law ⇐406(1)

The corpus delicti must be established before extrajudicial statements and admissions of a defendant are admissible in evidence, and can be considered as tending to establish a fact to which they relate.

3. Criminal law ⇐230

The essential principles of procedure and of evidence cannot be departed from by committing magistrate in conducting preliminary examinations, notwithstanding that such examinations are usually less formal in matters of procedure than would be required upon a trial of the cause. Pen. Code, § 872.

4. Criminal law ⇐406(1), 517(4)

Although committing magistrate may hold a defendant to answer upon evidence which would not support a verdict of guilty, there must be some evidence tending to show commission of crime charged before a defendant's admission or confession can be introduced for any purpose. Pen.Code, § 872.

5. Habeas corpus ⇐21

Petitioner, who was committed on a charge of performing a lewd and lascivious act upon the body of a female under the age of fourteen, solely upon petitioner's extrajudicial confession, and without other evidence tending to show commission of offense charged, was entitled to release on habeas corpus.

Original proceeding in the matter of the application of William Schuber for a writ of habeas corpus.

Writ granted and petitioner discharged.

C. Ray Robinson and Samuel V. Cornell, both of Merced, for petitioner.

Claude H. Adams, Dist. Atty., and Wm. R. Elam, Asst. Dist. Atty., both of Merced, Robert W. Kenny, Atty. Gen., and Jess Hession, Asst. Atty. Gen., for respondent.

PEEK, Justice.

Petitioner herein charges that his confinement is illegal in that he has been held to answer the charge of violation of Section 288 of the Penal Code without probable cause for the reason that no violation of said section was shown to have been committed.

Attached to his petition is a complete transcript of the proceedings before the committing magistrate. From said transcript it appears that the only evidence introduced tending to prove that a crime had been committed or to connect defendant with the crime charged, other than the extrajudicial statement of defendant which was reduced to writing but which was neither signed nor sworn to by him, was the testimony of a doctor who examined the young girl involved and who testified merely that "there was a slight tear at the posterior part of the genital;" that he took a smear but that no spermatozoa was disclosed. In other words, the transcript discloses no evidence whatever, independent of defendant's admission, as to the cause of the injury.

[1] Obviously such testimony is not sufficient under Section 872 of the Penal Code to hold the defendant to answer in the Superior Court. In no way does it appear from such testimony that "a public offense has been committed," and without some showing in that regard it cannot be said that there was "sufficient cause to believe the defendant guilty thereof" for no crime has been proved. Sec. 872, Penal Code. In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528.

[2] As stated in the case of People v. Simonsen, 107 Cal. 345, 40 P. 440: "It is elementary that the corpus delicti must be established before extrajudicial statements and admissions of a defendant are admissible in evidence and can be considered as tending to establish the fact to which they relate." That such is the overwhelming weight of authority in this country must be conceded. In re Kelly, 28 Nev. 491, 83 P. 223.

[3, 4] While it is true that preliminary examinations of persons accused of crime when held before a committing magistrate are usually less formal in matters of procedure than would be required upon the trial of the cause the essential principles of procedure and of evidence may not be departed from by committing magistrates in the conduct of such examinations. In re Williams, 52 Cal.App. 566, 199 P. 347, and although the committing magistrate may hold a defendant to answer upon evidence which would not support a verdict of guilty, nevertheless there must be some evidence tending to show the commission of the crime charged before a defendant's admission or confession can be introduced for any purpose. People v. Kaye, 43 Cal.App. 2d 802, 111 P.2d 679.

The cases relied upon by respondent are not in point, for, as previously stated, no evidence whatsoever other than the extrajudicial statement of the defendant was produced tending to show that any crime had been committed.

[5] It is our conclusion that petitioner, having been committed on a criminal charge without reasonable or proper cause, should be discharged, and it is so ordered.

ADAMS, P. J., and THOMPSON, J., concur.

68 Cal.App.2d 300

HULL et al. v. SANTINO et ux.

Civ. 14564.

District Court of Appeal, Second District, Division 3, California.

March 6, 1945.

1. Execution ⇐73

Where judgment creditor seeks issuance of execution more than five years after entry of judgment, question whether creditor exercised due diligence in attempting to enforce judgment during the five-year period is for trial court to determine in its discretion. Code Civ.Proc. §§ 681, 685.

2. Appeal and error ⇐983(3)

An order made under trial court's authority to issue execution more than five years after entry of judgment will not be disturbed on appeal unless it clearly appears that the court's determination constituted an abuse of discretion. Code Civ. Proc. § 685.

3. Execution ⇐73

Where title report obtained after entry of judgment showed that $1,000 note, secured by trust deed covering debtor's realty, had already expired by its terms, and that mortgage had been executed four years prior to judgment, but no further inquiry was made during life of judgment to ascertain whether lien had been canceled or extended, evidence sustained determination of trial judge that inactivity of judgment creditor constituted such lack of diligence on his part in levying upon property owned by judgment debtor as to justify refusal of writ of execution more than five years after rendition of judgment. Code Civ.Proc. §§ 681, 685.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action on a note by Albert M. Hull and Earl T. Hull against A. Santino and wife. From an order denying a motion for issuance of an execution after five years had elapsed from date on which the final judgment was rendered, Earl T. Hull, individually and as surviving partner of the firm of Albert M. Hull and Earl T. Hull, appeals.

Affirmed.

W. W. Middlecoff and Oscar S. Elvrum, both of Los Angeles, for appellant.

Jerrell Babb and David G. Kling, both of Los Angeles, for respondents.

DESMOND, Presiding Justice.

Earl T. Hull, individually and as surviving partner of the firm of Albert M. Hull and Earl T. Hull, appeals from an order of the Superior Court of Los Angeles County denying his motion for issuance of an execution after five years had elapsed from June 17, 1938, the date upon which a final judgment in favor of the partnership was entered. That judgment, based upon a promissory note signed by defendants, Mr. and Mrs. Santino, on October 29, 1932, amounted to $3,150.63, and no portion of it being collected within the five year period expiring June 17, 1943, Earl T. Hull gave notice, under date of November 27, 1943, of his intention to move the court for issuance of execution. Such a motion is provided for by section 685, Code of Civil Procedure, which, so far as pertinent, reads as follows:

"In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, *and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code. The failure to set forth such reasons as shall, in the discretion of the court, be sufficient, shall be ground for the denial of the motion.*" The language in italics was added to the section by an amendment adopted by the legislature in 1933, the force of which was recognized by the Supreme Court almost ten years later when, on December 10, 1942, opinions were filed in Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205, Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207, and Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210.

It is provided by section 681 of the Code of Civil Procedure that "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. * * *"

[1, 2] The question raised by this appeal is whether the court abused its discretion in refusing to authorize the issuance of the writ of execution. If no abuse

is found, this court may not set aside the order. The problem which the trial judge was called upon to solve was whether the creditor has exercised due diligence, under the circumstances of this case, in attempting to enforce his judgment during the five year period. As stated in Beccuti v. Colombo Baking Co., supra, 21 Cal.2d at page 363, 132 P.2d at page 209: "Whether he has exercised such diligence is, by the express provisions of the statute, for the trial court to determine in its discretion. And an order made under such authority will not be disturbed upon appeal unless it clearly appears that the determination constitutes an abuse of discretion. Butcher v. Brouwer, supra." A study of the affidavits in support of and opposing the motion and the principles set out in the three opinions just mentioned convinces us that this is not a case where it can be said that the action of the trial judge constituted an abuse of discretion.

The motion for execution was supported by an affidavit made by Mr. Hull. Counter-affidavits opposing the motion were filed by defendant Appollonio Santino and his son, Victor. These were followed by affidavits in rebuttal, signed by Oscar S. Elvrum, John F. McNeil and Paul Briskin, all at one time or another acting as attorney for appellant.

Mr. Hull, in his affidavit, stated that he was the owner of the judgment which had been obtained against these defendants, having acquired the interest of his partner, Albert M. Hull; that at the time the judgment was entered Mr. and Mrs. Santino were the owners and in possession of the West half of the Northwest quarter of Section 4, Township 7 North, Range 13 West, S. B. B. M., located in the county of Los Angeles; that "said property at said time, was doubtfully of a value sufficient to pay the encumbrances then on said property prior to the entry of said judgment and to provide for a $5000 homestead then on said property by the defendants, judgment debtors." The affidavit further recited that on the 5th day of December, 1938, the judgment creditors caused an abstract of the judgment to be filed in the office of the County Recorder of the County of Los Angeles; "That thereafter and prior to the 16th day of August, 1943, said real property above described became and as affiant believes is of the value of at least $25,000.00; that it is highly improved with residence and out-buildings and is planted to alfalfa; that the price of alfalfa is now over $24 per ton, while when said judgment was obtained it was less than $10 per ton as affiant believes, and affiant alleges that so far as he can ascertain said judgment debtors still own the whole equitable interest in said real property.

"That on or about the 16th day of August, 1943, said judgment debtors conveyed by grant deed, all of said real property to their son Victor Santino, upon a recited consideration in said deed of '$1.00 and other good and valuable considerations', and inserted in said deed the words, 'and in further consideration of the promise on the part of the grantee to the grantors of support for the remainder of the lives of the grantor or either of them by the grantee do hereby grant to Victor Santino, a married man as his separate property, all that real property (above described), reserving to the grantors a life estate therein, and subject to current taxes and deed of trust for $1000 dated May 5, 1930, recorded in book 10094 page 317 of Official Records of Los Angeles County and subject to a homestead recorded in book 11332 at page 374, said Official Records of said County.'

"That affiant states on his information and belief that in fact, and in equity, said Victor Santino, the son of said judgment debtors, holds said above described real property upon a trust and agreement for the benefit of said judgment debtors created by them for their own support and in addition thereto with the object and purpose of obtaining for themselves and their use the value of said property over and above the $5000 exemption of said homestead, free and removed from the possibility of said affiant obtaining satisfaction of his said judgment out of said property."

The defendant, A. Santino, in his counter-affidavit, alleged that he is 71 years of age and now resides at Tujunga in the County of Los Angeles; that he moved there in the winter of 1941 from the West half of the Northwest quarter of Section 4, Township 7 North, Range 13 West, S. B. B. M., which is located in Lancaster, California, where Earl T. Hull has resided; that during the whole life of the judgment in question the land in Lancaster was "conservatively valued at not less than $15,000.00, and in this connection affiant further alleges that during the whole life of the said judgment practically the same amount of alfalfa was growing

on the land as was grown in the last alfalfa season in 1943, and that the value of the crops produced on said land during the life of the judgment plus the value of the land at a minimum of $15,000 less all encumbrances and less $5000 homestead valuation, left a margin to pay said judgment (principal, interest and costs) many times over, if said plaintiffs had levied execution upon said land, during the life of said judgment." In this affidavit, Mr. Santino states that Mr. Hull "had full opportunity during the whole life of the judgment to see the alfalfa grown on said land which was cut, baled and stacked in the hay shed and hay barn which were located on said land, and to levy execution on the same had he so desired, but he neglected to do so." He also stated that on August 16, 1943, he and his wife executed a deed to his son, Victor, and at that time Victor "took said property * * * under the terms of said deed and not otherwise." Another allegation in the counter-affidavit of Mr. Santino is to the effect that at all times during the whole life of said judgment the Lancaster property has been of a fair, reasonable value of two or three times the amount of said judgment over and above all encumbrances and above the homestead exemption; "Further, that the value of the unincumbered alfalfa raised on said land during the life of said judgment was more than sufficient to have paid the amount of said judgment, principal, interest and costs, long before said judgment became outlawed." Mr. Santino closed his counter-affidavit of December 13, 1943, with the statement that "instead of levying execution while the judgment was alive, the plaintiff, Earl T. Hull alone, brought an action on said judgment, in this court, No. 486-891, on July 16, 1943."

Mr. Elvrum, in his affidavit, stated that on or about November 8, 1938, he examined the defendant Maria Santino in supplementary proceedings and mailed a report of those proceedings to Mr. McNeil at Lancaster. He attached, as an exhibit to his affidavit, the letter to Mr. McNeil, in which it appears that Mrs. Santino stated that she and her husband had acquired the Lancaster property in 1930; that on or about December 19, 1931, she executed a declaration of homestead attaching to that property. In this letter Mr. Elvrum stated to Mr. McNeil: "I asked Mrs. Santino if she cared to make any arrangement for the payment of this obligation to Hull Bros., and she said she did not. If we obtain anything from this defendant, we will have to battle every inch of the way. I feel, however, that Hull Bros. should advance the money for the complete examination of the title of the property I have mentioned before, as this will be the basis of the action to be brought." Within a month thereafter a title company report, which is attached as an exhibit to Mr. Elvrum's affidavit, showed that the West half of the Northwest quarter of Section 4, Township 7 North, etc., S. B. B. M., described in the report as parcel I, belonged to the defendants Santino but subject (1) to the declaration of homestead on 69.39 acres; (2) to a trust deed to secure a note for $1,000, dated May 5, 1930, due three years after date; (3) to an agreement to convey a portion of said parcel one, executed by defendants Santino to Gus Angelus, recorded March 2nd, 1931; (4) to a mortgage covering parcel I and other property in favor of the Pomona Pump Company to secure a note of March 1, 1934, in the sum of $739.22.

Mr. McNeil's affidavit was to the effect that prior to March 20, 1943, he was one of the attorneys for the plaintiff in the action and at a meeting held on or about March 15, 1943, between himself, Mr. Hull and Paul Briskin, in the city of Lancaster, "it was agreed between the three of them that from said time forth said Paul Briskin would act as sole attorney for said Plaintiffs to collect said judgment, and manage the case"; that prior to that time he had diligently tried to find property of the defendants exempt from execution but was unable to find any except the Lancaster property, which had been homesteaded by the defendants; that "at said times it was doubtful in the opinion of affiant whether said homestead was of sufficient market value to justify an attempt to sell it under execution, and obtain a substantial amount over the exemption allowed by law. * * * That affiant has been a resident of the Antelope Valley, Los Angeles County, where said Homestead property is located for over ten years, and has owned real property in said community, and has held the office of Justice of the Peace for several years in said Antelope Valley and Township; that he has dealt in real property, and knows of many transactions of sales in said Valley in the last 5 years; that real property in said vicinity has increased in Market Value from 100% to 300% in the last five years."

The affidavit of Paul Briskin, dated December 27, 1943, shows that several years prior to March 1, 1943, he maintained law offices and resided in Lancaster; that about March 1, 1943, he was consulted by Mr. McNeil with a request that he assist, as one of the attorneys, to bring proper actions or proceedings to renew the judgment before it had expired and to collect it by execution or otherwise; that all papers relative to the case were left with him but on or about the 20th of March, 1943, he volunteered for service in the American Red Cross and was immediately assigned to Washington, D. C.; that about June 2, 1943, he was transferred to Seattle and then to Victorville, "and since April, 1943, to the present time he has not been allowed to visit his office on business, and he was kept in Seattle Washington from June 2d, to August 13th, 1943"; that he made diligent effort to procure some attorney to act for him and attend to the unfinished business in his law office in Lancaster, California, and was unable to obtain any assistance until after the judgment had expired by limitation of five years from its entry; that on July 1, 1943, he obtained the assistance of W. W. Middlecoff; that all their transactions were carried on by mail and that they never met personally until August 15, 1943.

In support of his claim that the action of the trial judge represents an abuse of discretion, the appellant points out that section 685 of the Code of Civil Procedure contains no limitation of time within which an execution may be ordered, and urges that equity and good conscience require the judgment to be paid; further, that the discretion of the court "should not be used to increase the burdens which the law already casts upon a just creditor for relief." In his argument on these various points he cites Corcoran v. Duffy, 1937, 18 Cal.App.2d 658, 64 P.2d 735; City of Los Angeles v. Forrester, 1936, 12 Cal.App.2d 146, 55 P.2d 277; McClelland v. Shaw, 1937, 23 Cal.App.2d 107, 72 P.2d 225; Palace Hotel Co. v. Crist, 1935, 6 Cal.App. 2d 690, 45 P.2d 415; and Passow v. Bell, 1938, 27 Cal.App.2d 360, 81 P.2d 224. While these cases were decided after 1933, the effective date of the amendment, they preceded the three 1942 decisions mentioned in the opening paragraphs of this opinion. The first of these Butcher v. Brouwer, supra, 21 Cal.2d at page 358, 132 P.2d at page 207, holds that "in view of the legislative and judicial history of section 685, its present provisions should be construed as authorizing the court to give a creditor an execution only if, during the five years following entry of judgment, he exercise due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time." This principle is reiterated and enforced in the Beccuti v. Colombo Baking Co. case, supra, and in Hatch v. Calkins, supra.

[3] Although the title report which was obtained immediately after Mrs. Santino's examination in November, 1938, showed that the $1,000 note attaching to the real estate in question had already expired by its terms and that the mortgage to the Pomona Pump Co. had been executed four years prior to the date of the judgment, no further inquiry seems to have been made then or at any later time during the life of the judgment to ascertain whether those liens had been cancelled or extended. And although appellant resided in Lancaster, where defendants also resided until 1941, there is nothing in the record to indicate that he or his partner or any of his attorneys ever made a demand, oral or written, for the payment of any portion of the judgment. Nor does it appear that they ever made any inquiry of Mr. Santino concerning his assets or property although apparently from the statements made in the affidavits furnished by both sides, the ranch was in a flourishing condition, constantly increasing in value. Mr. Hull, according to his affidavit, believes that the property became worth "at least $25,000" prior to August 16, 1943, and one wonders why with that belief and since Mr. Elvrum five years previously had predicted a battle every inch of the way to recover anything from the defendants, he did not pursue his rights at least to the extent of examining Mr. Santino in supplemental proceedings. Presumably he could have re-engaged Mr. McNeil since in the latter part of the five year period Mr. Briskin was unable to serve. We note that Santino, in his affidavit, alleges that "during the whole life of said judgment said land was conservatively valued at not less than $15,000." If this statement were accepted as true, or even if it were not, the trial judge may well have concluded that the record of inactivity established by appellant over the

five year period constituted such lack of diligence on his part in levying upon the property owned by the debtor as to justify a refusal of the writ of execution.

No abuse of discretion appearing in this case, the order is affirmed.

SHINN and PARKER WOOD, JJ., concur.



68 Cal.App.2d 485

McKELLAR v. PENDERGAST et al.
Civ. 7070.

District Court of Appeal, Third District, California.

March 21, 1945.

Hearing Denied May 17, 1945.

1. Judgment ⇐199(3)

Trial court's power to set aside a verdict of a jury and enter a contrary judgment is the same as its power to grant a nonsuit. Code Civ.Proc. § 629.

2. Judgment ⇐199(3)

A motion for judgment notwithstanding verdict may properly be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff. Code Civ.Proc. § 629.

3. Landlord and tenant ⇐169(4)

A tenant seeking to recover against landlord for injuries sustained in a fall on leased premises had burden to establish the causal connection between the alleged negligence of defendant and the resulting injuries.

4. Landlord and tenant ⇐169(6)

Evidence that tenant slipped on oily substance which had been dropped on floor of apartment hall and merely showing a possibility that the apartment janitor, rather than another, dropped the substance on the floor, was insufficient to establish that apartment owner's negligence was the proximate cause of tenant's injury.

5. Landlord and tenant ⇐164(1), 169(6)

Operators of apartment house were not insurers of tenant's safety, and mere proof that a substance on apartment floor caused tenant to slip and suffer injuries was insufficient to establish negligence of operators.

6. Landlord and tenant ⇐164(6)

Landlord is only responsible for not removing a dangerous foreign substance brought upon the premises by others if landlord actually knew of the presence of such substance, or if it had been present for a sufficient length of time that he should have known thereof.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Sarah E. McKellar against Harriet E. Pendergast and others for injuries sustained by plaintiff in a fall on defendants' premises occupied by plaintiff as tenant. Defendants' motion for a judgment notwithstanding verdict was granted, and plaintiff appeals.

Affirmed.

Irvin C. Ford and Van Dyke & Harris, all of Sacramento, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondents.

PEEK, Justice.

Appellant Sarah McKellar, by her action, sought to recover from respondents Pendergast, as owners, and respondent Randlett, as manager of an apartment house in the city of Sacramento, damages for personal injuries. The jury returned a verdict in her favor. However, respondents' motion for a judgment notwithstanding the verdict was granted and judgment for defendants was entered accordingly.

By her complaint she alleged that at the time of the injury she was a tenant in defendants' apartment house; that defendants carelessly and negligently permitted an oily substance to remain on the lobby floor, and that as a proximate result of such negligence she fell and suffered serious injuries. Defendants' answer admitted the ownership of the premises and that plaintiff was a tenant, but specifically denied any negli-

gence in the maintenance of the lobby floor, and as an affirmative defense alleged that plaintiff was contributorily negligent.

It appears that at the trial plaintiff's case was predicated upon the theory that defendants' negligence consisted in collecting and carrying out the garbage from the individual apartments without sufficient care and caution to prevent dripping; that by reason of such negligence, garbage dripped upon the lobby floor, and it was that garbage upon which plaintiff slipped and sustained injuries. All of which were directly in issue and essential to plaintiff's case.

The very comprehensive memorandum opinion of the trial judge discloses that defendants' motion for a judgment notwithstanding the verdict of the jury was granted upon the sole ground that said verdict was not supported by the evidence.

On appeal it is plaintiff's contention that the evidence introduced by her when viewed in the most favorable light, was entirely sufficient to sustain the verdict of the jury under either or both of two propositions. (1) That either defendants were negligent by having carelessly caused the condition of the lobby floor or (2) that they failed to exercise that degree of care in the maintenance of the premises that the law exacted of them, and carelessly failed to remedy a dangerous condition created by others after having an adequate opportunity to do so.

[1, 2] The power of a trial court to set aside a verdict of a jury and enter a contrary judgment is the same as its power to grant a nonsuit. Sec. 629, Code Civ.Proc.; Neel v. Mannings, Inc., 19 Cal.2d 647, 122 P.2d 576. Therefore a motion for judgment notwithstanding a verdict of the jury may properly be granted "only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff." Card v. Boms, 210 Cal. 200, 291 P. 190, 191; Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826; Megee v. Fasulis, 57 Cal.App.2d 275, 134 P.2d 815.

In light of such rule the evidence which plaintiff must rely upon in support of her contention may be epitomized as follows:

Defendant Randlett, called as an adverse witness under Section 2055 of the Code of Civil Procedure, testified that the apartment house contained 36 apartments, housing approximately 60 people; that the floor of the lobby was inlaid linoleum of variegated colors; that in going to and from plaintiff's apartment on the second floor it is necessary to walk across said lobby; that janitor service was provided for the guests; that the janitor employed at the time of plaintiff's accident had been there but a short time; that one of his duties was to clean the lobby under her supervision; that a further duty of the janitor was to pick up from each apartment daily the accumulated garbage of the previous day; that the tenants put the garbage in paper bags which were provided by the landlord and placed the bags in cubby-holes opening from the kitchen of each apartment into the hallway; that the sacks of garbage were placed in a wicker basket by the janitor and carried to an incinerator; that in order to get to the incinerator it was necessary to carry the garbage so collected across the lobby floor; that on the floor near where plaintiff fell she saw a few yellow spots but she did not know what they were, that it might have been the drippings of mayonnaise or salad oil; that on the morning of the accident the floor of the lobby had been dusted thoroughly by the janitor preparatory to waxing; that he concluded his dusting at 8 o'clock, at which time the floor was clean; that several times thereafter but prior to the time he carried out the garbage, she observed the floor to be clean. Her testimony regarding the time she last saw the janitor in relation to the time the plaintiff fell is somewhat confused. She first testified that she did not notice what time it was when she saw him but that it must have been between 7:30 and 8 o'clock, and that it must have been just a few minutes before plaintiff fell; that she did not have time to examine the floor after the janitor collected the garbage. Later she testified, in response to questions by the trial judge, that she saw the janitor with the empty basket about 8:30 o'clock, and that plaintiff fell between 9 and 10 o'clock; that the spot where plaintiff fell was in a direct line with the stairway and where the janitor would have to cross in carrying out the garbage.

Mrs. Edith Davis, called as a witness for plaintiff, testified that she had lived at the apartment for several years; that in the

color of the linoleum were shades of cream and yellow to rusty; that when she went to the assistance of plaintiff she noticed a substance on plaintiff's heel—"something of a creamy—very pale—an oily, creamy substance" on the floor, covering an area about the size of the palm of one's hand.

Mrs. Maude A. Scott, a niece of the plaintiff, and a witness in her behalf, testified that she was called by Mrs. Davis, and upon entering the lobby was informed by the manager that plaintiff had fallen on some oil on the floor, that it looked like mayonnaise or cream or something of that order.

Plaintiff's testimony was merely that after taking three steps from the bottom of the stairs her feet slipped and she fell; that the manager mopped up the floor around her feet but that she did not know upon what she had slipped.

[3, 4] The burden of proof was upon plaintiff to prove the existence of every essential fact upon which she relied, which in the present case means primarily, proof of the causal connection between the alleged negligence and the resulting injury. Applying this rule to the evidence reviewed it is readily apparent that such evidence presented no basis for the conclusion of the jury other than mere speculation. Or, stated in another fashion, it is no more speculative to presume that the oily substance was dropped by another than it is to speculate that the janitor dropped it. In either event the conclusion reached can be only the result of speculation, and therefore was not sufficient to support the verdict of the jury. Reese v. Smith, 9 Cal.2d 324, 70 P.2d 933. Nor can a plaintiff recover where the facts go no further than to establish a possibility that defendant's negligence was the proximate cause of the injury. Wilbur v. Emergency Hospital Ass'n, 27 Cal.App. 751, 151 P. 155.

[5] Defendants as operators of the apartment house were not insurers of plaintiff's safety. Sylvia v. Mellema, 17 Cal. App.2d 728, 62 P.2d 746. Therefore mere proof that a substance on the floor caused plaintiff to slip and suffer injuries is not sufficient.

As stated in Gold v. Arizona Realty, etc., Co., 12 Cal.App.2d 676, 55 P.2d 1254: "It was not shown that the 'substance' which caused plaintiff's fall had been on the stairway any length of time or that it had been left there by an agent of defendant. Marple v. Manspeaker, 88 Cal.App. 682, 263 P. 1022. To determine how the 'substance' became attached to plaintiff's shoe one must enter the field of conjecture. It may have been picked up from the street as she entered the apartment house or it may have been dropped on the stairway by someone not in defendant's employ." See also Marple v. Manspeaker, 88 Cal.App. 682, 263 P. 1022.

Plaintiff argues, however, that the law has been relaxed particularly in a recent case decided by this court (Megee v. Fasulis, 57 Cal.App.2d 275, 134 P.2d 815, 818), and a subsequent case involving the same parties, reported in 65 Cal.App.2d 94, 150 P.2d 281.

In the first Megee case this court stated "there was evidence from which the jury had a right to conclude that respondent had so operated the shooting device and so maintained the premises that discharged cartridges had fallen upon the stairway and that appellant had slipped on one of them and had fallen. * * * Our conclusion is that there is sufficient evidence in the record to support a finding that appellant's injuries were the proximate result of the negligence of respondent in maintaining said premises and stairway, and that appellant was not guilty of contributory negligence."

In other words the evidence in the Megee case was sufficient to show that the negligence of the owner of the premises in allowing empty cartridge shells to fall on the stairway was in the nature of a continuing act of negligence, and in fact had caused the fall of one person other than plaintiff therein, and which evidence, although circumstantial, was sufficient to establish the chain of causation from which the jury might logically draw the inference that the plaintiff's fall was the result of slipping upon one of the empty shells.

Although, as stated by the trial judge in his memorandum opinion herein, "A plaintiff is not bound to negative every other conceivable theory or hypothesis which ingenuity may invent to account for his injury", yet, nevertheless, the burden of proof was upon her to show the causal connection between the alleged negligence and the injury.

In the Megee case, supra, the defendant was found to be negligent in allowing the empty shells to be on the stairway. In the present case the source of the substance on the floor is unknown. All that the record

herein discloses is that some time after the janitor carried a wicker basket of garbage across the lobby floor a tenant slipped on some oily substance and was injured.

[6] The second phase of plaintiff's appeal is that if some one other than the janitor dropped the substance upon which she slipped, defendants were negligent in not remedying such condition, and therefore the judgment must be reversed. The record discloses no evidence in support of such contention. An owner of premises is only responsible for not removing a dangerous foreign substance brought upon the premises by others if the owner actually knew of the presence of such substance, or if it had been present for a sufficient length of time that he should have known of its presence. Crawford v. Pacific States S. & L. Co., 22 Cal.App.2d 448, 71 P.2d 333; Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 66, 44 P.2d 405; 45 C.J. 837.

For the foregoing reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



68 Cal.App.2d 444

ROSE v. AMES et al.

Civ. 14540.

District Court of Appeal, Second District, Division 1, California.

March 19, 1945.

1. Appeal and error ⇐1194(3)

Where decision affirming judgment sustaining demurrer contained statements interpreting letter but such statements had reference to insufficiency of allegation of complaint to state cause of action, trial court was not bound by such statements in subsequent action on a new and different pleading.

2. Judgment ⇐572(2)

Defense of res judicata based on judgment sustaining general demurrer to complaint was inapplicable in action on new and different pleading resulting in judgment after trial on merits.

3. Contracts ⇐322(3)

In action for breach of contract under which plaintiff was to receive one-third of all moneys recovered by defendant either by sale or compromise in enforcement of a judgment, evidence disclosing that defendant made purported sale of judgment to judgment debtor's wife and received $7,800 on agreed settlement of $8,900 for which defendant failed to account to plaintiff sustained finding and judgment for plaintiff.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Maurice Rose, doing business as Golden State Finance Company, against E. Neal Ames and Waunetta G. Silverstein for breach of contract and for money had and received by defendant for the use of plaintiff. From an adverse judgment, Waunetta G. Silverstein appeals.

Affirmed.

E. Neal Ames, of Los Angeles, for appellant.

Benjamin & Kronick, A. J. Weiss, and Robert I. Kronick, all of Los Angeles, for respondents.

YORK, Presiding Justice.

The record herein discloses that plaintiff is engaged in the business of tracing assets of judgment debtors and assisting attorneys in the collection of judgments. Also, that defendants Silverstein on July 29, 1937, recovered in the Superior Court of Los Angeles County a judgment for $18,983.66 and costs against John A. Woodward, Jr., which judgment was based on a prior judgment against said Woodward recovered on November 17, 1931 by defendant Silverstein. The defendant Ames was attorney for defendant Silverstein in both of these actions. Nothing had been realized on either judgment except that a partial satisfaction thereon was made in the sum of $1431 on December 22, 1938.

On December 19, 1938, plaintiff Rose met the defendants at the office of defendant Ames, at which time the following agreement, in the form of a letter (Plaintiff's Exhibit 1) was executed by the defendants:

"December 19, 1938

Golden State Finance Company, Los Angeles, California, Attention: Mr. H. L. Rose. Dear Sir: In accordance with our conversation, you have informed me of the

fact that you are in a position to give me information whereby I may levy upon property belonging to John A. Woodward, Jr., under an execution issued in the judgment secured by Mrs. Waunetta G. Silverstein against Mr. Woodward in Superior Court Case No. 409108.

"It is understood the information which you are to give me is of sufficient definite nature that it will enable me on Mrs. Silverstein's behalf to levy upon the property designated by you, said information being sufficiently definite to both as to the nature of the property to be levied upon and its location.

"It is understood and agreed that there will be no expenses incurred or necessary in order to recover under an execution upon said property, other than the usual costs of levy and sale.

"It is further understood and agreed that for and in consideration of the giving of the information to E. Neal Ames on behalf of Mrs. Silverstein, you are to receive one-third (1/3) of all moneys recovered either by sale or compromise, after deducting all costs incurred by Mrs. Silverstein in connection with the levy upon the property from the information furnished by you.

"It is further understood and agreed that the property above referred to is not any interest which the said Woodward has under the terms of the trust created by his father's will or any real estate involved therein, nor shall it cover any property upon which you have already levied an execution.

"It is further understood that Mr. Ames is authorized and hereby instructed to pay the same to you out of the proceeds of any recovery made as hereinbefore set out.

"Very sincerely yours
"(Signed) E. Neal Ames.
E. Neal Ames

"I hereby approve the same. (Signed) Mrs. Waunetta G. Silverstein."

Thereafter, in accordance with said agreement, plaintiff informed defendants that John A. Woodward, Jr., had an interest in the St. Anthony Oil Corporation and in shares of stock thereof. On December 23, 1938, under the execution in the Silverstein action, defendant Ames levied upon the interest of said Woodward in the said oil company, and the sheriff's return therein indicated that the 2500 shares of stock of the oil company levied upon were held in escrow upon orders of the California Corporation Commissioner; that said shares had been pledged to secure a debt of $38,252; that a levy of execution for $1,693.10 had been made on November 25, 1938, in a Municipal Court action; and that the stock was subject to a blanket pledge agreement dated November 17, 1938, to secure the above pledge. After the levy under the Silverstein judgment was made, a third-party claim was filed by Martha Woodward, wife of the judgment debtor, in which it was stated that the stock levied upon had a value of $40,000 and that she had a lien thereon for $38,000, by reason of the above-mentioned pledge agreement entered into between her and her husband in November of 1938.

After considerable discussion and negotiation, a settlement and compromise agreement was entered into on July 8, 1940 between Mrs. Woodward and defendant Silverstein for the sale of the latter's judgment to Mrs. Woodward for $8900.

The trial court found: "VI. That it is true that on or about the 19th day of December, 1938, * * * plaintiff entered into an agreement with the defendants, by which it was agreed that if the plaintiff could furnish information to the defendants whereby a levy upon property belonging to the said John A. Woodward could be made under an execution issued on the judgment heretofore mentioned, the defendant, Waunetta G. Silverstein would pay to plaintiff, one-third of all moneys recovered either by sale or compromise, after deducting all costs incurred by said defendant in connection with the levy upon the property from the information furnished by the plaintiff, and that a true and correct copy of said agreement is attached to said amended complaint. It is further true that the defendant E. Neal Ames entered into and executed said agreement only as the agent of and attorney for the defendant, Waunetta G. Silverstein, and that no commitments or promises therein were made by him as a principal."

The trial court also found:

"VII. That it is true that within three months prior to the filing of the complaint in this action, the plaintiff learned for the first time that the defendant, Waunetta G. Silverstein did settle and compromise the judgment mentioned herein, for the sum of $8,900.00 and that she has received on account of said settlement and compromise of said judgment, the sum of $7,800.00 to date, from and as the proximate result of the in-

formation supplied by the plaintiff to the defendants.

"VIII. That it is true that immediately upon learning the aforesaid facts and prior to the institution of this action, demand was made by plaintiff upon defendants for an accounting of the sums so received by the defendant, Waunetta G. Silverstein but the said defendant last named did unlawfully and wrongfully fail and neglect to account to the plaintiff herein by reason of which, the plaintiff has at this date been damaged in the sum of $2,600.00; that no part of said sum has been paid to the plaintiff, and there is now due, owing and wholly unpaid to plaintiff from the defendant, Waunetta G. Silverstein only, the sum of $2,600.00 with interest thereon at the rate of 7% per annum from the dates on which the payments comprising said $2,600.00 were received by the defendant, Waunetta G. Silverstein, in the sum of $294.86."

From the judgment which was thereafter entered pursuant to said findings of fact, defendant Silverstein prosecutes this appeal, urging (1) that the interpretation placed upon the terms of Plaintiff's Exhibit 1 by the appellate court in Rose v. Ames, 53 Cal.App.2d 583, 128 P.2d 65, is binding upon the parties and the trial court in the instant action; and (2) the findings of fact are in conflict with and not supported by the evidence.

[1, 2] The complaint, as to which a general demurrer was sustained in Rose v. Ames, 53 Cal.App.2d 583, 128 P.2d 65, apparently contained four causes of action: (1) common count; (2) breach of contract; (3) specific performance, and (4) conspiracy, and while division 2 of this court in affirming the trial court's judgment sustaining the demurrer made some statements interpreting the terms of the letter of December 19, 1938 (Plaintiff's Exhibit 1 herein), such statements had reference to the insufficiency of the allegations of the complaint therein to state a cause of action on the various counts, and the trial court in the instant action was not bound by them. The complaint herein is a new and different pleading, defendants' demurrers thereto were overruled, and the judgment from which the appeal herein is taken was rendered after a trial on the merits. Therefore, the defense of res judicata has no application to the facts disclosed by the record herein.

In connection with her claim that the findings are in conflict with and not supported by the evidence, appellant submits "that there is not one word of evidence to support the finding that there ever was,

"(a) A sale under execution.

"(b) That there was ever any compromise of any alleged sale under execution entered into between defendant Silverstein and John A. Woodward.

"(c) That there was ever any compromise of the judgment entered into between the defendant Silverstein and John A. Woodward, and that the findings set out in paragraphs VI and VII insofar as they refer to an alleged compromise or settlement of the judgment or the execution sale are not supported by any facts and are in direct opposition to all of the evidence upon those issues introduced by the plaintiff and the defendants."

The so-called agreement (Plaintiff's Exhibit 1) expressly provided that respondent was to receive "one-third (1/3) of all moneys recovered either by sale or compromise, after deducting all costs incurred by Mrs. Silverstein in connection with the levy upon the property from the information furnished by you."

It is undisputed that after the levy was made on the stock of Mr. Woodward in the St. Anthony Oil Company, negotiations were commenced for the settlement or compromise of the judgment which finally resulted in the sale of the judgment to Mrs. Woodward. It is also undisputed that the compromise was made solely because of the levy made upon the stock by appellant and that the lien of the levy was continued on the stock despite the purported agreement to sell the judgment to Mrs. Woodward.

The contract does not state that the compromise must be made with any particular person, and it is obvious that the purported sale of the judgment to the wife of the judgment debtor was in reality a compromise and settlement of the judgment outstanding against her husband. The sum of $7,800 on the agreed settlement of $8,900 was accepted by appellant in payment of her claim against the judgment debtor.

[3] A careful examination of the evidence adduced at the trial herein discloses that it is amply sufficient to support the findings and judgment.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

68 Cal.App.2d 440

LAISNE v. CALIFORNIA STATE BOARD OF OPTOMETRY et al.

Civ. 3164.

District Court of Appeal, Fourth District, California.

March 17, 1945.

1. Appeal and error ⇐781(7)

Appeal from judgment ordering issuance of peremptory writ of mandate directing state board of optometry to revoke previous orders revoking petitioner's certificate of registration to practice optometry and to restore his license was dismissed as having been rendered moot by adoption by board in compliance with judgment and writ of mandate of resolutions setting aside previous orders and reinstating petitioner as a duly licensed optometrist.

2. Physicians and surgeons ⇐11(2)

Under statute making improper use of title "Doctor" or "Dr." cause for revoking or suspending certificate of registration to practice optometry, holder of such certificate may use such title as a prefix to name provided he uses the word "optometrist" as a suffix or in connection therewith, or, if he holds a diploma from an accredited school of optometry, he may use such title as a prefix provided he uses the word "optometrist" or the letters "Opt.D." or "O. D." as a suffix or in connection with his name. St.1937, p. 1295, § 3098.

3. Physicians and surgeons ⇐11(2)

The legislative purpose in adopting statute making improper use of title "Doctor" or "Dr." cause for revoking or suspending certificate of registration to practice optometry was to protect public by requiring holder of such certificate who desires to use such title to add a description which will identify him with profession in which he is licensed. St.1937, p. 1295, § 3098.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Proceeding by E. W. Laisne against the California State Board of Optometry and others for a peremptory writ of mandate to set aside an order of the board revoking petitioner's license and certificate of registration to practice optometry in the State of California. From a judgment ordering issuance of a peremptory writ of mandate directing the board to revoke its order and restore petitioner's license to practice optometry, defendants appeal.

Appeal dismissed.

Robert W. Kenny, Atty. Gen., and Carl W. Wynkoop and Allen L. Martin, Deputy Attys. Gen., for appellants.

Gilbert H. Jertberg and Conley, Conley & Conley, all of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment ordering the issuance of a peremptory writ of mandate.

In October, 1938, the plaintiff was charged before the defendant board with violations of section 3098 and 3125 of the Business and Professions Code, St.1937, pp. 1295, 1296. After hearings, the charges were sustained and on December 19, 1938, orders were made and entered by the board adjudging the plaintiff guilty of the violations charged and revoking his license and certificate of registration to practice optometry in this state.

In the proceeding which followed the trial court entered a judgment denying a peremptory writ. On an appeal that judgment was reversed. Laisne v. California State Bd. of Optometry, 19 Cal.2d 831, 123 P.2d 457. Upon a retrial of the matter findings were made in favor of the plaintiff and a judgment was entered directing the defendant board to revoke its orders and to restore the plaintiff's license to practice optometry in this state. From that judgment this appeal was taken.

The only point urged by the appellants is that the trial court erroneously interpreted section 3098 of the Business and Professions Code, which reads:

"When the holder uses the title of 'Doctor' or 'Dr.' as a prefix to his name, without using the word 'optometrist' as a suffix to his name or in connection with it, or, without holding a diploma from an accredited school of optometry, the letters 'Opt. D.' or 'O. D.' as a suffix to his name, it constitutes a cause to revoke or suspend his certificate of registration."

In the complaint filed, the respondent was charged with using the title "Dr." as a prefix to his name without also using

the word "Optometrist" as a suffix or in connection therewith. It appears that in the instance in question the respondent used the title "Dr.", followed by his name and the abbreviation "Opt. D." as a suffix. It also appears that he held a diploma from an accredited school of optometry. The appellants contend that section 3098 forbids two separate and distinct things, either of which constitutes a cause to revoke or suspend the certificate of registration; that the first of these is the use of the word "Doctor" or "Dr." as a prefix to the name without using the word "Optometrist" as a suffix; that the second is the use of the letters "Opt. D." or "O. D." as a suffix without holding the described diploma; that the second has no connection with the first; that the court erred in finding that the respondent was privileged to use after the words "Dr. E. W. Laisne" either the word "Optometrist" or "Opt. D."; and that it follows that the court erred in finding and holding that the respondent had not violated section 3098 of this code.

[1] Since the briefs were filed on this appeal there have been filed in this court certified copies of resolutions adopted by the respondent board, in compliance with the judgment and writ of mandate, revoking and setting aside its previous orders and reinstating this respondent as a duly licensed optometrist. It, therefore, appears that the only question here presented has become moot and that this appeal should be dismissed.

The appellants have urged, however, that in spite of this fact their question as to the proper interpretation of section 3098 should be passed upon and decided. In our opinion, this could only lead to an affirmance of the judgment.

In 1937, subdivision 7 of section 11 of the Optometry Law was amended, Stats.1937, Chap. 147, page 410. Later, in that same session, the legislature revamped the Optometry Law and placed it in the Business and Professions Code, St.1937, p. 1288. In so doing, it placed most of what had been subdivision 7 of section 11 in what is now 3098 of the Business and Professions Code, and placed the latter part thereof in section 3099. In thus codifying the Optometry Law the legislature separated the various causes for revoking and suspending licenses, which had been all included in section 11 of the old law, and adopted the general practice of treating each such cause in a separate section of the new codification. Also, in adopting section 3098, it left out the semicolon which had appeared between the first and second clauses in the amendment as adopted earlier in that session, omitted the portion which now is in section 3099, and added certain other language which makes the section complete as a separate unit.

[2] As section 3098 now reads it clearly permits the holder of such a certificate to use the title "Doctor" or "Dr." as a prefix to his name provided he uses the word "optometrist" as a suffix or in connection therewith, or, in the event he holds the required diploma, provided he uses the word "optometrist" or the letters "Opt.D." or "O.D." as a suffix or in connection with his name. Thus, it clearly appears that persons not holding diplomas from accredited schools of optometry may use the prefix "Doctor" or "Dr." only if the word "optometrist" is also used, while persons holding such diplomas may use such a prefix if either that word or the letters "Opt.D." or "O.D." are used as a suffix or in connection.

[3] The purpose of the legislature in adopting this section was to protect the public by requiring one holding such a certificate, and who desires to use the title "Doctor" or "Dr.", to add a description which will identify him with the profession in which he is licensed. As the appellants state in their brief, "By usage the doctor upon whom the degree has been conferred does not use the full wording of his degree such as Doctor of Optometry but uses as a suffix to his name Opt.D. or O.D. the abbreviation of his degree." The statute recognizes the meaning of the degree conferred by the accredited schools of optometry and the common practice of using the letters "Opt.D." or "O.D." as an abbreviation therefor, and provides, as an alternative, that this abbreviation may be used by one holding such a diploma instead of the word "Optometrist." Any other interpretation of this statute would not only be unreasonable but would make it a trap for the members of this profession who could not be expected to search for a hidden meaning.

The appeal is dismissed.

MARKS and GRIFFIN, JJ., concur.

68 Cal.App.2d 376

O'DONNELL et al. v. LUTTER et al.

Civ. No. 14616.

District Court of Appeal, Second District, Division 1, California.

March 14, 1945.

As Modified April 10, 1945.

1. Frauds, statute of ⇐116(10)

Specific performance of land contract arising out of series of letters could not be prevented by claim that vendor's brother, who signed certain letter as agent, had no written authority, where subsequent letter of vendor constituted in effect ratification of brother's letter. Civ.Code, §§ 1624, subd. 4, 2309.

2. Frauds, statute of ⇐107(2), 110(1), 112

Memorandum of agreement relied on for specific enforcement of land contract must within itself show the seller and buyer, give price and time of payment, and describe land so that it may be identified.

3. Frauds, statute of ⇐103(1), 118(1)

A land contract to be specifically enforced need not be a formal contract drawn with technical exactness, and memorandum of agreement need not be found in one paper but may consist of a number of documents, including telegrams or letters.

4. Pleading ⇐214(1)

Allegations of complaint must be assumed to be true in passing on demurrer.

5. Specific performance ⇐114(2)

Complaint and attached exhibits consisting of series of letters showed that parties had agreed on all material terms of contract to sell orange grove, and, as against general demurrer, stated cause of action for specific performance in action against vendor's executors and heirs.

6. Specific performance ⇐25

The usual and reasonable terms generally present in land contracts are deemed a part of such a contract or memorandum of agreement when sought to be specifically enforced.

7. Customs and usages ⇐10

As regards specific enforcement of land contracts, such as one arising out of series of letters, custom steps in and it is considered that as to opening of an escrow, furnishing deeds and title policies, prorating of taxes, insurance, rents, etc., the procedure would be as is customary in such contracts.

8. Specific performance ⇐117

Receipt of adequate consideration must be pleaded and proved before court can decree specific performance, as of a land contract. Civ.Code, § 3391.

9. Specific performance ⇐114(2)

In action for specific performance of land contract, allegations that price agreed on was at the time a just, fair, and adequate consideration, though involving conclusions of the pleader and of law, are sufficient as against general demurrer. Civ.Code, § 3391.

10. Specific performance ⇐49(2)

In determining adequacy of consideration for land contract sought to be specifically enforced, fact that vendor and purchaser were good friends and that vendor himself fixed the price may be considered.

11. Specific performance ⇐49(2)

In action for specific performance of contract to sell orange grove for $6,750, fact that vendor's estate had received offer of $10,000 did not indicate such inadequacy of consideration as would bar relief. Civ. Code, § 3391.

12. Specific performance ⇐49(2)

Alleged inadequacy of consideration which will militate against specific performance of contract, such as one to sell realty, must be determined as of date of contract and not by subsequent events. Civ. Code, § 3391.

13. Courts ⇐472(4)

The Probate Code provisions for judicial authorization of executor or administrator to transfer property pursuant to decedent's contract furnish alternative rather than exclusive remedy, and in adversary proceedings it is permissible and proper to resort to equity for specific enforcement, as of land contract, especially where action is brought against vendor's heirs as well as executors. Civ.Code, §§ 3390, subd. 4, 3395; Probate Code, §§ 850 to 853; Const. art. 6, § 5.

14. Specific performance ⇐106(1, 3)

If vendor dies before conveyance, action for specific performance of land contract may be maintained against his heirs and devisees. Civ.Code, § 3395.

15. Executors and administrators ⇐431(2)

Purchasers under land contract allegedly arising from series of letters were not "creditors" or "claimants" within statute, and filing of claim thereunder against deceased vendor's estate was not prerequisite to action for specific performance. Probate Code, § 707.

See Words and Phrases, Permanent Edition, for all other definitions of "Claimant" and "Creditor".

YORK, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Prima M. O'Donnell and husband against Henry W. Lutter and another, as executors of the will of Henry J. Lutter, deceased, and others, for specific performance of deceased's alleged agreement to sell realty, or for damages for breach thereof. From a judgment dismissing the action, plaintiffs appeal.

Reversed and remanded, with directions.

Allard & Whyte and James G. Whyte, all of Pomona, for appellants.

Chas. R. Stead, of Pomona, for respondents.

WHITE, Justice.

Plaintiffs commenced this action to specifically enforce an alleged agreement to sell real property, which agreement was predicated upon certain letters which passed between plaintiffs and Henry J. Lutter during the latter's lifetime; or to recover damages for the breach of said agreement if, for any reason, specific performance could not be decreed. Named as defendants are the two executors of the last will and testament of Henry J. Lutter as well as the latter's eight heirs at law.

Only the executors appeared in the action and a general demurrer was filed in their behalf. Following a hearing had upon said demurrer, the same was sustained by the court without leave to amend, and a judgment was entered by which the action was "dismissed and that the plaintiffs take nothing by reason thereof". From such judgment of dismissal plaintiffs prosecute this appeal.

By their complaint, plaintiffs alleged that between the 15th day of June, 1943, and the 12th day of August of the same year, through a series of instruments in writing, copies of which were attached to the complaint as exhibits and made a part thereof, Henry J. Lutter, during his lifetime, agreed to sell and the plaintiffs agreed to buy certain real property situated at Pomona, in the County of Los Angeles, for the sum of $6,750; that said sum was at that time a just, fair and adequate consideration for the land in question together with certain personal property included in the sale; that plaintiffs were at all times ready, able and willing to pay the agreed purchase price for the property and have demanded of the aforesaid executors a conveyance of said property, but that the latter refused to convey the property in question to plaintiffs or to perform said contract, whereas plaintiffs have performed all of the terms and conditions of said agreement enjoined upon them.

[1] The letters which plaintiffs assert constitute a contract for the sale of real property commenced with a communication from plaintiff Prima M. O'Donnell under date of June 15, 1943, to Henry W. Lutter, wherein she made an inquiry regarding the purchase of certain property located on Fifth Avenue in Pomona adjacent to property owned by said plaintiff's sister, and in which communication she stated "and in case you still plan to sell it would like to hear from you with regard to price, etc.". In answer to the foregoing, plaintiff Mrs. O'Donnell received from Henry J. Lutter under date of June 24, 1943, a communication wherein he stated: "With regards to my Fifth Avenue property in Pomona, I am willing to sell same provided I get my price which is $7000.00, payment to be one half cash and the balance in the form of a first mortgage. The above price would include all fruit on the trees at the time of purchase, water stock and equipment on the premises."

Plaintiffs did not accept this offer but by letter dated July 3, 1943, requested an allowance or reduction on the purchase price because of needed repairs on the house, and in this letter plaintiffs said: "It would be our intentions to pay one-half down and if you plan to hold the 1st mortgage, rather than have us make out a loan here in Pomona, would like to know what your rate of interest would be".

To this counter proposal, Henry J. Lutter replied under date of July 10th by letter in which, after referring to his previous offer to sell, he wrote:

"* * * since last writing you I have contacted my brother William and informs me that the house needed some repairs and that some allowance would be in order. In view of this information, I will make an allowance of $250.00 for the necessary repairs, same to be deducted from my offer of $7000.00.

"I have also recieved a notice from the orange association that there is due me monies which will not be dispersed until the end of the season, this money is not included in the sale price, all other stocks and equipment is included in the above mentioned price."

In this letter, Mr. Lutter also gave plaintiffs the option of obtaining a loan and paying him in full or of having him take a purchase money mortgage for one-half the purchase price. This letter was signed for Henry J. Lutter by his brother, Elmer W. Lutter, and respondents assert that, as an agent for his brother, Elmer W. Lutter was without authority to bind his principal on a contract for the sale of real property, because such authorization was not in writing. Sec. 2309, Civil Code; Subd. 4, Sec. 1624, Civil Code. However, we are convinced that by his subsequent letter of August 12, 1943, headed "Re: Sale of property 1379 Fifth Avenue Pomona, California, Prima O'Donnell, Purchaser", the principal, Henry J. Lutter, ratified the authority of his agent as exercised in the letter signed by such agent under date of July 10, 1943. Plaintiffs met the offer contained in the last communication with an unqualified acceptance under date of July 21st, when they wrote Henry J. Lutter in part as follows: "The price of $6750.00 is satisfactory with us and *we will accept this offer.*" (Emphasis added.)

After advising Mr. Lutter that they had contacted the escrow department of the Bank of America in Pomona and that the bank would request of him the necessary papers for the opening of an escrow, plaintiffs, with reference to the option given them regarding the payment for the property, wrote: "* * * we decided it would be more convenient to pay you off in full for the property. * * *"

Under date of July 20th, the above mentioned bank wrote Henry J. Lutter, asking the latter to forward deed, policy of insurance, and other papers affecting the property, and also advising that it was the bank's understanding that the sale price was $6,750. Replying to the last mentioned communication, Henry J. Lutter, on August 12, 1943, in a letter captioned: "Re: Sale of property 1379 Fifth Avenue Pomona, California, Prima O'Donnell, Purchaser", forwarded to the bank the requested documents. Henry J. Lutter, however, died on September 18, 1943.

[2, 3] Respondents earnestly contend that the foregoing series of letters, which the complaint alleges was "the entire contract between the parties", was not intended as a contract, but was a mere negotiation looking toward a formal agreement to be submitted later for approval by the parties. Respondents urge that such contention is fortified because of the claimed indefiniteness of many of the terms contained in the letters and because no provision was therein made for care of the property, which was an orange grove; date of possession; prorating of taxes, insurance and rent; who would pay the title charges and escrow costs; and when the cash purchase price would be deposited in the escrow. These contentions on the part of respondents cannot be upheld. The requirements of a contract for the sale of real property have been definitely established and are that the memorandum of the agreement shall within itself show who is the seller and who is the buyer, what the price is and when it is to be paid, together with a description of the land so that it may be identified. Breckinridge v. Crocker, 78 Cal. 529, 534, 21 P. 179. The case just cited is also authority for the statements that a contract of the kind with which we are here concerned need not be a formal contract drawn up with technical exactness, and that the memorandum of the agreement need not be found in one paper but may consist of a number of documents including telegrams or letters. It is only necessary that the memorandum contain all of the aforesaid material elements of the contract. In Grafton v. Cummings, 99 U.S. 100, 106, 25 L.Ed. 366, the law upon this subject is thus declared: "In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold, and of the price to be paid for it. It is therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it."

Tested by the foregoing rules, we find in the foregoing letters:

The Seller: Henry J. Lutter in his letter of June 24, saying "I am willing to sell."

The Buyers: Prima M. O'Donnell and her husband, declaring in the letter from Mrs. O'Donnell, dated June 15th, 1943, "We will accept this offer".

The Price: Henry J. Lutter, through his agent in the letter of July 10th, saying the price was $6,750.00 ($250.00 allowance) "to be deducted from my offer of $7000.00."

The letter of Prima M. O'Donnell dated July 21, saying "the price of $6,750.00 is satisfactory with us and we will accept this offer".

Time and Manner of Payment: As to the time when and the manner in which the purchase price was to be paid, it seems clear to us from the postcript on the letter from Mrs. O'Donnell that the price was to be paid in cash through a thirty-day escrow, to which Henry J. Lutter agreed in his letter of August 13th complying with the request of the escrow bank dated July 20th that he send deed and other documents necessary to open the escrow.

Description of Property to be Sold: In his letter of June 24th, Henry J. Lutter, the seller, identified the property as "my Fifth Avenue property in Pomona". And the complaint alleged that the seller owned no other property on Fifth Avenue in Pomona. Moreover, the seller definitely described and identified the property in his letter of August 12th, wherein he said: "Re: Sale of Property 1379 Fifth Avenue, Pomona, California".

[4, 5] In support of their claim that the letters herein were only intended as preliminary negotiations looking toward the execution of a later formal contract which was never executed, respondents direct our attention first to the case of Edgecomb v. Callahan, 132 Cal.App. 248, 254, 22 P.2d 521, 524, but that case is easily distinguished from the case at bar, because therein the letter relied upon to establish the contract clearly stated that it was only "a preliminary ouline to work from" and further stated that it "brings out the necessary high spots for you people to shoot at"; whereas in the instant case, Mr. Lutter's letters indicate that in his mind he had made a sale. Respondents also cite the cases of Van Hoosen v. Briscoe, 85 Cal.App. 746, 259 P. 1115, Dexter v. Ankiewicz, 26 Cal. App.2d 326, 79 P.2d 400, and The Pacific Rolling-Mill Co. v. Riverside & Arlington Ry. Co., 90 Cal. 627, 27 P. 525, but an examination of these cases shows that each of them involves and turns upon the proposition that it did not appear that either party intended to be bound until a formal written contract expressing all the terms of the agreement should be executed, or that there was not a meeting of the minds of the parties because they were merely negotiating as to the terms of an agreement to be entered into between them. Such is not the situation presented by the complaint herein. The allegations of the complaint and the exhibits made a part thereof, the truth of which must be assumed in passing upon a demurrer thereto, clearly indicate that the material terms of the contract of sale were agreed upon between the parties and nothing material to the validity of the contract was left to future settlement—nor does it appear in the case at bar that the parties intended or agreed that the contract between them should not be binding until evidenced by any other writing or agreement. The inference is also justified that the parties intended to be bound by the terms of their correspondence with each other in so far as the sale of the property in question was concerned, and that such correspondence embraced all the material terms of their agreement.

[6, 7] Respondents contend that the terms of the agreement are uncertain in that they do not provide for prorating taxes, insurance and rent. Equity, however, does not require that all of the terms and conditions of the proposed agreement be set forth in the contract. The usual and reasonable terms generally present in such contracts are, in contemplation of the parties, a part of such contract. In such a case custom steps in and it would be considered that as to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, insurance, rents, etc., the procedure would be as is customary in contracts of this kind. Wagner v. Eustathiw, 169 Cal. 663, 666, 147 P. 561; Janssen v. Davis, 219 Cal. 783, 788, 29 P.2d 196.

[8-12] Respondents next urge tnat the purchase price set forth in the agreement between the parties was not the fair adequate or reasonable value of the property. Specific performance cannot be enforced against a party "if he has not received an adequate consideration for the contract",

Sec. 3391, Civ.Code, and the authorities are uniform in holding that the above requisite must be pleaded and proved before such relief can be awarded. The complaint filed herein alleges that the price agreed upon for the purchase of the property "was at said time a just, fair and adequate consideration for the land therein referred to together with the personal property covered by said sale". While such allegations, as contended by respondents, do in a measure involve conclusions of the pleader and of law, they nevertheless also involve a statement of fact and are sufficient to withstand the effects of a general demurrer. Ehrhart v. Mahony, 43 Cal.App. 448, 450, 184 P. 1010. In the case of Prince v. Lamb, 128 Cal. 120, 129, 60 P. 689, 692, cited by respondents, an averment "that the price paid was a just and fair price, and the full value of the premises" was held sufficient. It is also evident from the letters incorporated in the complaint that Henry J. Lutter and appellant Prima M. O'Donnell had for some time been very good friends, and such relationships may also be taken into account in determining the adequacy of consideration. Wagner v. Eustathiw, supra, at p. 664 of 169 Cal., at p. 562 of 147 P. Consideration may also be given to the fact that Mr. Lutter himself valued the property at the price fixed by him when offering it for sale to appellants. Rischard v. Miller, 182 Cal. 351, 354, 188 P. 50. Respondents emphasize the fact that by their complaint appellants allege that, while they claim a contract to buy the property for $6,750, the estate had received another offer of $10,000, by reason of which it is argued that the consideration of the agreement between Henry J. Lutter and appellants was inadequate and unfair. This argument is unsound because inadequacy of consideration which will militate against specific performance of a contract must be determined as of the date of the contract and not by subsequent events. O'Connell v. Lampe, 206 Cal. 282, 285, 274 P. 336. The allegations of the complaint are sufficient to entitle appellants to an opportunity to prove the adequacy of consideration as of the date of the contract between them and the seller.

[13, 14] Respondents insist that since Henry J. Lutter died prior to the commencement of this action, specific performance cannot be decreed against the executors of his estate unless they were lawfully authorized to convey the property. Subd. 4, sec. 3390, Civil Code. It is contended that the power and authority of an executor to convey real property or to fulfill a contract executed by the decedent is governed by sections 850 to 853 of the Probate Code and that, until proceedings are instituted pursuant to the cited sections, the executor is without power to execute a deed. We do not regard the aforesaid Probate Code sections as providing an exclusive remedy for securing specific enforcement of a contract made by a decedent, but rather as an alternative remedy intended "to save the expense and delay that would follow a separate action in equity for a specific performance" (Estate of Garnier, 147 Cal. 457, 459, 82 P. 68, 69) in cases where the legal representatives of the decedent's estate and the other parties to a contract are in accord that the agreement made by a decedent should be enforced. The Probate Code sections above referred to merely add to the law another method of procedure, but resort to the same is permissive rather than mandatory. We are impressed that the Probate Code sections are permissive and that resort may be had to them in cases "where the right of petitioner in the premises is free from doubt." Estate of Garnier, supra. In adversary proceedings, such as the instant case, resort to equity procedure is both permissible and proper. Bewick v. Mecham, 26 Cal.2d —, [156 P.2d 757]. To us it appears doubtful whether the Legislature could constitutionally deprive a superior court of its inherent equity jurisdiction. Cal. Const. Art. VI, Sec. 5; Hall v. Rice, 64 Cal. 443, 1 P. 891, 2 P. 889. Furthermore, the instant action was commenced not only against respondents herein but as well against the heirs and legatees of Henry J. Lutter, who were also joined as defendants. Notwithstanding this, by its judgment the trial court sought to dismiss the action in its entirety and as to all defendants named therein. It has long been held that where a vendor dies before conveyance, an action for specific performance may be maintained against his heirs and devisees (Pomeroy's Specific Performance of Contracts, 3d Ed., sec. 494), and the same author is authority for the statement that where the purchase money remains unpaid, the personal representatives of the vendor are also necessary codefendants, and that they are always proper parties. The rule just announced with reference to the maintenance of an action against the heirs and devisees of a deceased vendor would appear to be followed in California

as is evidenced by section 3395 of the Civil Code.

[15] Finally respondents assert that appellants cannot maintain the action here under review because prior to the commencement of the same they failed to file a claim against the Estate of Henry J. Lutter. Sec. 707, Probate Code. That appellants were not creditors or claimants within the meaning and effect of the Probate Code section just cited and that the filing of a claim against the estate of the decedent is not a prerequisite to the commencement of an action for specific performance was the unqualified holding in Estate of Bailey, 42 Cal.App.2d 509, 511, 109 P.2d 356. Tested in the crucible of both reason and authority, we are persuaded that appellants' complaint stated a cause of action and that the general demurrer thereto should have been overruled.

For the foregoing reasons, the judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer and to allow the defendants a reasonable time within which to answer should they be so advised.

DORAN, J., concurs.

YORK, Presiding Justice.

I dissent. I agree with the trial judge in that portion of his decision which sustained the general demurrer, but I believe that the conclusions stated in the complaint show that possibly the plaintiffs may be able to state a cause of action, and that they should be entitled to amend their complaint, if they are so advised.

My dissent is based upon the belief that it is not fair to the defendants to be forced to trial on the complaint as it now stands. The complaint apparently asks for a personal judgment against the executors as individuals and not as executors, and although it is true that in the caption of the complaint defendants are named as executors and as individuals, the prayer of the complaint is as follows:

"3. That said defendants be adjudged to account and to pay to the plaintiffs damages they have sustained in the event said contract cannot be specifically performed, to-wit: the sum of $3250.00.

"4. For costs of suit.

"5. For such other and further relief as to the court may seem just and proper in the premises."

And the complaint does not ask for a judgment against the executors, as such, *to be paid in due course of administration.*

The actual facts as to any compliance with the terms of the contract are not fully stated. The complaint does not even state that any money was paid into the escrow, and the conclusion that the amount to be paid was equitable is offset by the direct allegation that the property is worth over $3,000 more than the amount to be paid under the contract. Just when this large increase in value over the contract price accrued is "left to the judicial knowledge of the court", is the explanation in appellants' brief.



68 Cal.App.2d 564

BOSTON IRON & METAL CO. v. ROSENTHAL.

Civ. No. 12681.

District Court of Appeal, First District, Division 2, California.

March 28, 1945.

1. Sales ⇐161

If contract for sale of goods to be shipped to given point is silent as to place of delivery, delivery to buyer is complete when made to common carrier at place where seller produces goods or has them for sale.

2. Sales ⇐79, 391(7)

In contract for sale of scrap steel at certain price per gross ton "delivered Japan," the quoted words referred merely to price and not to point of delivery or passing of title, which passed when scrap was loaded in ships and marine policies and title documents in buyer's name were delivered to buyer, and hence buyer could not recover alleged overpayment based on excess of shipping weights over weights at destination.

3. Sales ⇐201(4)

That bills of lading for scrap steel consigned to Japan showed buyer as both shipper and consignor indicated that title became vested in buyer before ship left the

dock, and as against seller, risk from then on was the buyer's including risk of deficiency in landed weights as compared with shipping weights.

4. Appeal and error ⇐882(3)

In action by buyer of scrap steel for alleged overpayment, where seller filed cross-complaint for breach of contract because of buyer's cancellation after part performance, buyer was required to set up its defenses, if any, and on appeal could not raise unpleaded contentions as to commercial frustration and seller's acquiescence and laches.

5. Appeal and error ⇐882(3)

On appeal there must be adherence to theory on which case was tried.

6. Sales ⇐384(2)

Where buyer, after part performance, canceled contract for purchase of scrap steel delivered at Kobe, Japan, seller's damages were properly based on domestic values rather than values at Kobe; title having passed before ships departed.

7. Sales ⇐383

In seller's cross-action for breach of contract for sale of scrap steel because of buyer's cancellation in July, 1937, after part performance, evidence supported finding that at time of breach and within reasonable time thereafter market value of scrap for export was $13 a ton.

8. Appeal and error ⇐1012(1)

Weight and persuasiveness of party's testimony were for trial court in trial without jury.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Boston Iron & Metal Company against William Rosenthal, doing business under the firm name and style of Pacific Coast Shipwrecking & Salvage Company, for an alleged overpayment and penalty under a contract for sale of scrap steel, wherein defendant filed a cross-complaint for breach of contract. From a judgment for defendant on his cross-complaint, both parties appeal.

Affirmed.

Anthony & Rogers, H. M. Anthony, and Henry J. Rogers, all of San Francisco, for appellant and respondent Boston Iron & Metal Co.

William H. Hollander, of Oakland, for respondent and appellant Rosenthal.

GOODELL, Justice.

On April 20, 1937, a contract was entered into between William Rosenthal as seller and Boston Iron & Metal Co. as buyer for the sale of 4,000 to 4,500 gross tons of scrap steel at $30 per gross ton, delivered Japan, for shipment during May, June, July and August, 1937. Three cargoes were shipped, the first from Honolulu and the other two from Oakland, weighing in all, according to weights at points of shipment, 1457.09 gross tons. On July 12, 1937, the Boston Company by telegram and letter notified Rosenthal that no further shipments should be made.

Boston Company's evidence showed that the weight of the first two cargoes at destination was 38.32 gross tons less than at points of shipment. It also disclosed that 536.68 pounds of material in the first cargo exceeded in size the limits set by the contract. Invoices with shipping documents had been sent to Boston Company when the shipments were made, and immediately paid. The plaintiff brought this action for $1,306.51, of which $1,150.87 was claimed as an overpayment because of the shortage in weight, and $155.64 as a penalty for the oversized material. When the defendant answered he filed a cross-complaint for breach of contract arising out of the repudiation as to the 2542.91 tons remaining unshipped at the time of cancellation. Judgment went for the cross-complainant. The court found Rosenthal's damages to be $7,598.64, but deducted the $155.64 (which was conceded) for the oversizes, and entered judgment for $7,443 against the plaintiff.

Plaintiff appeals, contending that it is entitled to judgment for the short weights because, it claims, the seller was obligated to deliver in Japan and therefore landed weights should control. Its other contention is that the measure of damages should have been based on values at Kobe and that no such values were proved; also that Rosenthal acquiesced in the cancellation and was guilty of laches and that this is a case of commercial frustration.

Defendant appeals on the ground that the award of $7,443 is insufficient.

The Boston Company's Appeal.

The questions (1) whether shipping weights or landed weights should control,

and (2) whether values here or in Japan should form the basis of the measure of damages, invite the inquiry as to where the contract was to be performed; where title was to pass.

The writing sued on is dated Baltimore, April 20, 1937. It describes the material, shows the tonnage, and then provides as follows: "Price: Thirty Dollars ($30.00) per gross ton, delivered Japan. Shipment: During month of May, June, July, August, 1937. Terms: All payment to be cash against the following documents: Certificate of weight, Mate's receipt that he has received the weight on the ship, prepaid freight bills, and invoices in duplicate. Remarks: Material to be loaded in vessel, insurable, under the nominal rates of insurance. Proper destination as to port delivery will be furnished upon advice as to the amount of tonnage you are ready to ship." Under Boston Company's signature appears: "Accepted: C. & F. Japan Accepted Ports. Wm. Rosenthal".

The cross-complaint, in addition to stating a cause of action for damages, pleaded that at and prior to the making of the written contract the parties agreed that the defendant would ship all material in the name of the plaintiff, procure at his own cost marine insurance in the name of the plaintiff and for its benefit, and deliver the marine insurance policies to plaintiff; and that these matters had been omitted from the written contract by mutual mistake. The prayer asked for reformation. It was stipulated and the court found that the parties had signed the writing in the belief that it embodied these omitted matters.

The first cargo was shipped on the S. S. "Ethan Allen" from Honolulu. An affidavit was furnished showing the weight to be 1,018,450 pounds, or 454.665 gross tons. The court found that material of that weight was loaded aboard ship, but also found that the weight of the cargo on arrival at Kobe was only 437.55 gross tons. The second shipment was on the S. S. "Golden Tide" from Oakland. Weight certificates were furnished showing the weight to be 1,161,920 pounds, or 518.7142 gross tons. The court found that material of that weight was loaded, but that the cargo at Kobe weighed only 497.51 gross tons. When each shipment was made the defendant delivered to the plaintiff an invoice, a bill of lading, prepaid freight bills, certificates of railroad or truck weights and an insurance policy. The contract called for payment against such documents. The contract also called for a mate's receipt showing the weight on the ship, but the court found that compliance with that provision had been waived.

The parties by stipulation defined the issues to be tried. The first question was whether plaintiff was "obligated to pay for merchandise 'delivered Japan' only?" and the second: "When defendant delivered to plaintiff bill of lading, certificates of railroad or truck weights, insurance policies and invoice did defendant fulfill his contract obligations?"

[1-3] Boston relies upon the words "delivered Japan" as creating a condition that Rosenthal had to actually land the material there. There is nothing in the contract touching the place of delivery other than may be suggested by the words "delivered Japan", and it is settled law that "if, in a contract for purchase and sale of goods to be shipped to a given point, nothing is stated as to the place of delivery, the delivery to the buyer is complete when it is made to the common carrier at the place where the seller produces them or has them for sale." 1 Williston on Sales, 2d Ed., Sec. 280 h, p. 623; Pond Creek, etc., Co. v. Clark, 7 Cir., 270 F. 482, 486. Counsel for Boston have submitted no authority holding that the words "delivered Japan" mean what they claim. On the other hand, in Meyer v. Sullivan, 40 Cal.App. 723, 181 P. 847, this court held, where the words "f.o.b. Kosmos steamer at Seattle" gave rise to a controversy as to precisely where delivery was intended, that the trial court properly admitted parol evidence of custom and usage to aid in determining that question. In the instant case the words "delivered Japan" are part of the sentence "Price: Thirty Dollars ($30.00) per gross ton, delivered Japan." The trial court was undoubtedly satisfied, as we are, that the words in that collocation were used to refer to and qualify price, and not to indicate the point of delivery or where title was to pass. The other provisions of the contract, which were performed to the letter, are consistent with this view, for marine insurance and ocean freight were paid by the seller, which rendered the price of $30 per ton inclusive of all charges up to the actual landing of the cargo in Japan. In short, it was a "delivered Japan" price. In Meyer v. Sullivan, supra, the court

points out that the trial court had determined that the phrase "f.o.b. Kosmos steamer at Seattle" had been "used therein in connection with the price of the grain only, and not as fixing the exact place at which it should be delivered." "In arriving at this conclusion" says the court "the trial court was assisted by the position of the clause in the contracts, used, as it was, in connection with the words fixing the price of the wheat sold." The rule is then cited with authorities. In Pond Creek, etc., Co. v. Clark, 270 F. 482, 486, supra, the rule was thus stated: "It is quite generally accepted as the law that where in a contract the price of goods is fixed, and in connection with the price is employed the term 'f.o.b.' at a given point, it means that this refers to and qualifies only the price, and does not indicate that the seller is actually to deliver the goods at the indicated point, and it is construed to have no reference to delivery, but that wheresoever the goods may be shipped the seller will either pay freight to the indicated point, or, if the goods are not shipped there, will deduct or permit the purchaser to deduct from the fixed price an amount equivalent to the freight on such a shipment to the point indicated." Identical language is found in 1 Williston on Sales, 2d Ed., sec. 280 h, p. 622. The Pond case held that the words "basis Chicago" were used in the contract to refer to and qualify the price, and did not mean or call for delivery at Chicago. The Pond case was followed in Goodyear, etc., Co. v. Northern Assurance Co., 2 Cir., 92 F.2d 70, 72, where the court points out that "F. O. B. Cars New York City" was not found under the caption "Place of Delivery" but "Instead, the f. o. b. provision was placed under the heading 'Terms,' where it would seem to have relation to price and to indicate that the cost of loading on cars was to be borne by the seller * * *." See also for similar reasoning, Chas. F. Orthwein's Sons v. Wichita, etc., Co., 32 Tex.Civ.App. 600, 75 S.W. 364, 365, a case involving the phrase "delivered Galveston". The case of Willits & Patterson v. Abekobei & Co., 197 App.Div. 528, 189 N.Y.S. 525, relied on by Boston, is not in point, for there the contract specified "net landed weights". In the contract under review weights are not mentioned except where cash payment is called for against certain shipping documents including certificates showing weight at point of loading.

If the trial court at any time entertained any doubt because of the ambiguity of the phrase "delivered Japan" (see Cameron, etc., Co. v. Chas. F. Orthwein's Sons, 5 Cir., 120 F. 463, 465, where the price of wheat "at 70½ cents per bushel, delivered Galveston" was held to be ambiguous as to where delivery was to be made), we are satisfied that such doubt must have been removed by the manner in which these shipments were handled. As appears earlier, the contract as reformed required Rosenthal to "ship all scrap iron shipped pursuant to said Agreement in the name of plaintiff". The buyer presumably had some reason for requiring this, and it seems to have been an important one, for in three separate letters (dated May 24, May 28 and June 11, 1937), to Rosenthal, Boston says: "Documents for this shipment should show that the Boston Iron and Metal Company is the shipper, and material is to be shipped to our order at Kobe, notify Mitsui Bussan Kaisha, Ltd. Kobe, Japan." The bills of lading covering both shipments were made out in the name of Boston Iron & Metal Co. as shipper, cargoes deliverable to the order of the same company, notify Mitsui Bussan Kaisha, Kobe. Thus there was strict compliance with this requirement, imposed by the buyer who now urges that title was not to pass until the cargoes were landed in Japan. The court found that Rosenthal procured and paid for the marine insurance and delivered to Boston Company the policies issued in Boston's name and for its benefit, as required by the contract. The contract as reformed and as executed possessed all the attributes of a "c.i.f. Japan" contract. But, more than that, the fact that the bills of lading showed the buyer itself as shipper and consignor would seem to show rather conclusively that title became vested in Boston Company before the ship left the dock and that no scintilla of title remained in Rosenthal. There is no evidence of any collateral or extrinsic understanding between the parties that, despite these indicia of ownership, the seller retained the jus disponendi or that he could, once the bills of lading were signed, assert any control whatever over the goods. 55 C.J. sec. 367, p. 371. Rosenthal thereafter apparently relied only upon the personal credit of the buyer. The risk from then on was Boston's and this was covered by marine insurance in its name for which Rosenthal had paid. In 55 C.J. sec. 367, p. 371, it is said:

"The delivery to the carrier must be such a transfer of possession as will remove the goods wholly from the dominion of the seller and such as to entitle the purchaser to demand the goods of the carrier", citing Ward-Lewis Lumber Co. v. Mahony, 70 Cal.App. 708, 234 P. 417. What was done in the case at bar removed the cargoes wholly from the dominion of the seller by putting them at once into Boston's name as shipper. It is difficult to see how the court could have arrived at any conclusion other than that the contract had been fully performed by Rosenthal and title had passed to the Boston Company when the material was loaded and the documents of title delivered to the plaintiff, all in the name of Boston. That being so, and the court having found that the weights at points of shipment were exactly as claimed by Rosenthal, the weights at Kobe become wholly immaterial.

[4, 5] Other points made by Boston are that Rosenthal acquiesced in the cancellation of the contract and was guilty of laches; that his cross-complaint for damages was an afterthought, and that this was a case of commercial frustration. Rosenthal by his cross-complaint pleaded a breach of contract by Boston, arising out of the cancellation of July 12, 1937. This pleading, which set forth a clear-cut case of prevention of performance as to the remaining 2542.91 tons, required Boston to set up whatever defenses it had to these claims. See 2 Cal.Jur., p. 236, sec. 67. Instead of pleading commercial frustration, acquiescence and laches, it pleaded that Rosenthal had been guilty of the first breach in that he failed prior to the cancellation "to perform the conditions on its (his) part"; that Boston had notified him of this failure and default; that the agreement "was thereby terminated," and that for that reason Rosenthal ceased to attempt delivery of the balance of the material. This, of course, was wholly inconsistent with any of these three points now urged on appeal. Incidentally the court found against Boston on these allegations. The cancellation was on July 12, 1937. Boston's answer to the cross-complaint was filed almost four years later, when all the facts of the transaction must have been within its knowledge, and it certainly knew as much when it filed its pleading as when this case was briefed. Moreover the parties on the eve of trial defined by stipulation the issues to be determined, and commercial frustration, acquiescence and laches were not among them. It is settled law that on appeal there must be an adherence to the theory upon which a case is tried. 2 Cal.Jur. p. 234 et seq., sec. 67 et seq.

[6] Boston's last contention is that Rosenthal's damages should have been based upon values at Kobe. The preceding discussion answers this claim.

We find no merit in Boston's contentions.

The Rosenthal Appeal.

[7, 8] The court at first awarded Rosenthal $7,947.16. Boston moved for a new trial, and, instead of granting it, the court set aside its findings and judgment and reopened the case on the sole issue of damages. The record not only in this respect, but throughout, shows extreme care and thoroughness on the part of the trial court. The findings show the precise method by which damages were computed. The cancellation left 2542.91 tons unshipped, for which Rosenthal would have received, at the contract price of $30 a ton, $76,287.30. Ocean freight, marine insurance and other expenses of Rosenthal's because of the "delivered Japan" price, would have been $35,126.77, leaving a difference of $41,160.53. Between August 9 and September 30, 1937, Rosenthal sold 1379.65 gross tons in 5 lots, which netted him $18,439.64. These 5 sales left 1163.25 tons on hand which were sold by Rosenthal between January 25 and March 4, 1938, but the court found such latter sales were too remote. The court found that the market price at San Francisco of these 1163.25 tons at the time of the breach and immediately thereafter was $13 per gross ton, net, which is $15,122.25. The result is $7,598.64 from which was deducted the $155.64 admittedly due Boston because of the oversizes, and judgment was entered for $7,443. No fault is found by Rosenthal with any of these figures except he claims that the market value instead of being $13 a ton was only $10.50. The only question is whether there is evidence sufficient to support the $13 figure. We are satisfied that there is.

In the first place the record shows that the price of scrap in this market for export was from $1.50 to $2.50 a ton higher than the domestic price. The witness Gruenebaum, called by Rosenthal, testified that

the domestic price was in the neighborhood of $11 per ton and the export price $1.50 or $2 higher, in July, 1937. This testimony alone would suffice to support the finding. Rosenthal himself when questioned with respect to the reasonable market value as of July 12th and a reasonable period thereafter answered: "The market value local mills was around $11.50 a ton * * *. Q. And what is the export price on the same? A. Always $1.50 to $2.50, depending on how bad they want it—it always ranges from $1.50 to $2.50 a ton more than the local price." It is true that Rosenthal later testified to $12.50 a ton, as the export price, but the weight and persuasiveness of such testimony were questions for the trial court.

The foregoing testimony was given at the original hearing. After the case was re-opened the court remarked that his recollection was that there had been other testimony as to value, to which Rosenthal's counsel responded: "Mr. Gruenebaum testified the reasonable market value was $13.50 and Mr. Rosenthal $12.50". From a reading of the record it would seem that at the opening of the second hearing Rosenthal testified to $11.50 to $12.50 plus $1.50 to $2.50 a ton more, which would bring the export price up to a range of from $13 to $15. This would appear to be so, for the court was careful to inquire "That is $12.50 a ton plus what, did you say? A. $1.50 to $2.50.

"Mr. Hollander: Q. What would that differential be for, was that export? A. Yes * * *.

"Q. In other words, that would be the naked price in San Francisco? A. That is right."

Later, undoubtedly referring to this testimony, the court remarked that Rosenthal had "increased it from $13 to $15 a ton this morning." Later on Rosenthal was questioned as to the net "reasonable market value" and he answered $10 and $10.50 a ton. He was not asked, nor did he say, whether this was the domestic or the export price but he certainly must have meant domestic in view of his earlier testimony. In addition to this testimony there is documentary evidence showing that during August (which was within the contract's time range for performance) Rosenthal sold on the 9th, 82.64 gross tons at $14.40 net per ton, on the 11th 297.71 at $13.46 net and on the 18th 420.76 at $13.46 net and that on September 30, which was a month beyond the time range for performance he sold 578.54 gross tons at $13.10. On July 26, 14 days after the cancellation, Rosenthal wrote Boston "Besides this 1500 tons of Rail, I have about 1500 tons of ship scrap and railroad scrap. The local mills are paying $12.50 per ton for scrap today, but I am going to hold on to this scrap for a little while and wait for a better market." Local mills of course meant domestic market and the export prices were higher, as we have seen. On August 19, 1937 (still within the contract's time range), Rosenthal wrote to Boston: "With regards to myself, I just got through shipping 1500 tons of heavy melting steel on the 'Asia' Maru which I sold for $16.55 f.o.b. dock Oakland, and there is 55¢ unloading and tolls which nets me $16.00, which is about $2.50 more than the mills are paying here. I have about 1000 tons left and will probably ship that the early part of next month, and that cleans me all up on the balance of the 'Monterey' and other miscellaneous railroad scrap that I had in my yard." With all this in the record we are satisfied that there was abundant evidence to support the court's finding that the market value was $13 a ton at the time of the breach and within a reasonable time thereafter.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem.

68 Cal.App.2d 426

JARKIEH v. BADAGLIACCO.

Civ. 12756.

District Court of Appeal, First District, Division 1, California.

March 16, 1945.

Hearing Denied May 14, 1945.

1. Appeal and error ⇐607(1)

Since under new Rules on Appeal, a motion in lower court to terminate proceedings to obtain a transcript is unauthorized, an order granting such motion is nonappealable. Rules on Appeal, rules 45 (c), 53(b).

2. Appeal and error ⇐607(1)

Under new Rules on Appeal, power to relieve appellants from default in preparing the record does not rest in the trial court but in the appellate court. Rules on Appeal, rules 10(a), 45(b), 53(b).

3. Appeal and error ⇐801(1)

Public policy favors hearing appeals on their merits and in not depriving a party of his right of appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith.

4. Appeal and error ⇐787

A respondent is entitled to have appellant proceed with expedition, and if appellant fails to comply with Rules, respondent is entitled to have appeal dismissed.

5. Appeal and error ⇐801(1)

Respondent's right to a dismissal of appeal for appellant's failure to comply with rules is not absolute except for failure to file a notice of appeal. Rules on Appeal, rules 10(a), 45(b), 53(b).

6. Appeal and error ⇐607(1)

In determining whether appellant should be relieved from default in preparing record, appellate court must consider the length of the default, circumstances surrounding it, the relative injury that will flow to either party by granting or denying the relief, the nature of the default and other factors, and each case must turn on its own facts. Rules on Appeal, rules 10(a), 45(b), 53(b).

7. Appeal and error ⇐607(1)

That appellant was, in a sense, lulled into a state of security by respondent's participation in settlement conferences is a factor to be considered of some importance in determining whether to waive appellant's default in preparing record on appeal. Rules on Appeal, rules 10(a), 45 (b), 53(b).

8. Appeal and error ⇐607(1)

Where timely notice of appeal was given, counsel for both parties participated in settlement conferences and created reasonable belief that no advantage would be taken of failure to have transcript prepared, and appellant's delay of 30 days following last conference in paying reporter for cost of transcript was caused by mutual and understandable mistake in following an improper procedure, appellant was entitled to be relieved of default in preparing transcript. Rules on Appeal, rules 10 (a), 45(b), 53(b).

WARD, J., dissenting in part.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Albert E. Jarkieh against Emma Badagliacco to recover an interest in proceeds of certain savings accounts, wherein plaintiff recovered a judgment and attempted an appeal. On defendant's motion to dismiss her appeal from order granting plaintiff's motion to terminate proceedings to secure transcript and to dismiss appeal from order denying her motion to vacate order terminating the proceedings, and on motion to be relieved of her default in preparing transcript, and on plaintiff's motion to dismiss the appeal from the judgment.

Appeal from order terminating proceedings to secure transcript and from order denying motion to vacate such order dismissed; plaintiff's motion to dismiss the appeal from the judgment denied; defendant's motion to be relieved of her default granted.

Prior opinion, 154 P.2d 27.

Emmett R. Burns and James M. Thomas, both of San Francisco (James A. Himmel, of San Francisco, of counsel), for appellant.

O'Connor, Neubarth & Moran and Harold H. Cohn, all of San Francisco, for respondent.

PETERS, Presiding Justice.

There are pending before this court several appeals and motions, all connected with plaintiff's attempts to secure a dismissal of the appeal of defendant, or with defendant's attempts to secure relief from her default in failing to have the record prepared within the time prescribed by law.

Plaintiff and defendant are brother and sister and administrator and administratrix of the estate of their deceased mother. The mother had several bank accounts in her name as trustee for defendant, or in the names of herself and defendant as joint tenants. Plaintiff claims a one-half interest in each account, and brought this action to have such right declared. The case was tried before a jury, and, on July 13, 1943, a verdict was rendered for plaintiff. On October 11, 1943, defendant, within the time required by law, filed her notice of appeal. Rule 4 of the Rules on Appeal, effective July 1, 1943, requires an appellant to serve on respondent and file with the court clerk within ten days after filing the notice of appeal, a notice to prepare the reporter's transcript. Subdivision (c) of this rule provides: "The notice given by the appellant under the foregoing provisions of this rule shall not be effective for any purpose unless, within 10 days after notification by the clerk of his estimate of the cost of preparing the reporter's transcript as designated by the notices of the parties, the appellant shall either deposit with the clerk an amount of cash equal to the estimated cost * * * or file with the clerk a waiver of such deposit signed by the reporter. When the appellant has complied with the provisions hereof, the clerk shall forthwith direct the reporter to prepare the reporter's transcript * * *." Subdivision (d) requires the reporter to prepare the transcript within 30 days of receipt of notification by the clerk.

On October 20, 1943, well within the 10 day limitation of Rule 4, by stipulation of counsel and with the approval of the trial judge, the time for filing the notice to prepare the transcript was extended for a period of ten days. The trial court refused any further extension, and on October 30, 1943, a notice to prepare the transcript was duly served and filed. On November 12, 1943, the court reporter advised counsel for defendant that the cost of preparing the transcript would be $1,000. Defendant's counsel did not make any financial arrangements with the reporter until March 13, 1944, when associate counsel handed the reporter a check for $1,000. Obviously, this step was several months too late unless defendant is to be relieved of her default.

[1] On March 2, 1944, plaintiff moved in the lower court to terminate proceedings to obtain a transcript. This motion was granted on March 15, 1944, and defendant has appealed therefrom. Thereafter, defendant moved to vacate the order terminating the proceedings. This motion was denied in April of 1944, and defendant has appealed from such order of denial. Defendant now moves to dismiss these two appeals taken by her. Both of these appeals must be dismissed for the reason that under the new Rules on Appeal a motion to terminate is unauthorized, and therefore an order granting such a motion is nonappealable. Averill v. Lincoln, 151 P.2d 119, 120. In that case the changes accomplished by the new rules were commented on as follows:

"Under the old statutes and former rules, control over the preparation of the record on appeal was in the hands of the trial court, and its power to accept or reject a record, to grant or deny extensions of time, and to grant or deny relief from default, was virtually unlimited.

"The new rules constitute a fundamental departure from the old procedure in the following respects: (1) Fixed periods are specified for the performance of the various steps in preparing the record, and when the allotted time has elapsed the appellant is in default. Rules 4–7. (2) The trial court has authority to extend time for limited periods, and has no power to extend if the time has already expired. Rule 45(b). (3) The appellate court alone has power to grant additional extensions of time and to relieve from default. Rules 45(c) and 53(b).

"As a result of these changes, the motion to terminate proceedings for a record has disappeared from our procedure. If the specified time and allowable extensions have elapsed, the appeal will be dismissed under rule 10(a) unless the appellate court grants relief."

Under Rule 45(b) the power of the Superior Court to grant extensions of time for doing any act or acts involved in the preparation of the record is limited to a total of 90 days. No power to relieve from

default, even within the 90 days, is granted to the trial court. After the expiration of 90 days control over extensions and control over the preparation of the record are in the appellate courts alone. It follows, of course that a motion to terminate proceedings in the lower court is a nonexistent motion. It should be mentioned that these new rules went into effect on July 1, 1943, and the Averill case was not decided until August of 1944, so that neither the trial court nor counsel had the benefit of that decision when these motions were made and passed on in March and April of 1944.

Prior to the April, 1944, order, defendant's counsel ordered the reporter to proceed with the preparation of the transcript so that on the date the order refusing to vacate the order of termination was signed, a substantial portion of the transcript had been transcribed.

When counsel's attention was directed by this court to the case of Averill v. Lincoln, supra, defendant on January 19, 1945, moved this court to dismiss her two appeals above mentioned, and, under Rule 53(b), moved to be relieved of her default. On the hearing of this motion on January 22, 1945, counsel for plaintiff under Rule 10(a) moved to dismiss the appeal from the judgment. By stipulation these two motions were consolidated, and it was stipulated that on the motions this court could consider the entire record produced on the appeals from the order terminating and from the order refusing to vacate, plus certain new affidavits filed in support of the present motions.

The procedure now adopted by counsel is the proper procedure under the new rules. For any default in preparing the record relief must be secured, if at all, in the court to which the appeal has been taken. The last sentence of Rule 53(b) reads: "The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with the new rules, except the failure to give timely notice of appeal." Rule 10(a) contains the converse power. It provides: "If the appellant shall fail to perform any act necessary to procure the filing of the record * * * and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or the reviewing court's own motion."

[2] Before the adoption of these rules the control over, and responsibility for, the preparation of the record was in the trial court, and its discretion in relieving from default or in terminating would not be disturbed in the absence of a manifest abuse. Hohnemann v. Pacific Gas & Elec. Co., 31 Cal.App.2d 692, 88 P.2d 748; Smith v. Jaccard, 20 Cal.App. 280, 128 P. 1023, 1026; Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385; Bonfilio v. Ganger, 60 Cal.App.2d 405, 140 P.2d 861; Cooke v. Cooke, 60 Cal. App.2d 451, 140 P.2d 989; Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468; Bodin v. Webb, 17 Cal.App.2d 422, 62 P.2d 155. That discretion is now conferred on the appellate courts. Without regard to what the trial court did on the motions to terminate and to vacate, we are called upon to determine whether in our discretion we should grant defendant's motion for relief from default or plaintiff's motion to dismiss. We turn to a discussion of these problems.

[3-6] In determining whether to relieve from default we are faced with two conflicting policies. There is, of course, a strong public policy in favor of hearing appeals on their merits and in not depriving a party of his right of appeal because of technical non-compliance where he is attempting to perfect his appeal in good faith. On the other hand, a respondent is likewise entitled to consideration. He is entitled to have the appellant proceed with expedition, and if the appellant fails to comply with the Rules, to have the appeal dismissed. But this right to a dismissal is not absolute, except for failure to file the notice of appeal. Under the Rules, the trial court may grant extensions not to exceed 90 days, the appellate court may grant additional extensions (Rule 45(c), and the appellate court may relieve from default (Rule 53(b). In determining whether an appellant should be relieved from default, various factors must be considered such as the length of the default, the circumstances surrounding the default, the relative injury that will flow to either party by granting or denying the relief, the nature of the default and other factors. Each case must turn on its own facts, and precedents are of little value.

[7, 8] There have been many affidavits, counter affidavits, supplemental affidavits, affidavits in rebuttal, and affidavits in surrebuttal filed in these proceedings. On

several important matters the affidavits agree as to the facts. On other important matters, and on many trivial matters, they are in conflict. The affidavits agree that shortly after the jury brought in its verdict for plaintiff, counsel for plaintiff orally agreed not to execute on the judgment until the matter was finally determined. Counsel has scrupulously observed this agreement. It is also agreed that shortly after the jury brought in its verdict on July 13, 1943, counsel for plaintiff initiated negotiations for a settlement of the entire controversy. Admittedly, these negotiations continued until October 30, 1943, when defendant rejected the offer made by counsel for plaintiff. It is also admitted that thereafter, and until February 18, 1944, defendant and her counsel made various counter offiers of settlement, all of which were rejected by plaintiff and his counsel. Counsel for plaintiff in his affidavit filed in this court frankly and fairly admits that he participated in such negotiations as late as February 18, 1944, when he and his client visited the office of the attorney for defendant to entertain and discuss a new offer of settlement. The affidavits are sharply in conflict as to whether there was an oral understanding between counsel that the transcript need not be prepared pending these negotiations. Counsel for plaintiff denies making such an agreement and avers that after October 30, 1943, he was under the impression that the transcript was being prepared. Counsel for defendant avers that such an understanding was had. We do not find it necessary to pass upon this conflict. The records shows that it is admitted that from July, 1943, to February, 1944, the parties and their counsel were discussing a compromise. Obviously, if $1,000 were expended for a transcript it would materially affect the result of that compromise. Defendant and her counsel were proceeding to try to settle the case and plaintiff and his counsel were participating in those conferences. Regardless of whether or not there was an agreement that the preparation of the transcript should be delayed, counsel for defendant and defendant apparently believed, in good faith, that no advantage would be taken of their default. Assuming defendant was careless in not having a formal understanding concerning the record, nevertheless she was, in a sense, lulled into a state of security by plaintiff's participation in the settlement conferences. This is a factor that has always been considered of some importance in determining whether to waive a default. Bonfilio v. Ganger, 60 Cal. App.2d 405, 140 P.2d 861. Defendant should have made arrangements to pay the reporter by November 22, 1943. This, she did not do until March 13, 1944. But it is significant that plaintiff and his counsel participated in a settlement conference as late as February 18, 1944, and that shortly after the motion to terminate was filed, arrangements were immediately made with the reporter. Thereafter, a considerable portion of the record was prepared.

The real default here is from February 18, 1944, to March 13, 1944, less than one month. What delay has occurred since March of 1944 has been caused by counsel's mutual and understandable mistake in following an improper procedure. When these factors are considered, together with the fact that the new Rules went into effect on July 1, 1943, but 13 days before the verdict of the jury, we think defendant has made a sufficient showing to cause this court to relieve her from her default.

The appeals from the order terminating proceedings to secure a transcript and from the order denying the motion to vacate such order are dismissed for the reason that such orders were unauthorized and are non-appealable; the motion of plaintiff made under Rule 10(a) to dismiss the appeal from the judgment is denied; the motion of defendant made under Rule 53(b) to be relieved of her default is granted, and defendant is granted 30 days from the date this opinion becomes final to have the record prepared and filed as provided by the Rules on Appeal.

KNIGHT, J., concurs.

WARD, Justice (dissenting in part).

I concur in the order of dismissal of the purported appeals from the order terminating proceedings and from the order denying the motion to vacate such order. I dissent from the order of this court denying plaintiff's motion to dismiss the appeal, and from the order granting defendant's motion to be relieved of default.

In this matter it is necessary to deal with new rules (Rules on Appeal, adopted by the Judicial Council, effective July 1, 1943.) It may be assumed that the purpose in transferring the rule-making power from the Legislature to the judiciary, in the matter of the preparation of the record

on appeal, is to facilitate and expedite the business of the court, to accomplish which it is necessary that all parties conform to the new rules. In Murphy v. Krumm, 21 Cal.2d 846, 848, 849, 136 P.2d 8, 9, wherein a reasonably strict adherence to the rules of the court is advocated, the court said: "It is argued that regardless of defendants' delay both in the payment of the fee prescribed for the undertaking of an appeal and in the filing of points and authorities as above detailed, the attendance of these matters prior to the hearing of the motion to dismiss will of itself, justify a denial of the relief sought on this proceeding. While there is a line of decisions in this state supportive of this proposition [citing cases], these cases, by reason of their conflict with the plain language of rule V of the Rules for the Supreme Court and District Courts of Appeal and its uniform interpretation by this court, are of no avail here." It should be noted that the decisions in all cases cited in the above paragraph are by the District Court of Appeal and that no petition for a hearing was filed in the Supreme Court in any of those cases. It was further said in the Murphy case (p. 849 of 21 Cal.2d, p. 10 of 136 P.2d): "That rule has the force of positive law so far as the rights of the parties are concerned. Brooks v. Union Trust & Realty Co., 146 Cal. 134, 138, 79 P. 843; Helbush v. Helbush, 209 Cal. 758, 763, 290 P. 18. The right of the complaining party to a dismissal must be determined by the facts as they exist at the time the notice of motion is given, and it is not destroyed by the mere subsequent filing of the necessary document. Shain v. People's Lumber Co., 98 Cal. 120, 122, 32 P. 878; McCabe v. Healey, 139 Cal. 30, 32, 72 P. 359; Raisch Improvement Co. v. Arata, 193 Cal. 573, 574, 226 P. 399."

Rule 53(b) provides that an appellate court may not set aside a default based upon a failure to serve and file a notice of appeal within the time limit. It appears that failure to conform with the requirements of the new rules in other respects may be excused. There is no method of determining an abuse of discretion by further appeal if the motion is presented direct to the Supreme Court. Remission of the penalty rests entirely in the discretion of the appellate court to which the appeal has been taken, unless there is an abuse of discretion. Nevertheless, this trial function, as distinguished from matters ordinarily within the province of an appellate court, has been imposed upon the justices collectively and individually. Unless the Supreme Court declares to the contrary, it must be assumed that on petition for hearing, after disposition by the District Court of Appeal, the Supreme Court will follow the test heretofore applied by all appellate courts, namely, did the trier or triers of the facts—in this case, appellate judges—abuse their discretion. The determination of that question rests completely with the Supreme Court. When an appellate division is not unanimous in finding the facts, ordinarily the majority view will be accepted unless there appears a clear abuse of discretion.

A former opinion was filed in this case but the matter was resubmitted on the court's own motion for the purpose of considering a point not theretofore brought to our attention, namely, the rule announced in Averill v. Lincoln, Cal.App., 151 P.2d 119. I find that I cannot agree with my associates. My view, irrespective of any previous opinion filed in this matter, is that the appellant has been wilfully negligent in the prosecution of the appeal and I believe it to be my duty to say so.

Averill v. Lincoln, supra, held that the new rules constituted a fundamental departure from the old procedure, and in the course of the opinion said: "Fixed periods are specified for the performance of the various steps in preparing the record, and when the allotted time has elapsed the appellant is in default." After a litigant has had his day in court he should, under the new Rules on Appeal, be held to a reasonably strict performance. If the question presented on appeal or on a motion to the appellate court shows a failure to comply with a strictly jurisdictional or mandatory rule, there is no opportunity to use discretion, as under such circumstances the Court of Appeal has no power to review the order.

However, settlement of disputed issues and the right of appeal on the law and the facts in accordance with appropriate court rules should be favored. Failure to comply strictly with the rules may be excused in the interest of affording a litigant an opportunity to be heard on appeal. If the failure to comply with the rules is inadvertent, and there is no dispute upon such fact—as in Averill v. Lincoln, supra, wherein a law secretary had been instructed to file an original and serve a copy of a "notice of election to proceed by way of

settled statement," and the secretary instead of personally serving the copy upon opposing counsel, mailed it, resulting in his receipt of the copy two days late—the violation of the rule may be excused as the Supreme Court held in that case. In my opinion the facts in the Averill case do not even resemble the facts in the present case.

In this case defendant gave notice of appeal. After extension of time by stipulation and order of court she served and filed a notice to prepare a reporter's transcript, etc., and subsequently received an estimate of cost. She failed to deposit with the clerk an amount of cash equal to the estimated cost, with directions to apply the same to the fees, etc., within ten days of the time she received the estimate. Rules on Appeal, Pt. II, Rule 4(c). Not only did defendant fail within the ten-day period to comply with the rule, but she failed for four months to do so.

Rule 45(b) of the Rules on Appeal provides that the superior court may grant an extension or extensions of time within which to perform any act in the preparation of the record on appeal in a civil action not exceeding ninety days. If the superior court had the power to grant extensions and had used such power, in this case defendant would still, by thirty days have exceeded the time within which to make the deposit.

Rule 43 and subdivision (c) of rule 45 provide for extensions of time by a Chief Justice or Presiding Justice in his discretion, without notice to opposing party to do any act required or permitted under the rules. * * * The defendant herein, however, is faced with the fact that the record does not indicate that any application was made to the Presiding Justice.

The excuse offered by defendant is that the attorneys for plaintiff had agreed with her attorneys that they (the attorneys for plaintiff) would not require the preparation of the transcript until "we can go no further to settle this matter." Whatever agreement was made was oral and at that time referred to an offer by plaintiff to accept less than the amount awarded him by the judgment.

This proceeding might well be referred to as the battle of affidavits, which raises the question of the veracity of the respective affiants. However, it was stipulated that the complete record of any transcript or document on file might be used on the several motions pending. This is fortunate as in this case the appellate court would not be in the advantageous position of the trial court. The trial judge knew practically all affiants as attorneys or witnesses, had observed their conduct in the trial of the case and was therefore in a better position to determine the credibility of opposing affiants.

The trial judge herein, assuming the old statutory rules to be still operative, passed upon similar motions in favor of plaintiff. He did not, as in the Averill case, face an undisputed fact but affidavits covering the same matters as appear on appeal. This court in the majority opinion correctly declares that the trial court did not have jurisdiction to pass upon the matter. The order made by the trial court is invalid but the fact that the proceedings and subsequent events—all of which by stipulation of the parties are made part of the record on all of these motions—show that the trial court definitely determined the question of veracity in favor of plaintiff. Having been made part of the record, this court is at liberty to consider the transcript of proceedings, and the matter of the determination by the trial court of the veracity of the respective parties. I feel that the judgment of the trial court, with the opportunity of observing the various affiants at the trial, is superior to mine. I am also impressed by the record on these motions, which shows that under the terms of the judgment herein plaintiff was entitled to one-half of the money in certain banks; that practically all of the half which is admittedly the property of defendant has been withdrawn, and that plaintiff's half is still withheld. There appears to be a basis for the statement by the attorney for plaintiff that "the plan of the attorneys and the plan of the defendant is to hold that money there as long as they possibly can, to stall, stall and stall."

Eliminating any view based upon the opinion of the trial judge or the arguments by respective counsel, in my opinion the plaintiff should prevail on the questioned motions based upon certain circumstances which point the way to the determination of the truth.

Irrespective of the conflict in the facts averred in the affidavits, any agreement between the attorneys, oral or written, extending time to a period beyond the limit permitted by the rules would have been of

no legal avail unless defendant obtained an order from a court of competent jurisdiction approving a stipulation between them or a separate order extending the time. In this case no order was obtained. The facts differ from Averill v. Lincoln, supra, wherein the failure to comply with the rules was an inadvertence. Here there appears a reckless disregard of the Rules on Appeal.

It may be suggested that in the present case the attorneys for defendant should be excused because they were not familiar with the new Rules on Appeal. I am sympathetic with them in this respect. It may be assumed that the attorneys for plaintiff also proceeded upon the theory that the old rules were in effect.

The trial judge advised all parties herein that he would strictly enforce the Rules on Appeal. The record shows only one extension of time granted by him. Thereafter an effort to obtain a further extension from the trial judge was met with a denial in form and manner so positive that there does not appear to be any further request for additional time. The trial judge in open court, referring to a telephone conversation with the attorney for defendant "around the first of November, very close thereto, 1943," said: "He asked me at that time if I would consent or stipulate to any further time, and I stated definitely, emphatically and positively, 'No.'" This period "around the first of November is important."

Assuming that the attorney for defendant had been lulled into a sense of security in the belief that it would not be necessary to prosecute the appeal while there was under consideration an offer of compromise made by plaintiff, it is admitted that defendant definitely refused the offer on or about October 30, 1943. From that date on until the early days of March there was no misunderstanding, no lulling of defendant's counsel into a sense of security about the matter, and proof thereof appears in the telephone request by defendant's counsel to the court, at or about that period, requesting an extension of time.

An affidavit sworn to by the attorney for defendant and filed in the superior court March 31, 1944, stated that in the "early part of November 1943" he "stated to counsel for the plaintiff, Harry J. Neubarth, that all negotiations were off and that he would ascertain from the official court reporter what it would cost to prepare a clerk and reporter's transcript and proceed to perfect said appeal." Defendant claims that immediately after such determination the attorney for plaintiff persuaded her attorney not to proceed further with the appeal, and that he was lulled into a sense of security. However, the record shows that pursuant to the request of such attorney the official court reporter made the requested estimate on November 12, 1943.

Some suggestion has been made that a substantial portion of the transcript has been written. In an affidavit by the court reporter the following appears: "[T]hat he dictated and transcribed approximately 174 pages of the proposed transcript on appeal in said action, at the request of defendant and appellant's attorneys at which time he refused to proceed further with the transcript because he was neither paid for such preparation nor were satisfactory arrangements made with him to secure his compensation; that he was paid for the aforementioned dictation and transcription only after repeated demands for payment made upon defendant and appellant's attorney and only after there had been granted in the trial court a motion to terminate proceedings to obtain the transcript on appeal and after the refusal of the trial court to vacate said order."

The failure in the present case to comply with the rules, whether under the old statutes and former rules or under the new Rules on Appeal, is not an inadvertence. It shows negligence far beyond mere forgetfulness or carelessness and demonstrates that defendant knew she had forfeited her right to appeal and hoped that some judge would extricate her from that position. In the words of an able, experienced and esteemed justice of the Supreme Court: "While appellate courts are loath to dismiss appeals, without consideration on the merits, for failure to comply with rules of procedure, such rules are essential to the orderly handling and dispatch of the courts' business and create rights which an adverse party is entitled to enforce. Shain v. People's Lumber Co., supra, 98 Cal. [120], at page 122, 32 P. 878; McCabe v. Healey, supra, 139 Cal. [30], at page 32, 72 P. 359. Under the present circumstances a failure to grant plaintiffs' motion, if not a complete abuse of discretion, would at least constitute an unwarranted disre-

gard of the rule here in point. To uphold and respect such rule defendants' appeal must be dismissed. Hoyt v. San Francisco & N. P. R. Co., 87 Cal. 610, 613, 25 P. 160, 1066." Murphy v. Krumm, supra, p. 850 of 21 Cal.2d, p. 10 of 136 P.2d.



68 Cal.App.2d 393

BROWN et al. v. OSHIRO.

Civ. 14605.

District Court of Appeal, Second District, Division 3, California.

March 14, 1945.

1. Contracts ⇐309(1)

That the purpose or desired object of one of parties to contract has been frustrated does not render the defense of frustration applicable but purpose or desire of both parties must have been frustrated.

2. Contracts ⇐309(1)

Where assumed possibility of a desired object or effect to be attained by either party to contract forms basis on which both parties entered into it, and object or effect is or surely will be frustrated, under doctrine of "frustration" a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from duty of performing his promise unless a contrary intention appears.

See Words and Phrases, Permanent Edition, for all other definitions of "Frustration".

3. Landlord and tenant ⇐112½
War ⇐4

In landlord's action for declaratory relief regarding a lease of building in Japanese community to Japanese tenant for purpose of conducting hotel and renting office space, where tenant defended on ground of frustration because of civilian exclusion order excluding all persons of Japanese ancestry from the area in which hotel was located, evidence was insufficient to establish that value of lease had been destroyed so as to relieve tenant from obligation to perform.

4. Landlord and tenant ⇐112½
War ⇐4

Where building located in Japanese community was leased to Japanese tenant for purpose of conducting a hotel and renting office space therein, purpose of lease was not frustrated and lease was not rendered unenforceable by civilian exclusion order excluding persons of Japanese ancestry from area in which hotel was located, in view of evidence regarding results of subtenant's operation.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Leon B. Brown and another as trustees under the last will and testament of Anna D. Brown, deceased, and another against Y. Oshiro for declaratory relief regarding a lease. From a judgment in favor of defendants, the plaintiffs appeal.

Reversed.

Monroe B. Kulberg, of Los Angeles, for appellants.

A. L. Wirin and J. B. Tietz, both of Los Angeles, amici curiæ on behalf of respondent American Civil Liberties Union and Japanese American Citizens League.

FOX, Justice pro tem.

This is an appeal by the plaintiffs from a judgment in favor of the defendant in an action for declaratory relief.

Plaintiffs leased to defendant, a Japanese, the second floor of the building located at the northeast corner of First and Los Angeles Streets, in the city of Los Angeles, for the period from February 1, 1940 to January 31, 1944, at a rental of $175 per month. Defendant operated a hotel business in the demised premises until May 8, 1942. On May 3, 1942, a Civilian Exclusion Order, issued by the Military authorities, ordered that from and after May 11, 1942, all persons of Japanese ancestry be excluded from the area in which the hotel was located. On said last-mentioned date defendant and all other persons of Japanese ancestry were evacuated from the city of Los Angeles and were excluded by Civilian Exclusion Orders from said area during the remainder of the term of said lease.

The lease provided that "the lessee shall use the premises for conducting a hotel and renting office space, and for no other pur-

pose, except upon the written consent of the lessors." It also provided that "the lessee shall personally occupy said demised premises." It was further provided that the lease could not be assigned or the premises sublet without the written consent of the lessors.

It was stipulated that at no time during the period covered by the lease did the defendant actually reside on the premises. He employed various persons to reside therein and manage his hotel business. Each day, however, he visited the premises and advised said manager with respect to various matters and assisted in doing the physical labor necessary to the operation of said business. On May 5, 1942, plaintiffs sent defendant a letter in which they waived any requirement of the lease that he personally occupy the premises and consented to any assignment or sublease he might care to make. On May 8, 1942, defendant, with consent of the plaintiffs, sublet the premises to H. J. Marrs, at a rental of $100 per month. He immediately went into possession. The plaintiffs commenced this action for declaratory relief in which they sought to have it determined that the lease was still binding. The original judgment was in favor of plaintiffs, but it was reversed (on an appeal on the judgment roll) and remanded for a new trial. See Brown v. Oshiro, 1943, 58 Cal.App.2d 190, 136 P.2d 29. The plaintiffs have since filed an amended and supplemental complaint and defendant has filed an answer thereto.

The trial court found, among other things, that prior to the evacuation order 75 per cent of the tenants in number, on the average, in said hotel were of Japanese ancestry, and inferentially that 25 per cent were non-Japanese; that the hotel was located in the heart of the area known as "Little Tokio"; that the parties, at the time of the execution of said lease, intended that defendant should personally conduct a Japanese hotel, that is, one catering primarily to persons of Japanese ancestry; that by virtue of the removal of all Japanese from the area defendant could not operate the kind of a hotel contemplated by the parties when the lease was executed.

As conclusions of law the court concluded that the terms and conditions of the lease were impossible to perform by defendant after May 11, 1942, and that he was excused from all obligations thereunder, and that his defense of commercial frustration had been sustained.

Plaintiffs contend: (1) that the evidence is insufficient to support the findings that the parties intended that defendant should operate a Japanese hotel and that defendant could not operate the kind of a hotel contemplated by the parties by reason of the evacuation of the Japanese; and (2) that the doctrine of commercial frustration is not applicable and that therefore the lease was not terminated by said exclusion and evacuation orders. In our opinion these contentions must be sustained.

[1, 2] It is apparent from the lease, as stated by the court on the former appeal (page 193 of 58 Cal.App.2d, page 31 of 136 P.2d), "that the 'desired object' of the parties was to provide 'for conducting a hotel and renting office space.'" There is no direct evidence which tends to limit or define this "desired object" as expressed in the lease. It may be that the defendant *hoped and expected* that because he was of Japanese ancestry and because his hotel was located in the Japanese community he would be able to get a large amount of Japanese patronage. In this connection it should be noted that the defendant had operated this hotel under a prior lease since some time in 1936 and that, according to the undisputed evidence, for at least several years prior to the execution of the lease here in question the proportion of the tenants who were Japanese and those who were not Japanese was substantially the same as it was during the period of this lease. It is also significant that defendant changed the name of the hotel from a Japanese name to State Hotel prior to entering into this last lease. Furthermore, the evidence is undisputed that there was non-Japanese occupancy of a substantial number of properties in the immediate vicinity of this hotel. As previously stated the hotel is located on the northeast corner of First and Los Angeles Streets. It has an entrance on each of said streets. On the west side of Los Angeles Street, both north and south of First Street, the occupancy was non-Japanese. On the east side of Los Angeles Street, north of the hotel, the occupants were non-Japanese. On the east side of Los Angeles Street, south of First Street, the predominant character of the occupancy was non-Japanese. On the north side of First Street, immediately adjacent to the hotel on the east there was a garage operated by a non-Japanese. Defendant's hotel was thus readily accessible, geographically, to whatever non-Japanese trade these

neighboring establishments brought to that vicinity. Defendant was thus in a position to get substantial non-Japanese patronage and succeeded to the extent that 25 per cent of his tenants, on the average, were not Japanese. In the circumstances and in view of defendant's previous operation of this hotel and his percentage of non-Japanese tenants and his change of the name of the hotel from a Japanese to an American name, it may be questioned whether the evidence is sufficient to support the finding that it was the purpose or the "desired object" of even the defendant to operate a Japanese hotel. That, however, is not the crucial question. Even though it be said that the evidence is sufficient to support the finding as to the purpose or "desired object" of the defendant that alone is not sufficient to sustain the judgment in his favor. In order that the defense of frustration be applicable it is not sufficient that the purpose or "desired object" of one of the parties to the contract has been frustrated. The purpose or "desired object" of both parties must have been frustrated. On this point it is said in the Restatement of the Law of Contracts (sec. 288) that: "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears." Williston on Contracts (Rev.Ed. Vol. 6, pp. 5486, 5487) states the rule in this language: "Even more clearly with respect to leases than in regard to ordinary contracts the applicability of the doctrine of frustration depends on the total or nearly total destruction of the purpose for which, *in the contemplation of both parties,* the transaction was entered into." (Italics added.) That clearly was not true in this case for under the facts and circumstances herein recited there is no support for a finding that the purpose or "desired object" of the plaintiffs in the execution of said lease was other than that stated therein; viz. "for conducting a hotel and renting office space." Nor is there evidentiary support for a finding that either limits or defines the stated object of the lease in so far as the plaintiffs are concerned.

In order to determine the applicability of the defense of frustration to the "desired object" or purpose of the lease as therein stated some additional evidence should be recited. That evidence, which is not disputed, is that Mr. Marrs, to whom defendant sublet the hotel on May 8, 1942, took in from his operations thereof, between said date and December 31, 1942, the sum of $2,722.53. During that period he paid out $1,450.28, in operating the hotel. This included $100 per month rent paid to plaintiffs on defendant's account and $46 for depreciation. This left Marrs a balance of $1,273.25 for his less than eight months operation of the hotel. For the first nine months of 1943 (Marrs gave his testimony in October, 1943) his gross income was $3,388.13, an average of $376.36 per month; and his expenses (including rent) $1,496, an average per month of $166.22. This left Marrs a balance of $1,892.13 for his nine months operations of the hotel or an average of $210 per month. It appears that he did practically all the work in running it.

[3, 4] From these figures it is plain that the defendant has not sustained "the burden of proving that the value of the lease has been destroyed." Lloyd v. Murphy, 1944, 153 P.2d 47, 51. In this latter case (decided since the retrial of this case) which also involved a lease, the Supreme Court has set forth in detail the principles, on which the doctrine of frustration rests. It is therefore unnecessary for us to go over that ground. It is there pointed out that "the consequences of applying the doctrine of frustration to a leasehold involving less than a total or nearly total destruction of the value of the leased premises would be undesirable." (Page 52 of 153 P.2d.) It is also said therein that "No case has been cited by defendant or disclosed by research in which an appellate court has excused a lessee from performance of his duty to pay rent when the purpose of the lease has not been totally destroyed or its accomplishment rendered extremely impracticable or where it has been shown that the lease remains valuable to the lessee." (Page 52 of 153 P.2d.) The principles of that case apply to and govern the instant case and require a reversal of the judgment.

Other cases involving leases which support our conclusion that the purpose of the lease was not frustrated are: Mitchell v. Ceazan Tires, Ltd., 1944, 153 P.2d 53; Grace v. Croninger, 1936, 12 Cal.App.2d

603, 55 P.2d 940; Davidson v. Goldstein, 1943, 58 Cal.App.2d Supp. 909, 136 P.2d 665; Burke v. S. F. Breweries, Ltd., 1913, 21 Cal.App. 198, 131 P. 83; Byrnes v. Balcom, 1942, 265 App.Div. 368, 38 N.Y.S.2d 801; Deibler v. Bernhard Bros., 1944, 385 Ill. 610, 53 N.E.2d 450; and Wood v. Bartolino, 1944, 48 N.M. 175, 146 P.2d 883.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



68 Cal.App.2d 476

PEOPLE v. WELLS.

Cr. 1891.

District Court of Appeal, Third District, California.

March 19, 1945.

1. Criminal law ⇐1144(17)

On appeal from conviction of possessing and carrying a knife while accused was prisoner in state prison, appellate court was required to assume that jury's implied findings supported judgment of conviction. Pen.Code, § 4502, as added by St.1943, p. 1068.

2. Convicts ⇐5

Evidence sustained conviction of possession and carrying a knife while accused was a prisoner in state prison, as against defense of self-defense. Pen.Code, § 4502, as added by St.1943, p. 1068.

3. Criminal law ⇐696(1)

In prosecution for possessing and carrying a knife while accused was prisoner in state prison, record established that evidence of self-defense was not stricken from record, in view of fact that, though such evidence was adduced over district attorney's objection, case was tried and argued to jury as though such evidence was competent. Pen.Code, § 4502, as added by St. 1943, p. 1068.

4. Criminal law ⇐1104(3)

Instructions in criminal case were properly excluded from transcript on appeal where appellant failed to request inclusion of such instructions in transcript. Rules on Appeal, § 33.

5. Constitutional law ⇐87
Convicts ⇐5
Weapons ⇐3

The Code provision prohibiting prisoners in state prisons from possessing or carrying designated weapons is a valid police regulation and is not violative of constitutional provisions guaranteeing right to acquire and possess property and prohibiting infringement of right of people to keep and bear arms. Pen.Code, § 4502, as added by St.1943, p. 1068; Const. art. 1, § 1; U.S. C.A.Const. Amend 2.

6. Convicts ⇐5

Under Code provision prohibiting prisoners in any state prison, without qualification, from possessing or carrying certain deadly weapons, intention with which weapon is carried is not element of offense, but proof of possession infers that weapon is carried in violation of statute. Pen.Code, § 4502, as added by St.1943, p. 1068.

7. Convicts ⇐5

In prosecution against prisoner in state prison for possessing or carrying on his person a deadly weapon in violation of statute, defendant had burden of proving as matter of defense that he did not carry weapon in violation of statute. Pen.Code, § 4502, as added by St.1943, p. 1068.

8. Criminal law ⇐327

Where intent is not made a necessary element of a crime, it is not essential for prosecution to affirmatively prove purpose for which act is performed.

9. Convicts ⇐5

In prosecution against prisoner in state prison for possessing and carrying a knife in violation of statute, purpose for which knife was secured, carried, and used by defendant, and questions as to who was aggressor in affray in which fellow prisoner was wounded, were for jury. Pen.Code, § 4502, as added by St.1943, p. 1068.

10. Convicts ⇐5

Evidence was sufficient to sustain conviction of prisoner in state prison for possessing and carrying a knife. Pen.Code, § 4502, as added by St.1943, p. 1068.

11. Criminal law ⇐13

That statute makes offense punishable by imprisonment for not less than five years

without prescribing maximum penalty does not render statute indefinite, since under indeterminate sentence statute maximum penalty is presumed to be for life. Pen. Code, § 664, subd. 1; § 1168; § 4502, as added by St.1943, p. 1068.

12. Convicts ⇐5

Where prisoner in state prison was convicted of possessing and carrying a knife in violation of statute, term of sentence was properly undetermined by trial judge in accordance with indeterminate sentence statute. Pen.Code, § 664, subd. 1; §§ 671, 1168; § 4502, as added by St.1943, p. 1068.

13. Criminal law ⇐1208(9)

The statute respecting indeterminate sentences by necessary implication suspends operation of previously enacted statute authorizing court to sentence defendant to prison for certain number of years. Pen.Code, §§ 671, 1168.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Wesley Robert Wells was convicted of unlawful possession of, and carrying on his person, a knife while he was a prisoner in a state prison, and he appeals.

Affirmed.

Wesley Robert Wells, in pro. per.

Robt. W. Kenny, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment rendered pursuant to the verdict of a jury, convicting him of the crime of unlawful possession of, and carrying on his person, a sharp instrument, to-wit, a knife, while he was a prisoner in Folsom State Prison, contrary to the provisions of Section 4502 of the Penal Code, as added by St.1943, p. 1068. He also gave written notice of an appeal from "the court's order denying a motion for a new trial." No motion for new trial was presented to the trial court, and we shall therefore disregard that portion of the notice of appeal.

The defendant was represented at the trial by an attorney. During the trial the attorney withdrew as counsel, at the defendant's request. The defendant elected to and did represent himself in the completion of the trial, except that the attorney was permitted to argue the case to the jury. The defendant appears in proper person on this appeal.

It is contended, in effect, that Section 4502 of the Penal Code is unconstitutional; that the verdict and judgment are not supported by the evidence; that the court erred in "ruling out his defense of self-defense," and that, since the statute does not prescribe a maximum penalty for the crime, the judgment is uncertain and void. It is also claimed that the court erred in failing to require the Clerk to include in his transcript on appeal the instructions to the jury which were given and refused.

The defendant admitted at the trial that he was a prisoner in Folsom State Prison at the time charged in the information, and that he was then in possession of a knife with which he stabbed a fellow prisoner by the name of William H. Brown. The defendant claimed to have armed himself and to have used a knife in necessary self-defense. The transcript contains over two hundred pages of testimony, most of which relates directly to defendant's possession and use of the knife in alleged necessary self-defense, which evidence was adduced over the objection of the prosecuting officer. That evidence was not stricken from the record. The defendant was permitted to fully develop that defense. Numerous inmates of the prison and several officers were fully examined upon that issue as witnesses. The defendant took the stand in his own behalf. There is a conflict of evidence regarding the affray which occurred in the mess hall. The defendant claimed that he had a controversy in the mess hall with Brown who had threatened to inflict upon him bodily harm. He testified that at the time of the cutting affray Brown was also armed with a knife. That was apparently true. The defendant stated that he procured the knife in question from another prisoner and put it inside of the case in which he was carrying a musical instrument. He was a member of the prison orchestra. At the same time he also took another prisoner's jacket from a hook in the hallway, and placed it on the bench upon which he subsequently sat at the mess table. When he observed Brown enter the mess hall the defendant removed the knife from the musical instrument case and slipped it into a music book which he carried. He then placed the jacket over the hook. It appears that the controversy was re-

newed, and as Brown approached the defendant he arose and, picking up the jacket which he used as a shield, he seized the knife and cut Brown repeatedly in the abdomen and chest, inflicting serious injuries. He drove Brown from the mess hall into the kitchen. The prison guards interfered in the affray and demanded that the defendant surrender possession of the knife, which he then refused to do. He was taken some distance to the office of the Captain of the Guard, to whom he delivered the knife. The circumstances of the case leave a reasonable question as to which party was the aggressor in the affray.

[1, 2] If self-defense is a proper defense to the crime charged under Section 4502 of the Penal Code, under the circumstances of this case, which we do not decide, we must assume the implied findings of the jury determined that the defendant did not procure the knife and retain possession of it, in necessary self-defense, believing as a reasonable man that it was necessary to do so to protect himself against imminent danger of great bodily harm at the hands of his fellow prisoner. That issue was decided against him. There is sufficient evidence to support the verdict and judgment of conviction in that regard.

[3] The appellant is mistaken in asserting that his evidence of self-defense was stricken from the record. We have carefully examined the transcript and find there was neither a motion nor an order to strike that evidence from the record. That evidence was adduced over the objection of the District Attorney, but the case was tried and argued to the jury on the theory that it was competent. Some objections to certain questions were sustained. Our attention is not called to any specific assignments of error in that regard. We observe no error in such rulings. The rulings of the court appear to have been proper.

[4] The instructions were properly excluded from the Clerk's transcript on appeal. The appellant failed to request the inclusion of the instructions in the transcript. Sec. 33, Rules on Appeal. Subdivision (b) of the previously cited section of rules contemplates that instructions shall not be included in the transcript unless they are specifically requested. In his brief on appeal the appellant designates no instruction given or refused which he contends constituted error. There is no merit in the assertion that the appellant was prejudiced by failure to include the instructions in the Clerk's transcript.

[5] Section 4502 of the Penal Code, prohibiting prisoners in any state prison from having possession of or bearing on their persons certain designated weapons, is not unconstitutional or in conflict with Article I, Section 1, of the State Constitution, which guarantees all men the right to acquire and possess property. Neither does that section of the code violate the provisions of the Second Amendment of the Federal Constitution which prohibits infringement of the right of the people to keep and bear arms. It has been frequently held that similar statutes are valid enforcements of reasonable police regulations. In re Rameriz, 193 Cal. 633, 650, 226 P. 914, 34 A.L.R. 51; People v. McCloskey, 76 Cal.App. 227, 244 P. 930; People v. Gonzales, 72 Cal.App. 626, 237 P. 812; Const. of the U.S., 2nd ed. of 1938, p. 846; 2 Meig's Constitution and Courts, p. 350; Bishop on Statutory Crimes, 3rd Ed., 535, sec. 792. Section 4502 of the Penal Code is a reasonable, uniform police regulation enacted to protect inmates and officers of state prisons from the peril of assaults with dangerous weapons perpetrated by armed prisoners. That statute was adopted on the justifiable theory that there is greater danger of imprisoned felons becoming incorrigible and resorting to violence if they are permitted to carry upon their persons deadly weapons. The possession of such weapons by prisoners is therefore validly and wisely prohibited.

[6-8] It was not necessary for the prosecution to affirmatively prove that the defendant armed himself with the *intention* of unlawfully carrying upon his person the prohibited weapon for the purpose of violating the statute. That section of the code absolutely prohibits all prisoners in any state prison, without qualification, from possessing or carrying on their persons certain designated deadly weapons. The intention with which the weapon is carried on the person is not made an element of the offense. Proof of the possession of the prohibited weapon infers that it is carried in violation of the statute. People v. Gonzales, supra; People v. Wolfrom, 15 Cal. App. 732, 736, 115 P. 1088; 8 R.C.L. 288, sec. 309. Certainly the defendant, under such circumstances, has the burden of proving as a matter of defense, that he is not carrying the weapon in violation of the statute. In some jurisdictions statutes which prohibit the carrying of concealed

weapons contain specified exceptions, such as the transportation of a weapon as a mere article of merchandise, or for the purpose of taking it to a shop for repairs. Foster v. State, 59 Tex.Cr.R. 44, 126 S.W. 1155, Ann.Cas.1912A, 1206. Under such statutes, and apparently in some cases in which such exceptions were not provided for, it is held that courts should take into consideration the intent or purpose with which the accused carries the weapon. But California courts are in accord with those jurisdictions which hold that where the intent is not made a necessary element of the crime it is not essential to affirmatively prove the purpose for which the act is performed. Section 4502 of the Penal Code is unqualified in its prohibition against prisoners of a state prison having in their possession or on their persons the weapons enumerated therein. We are convinced that the intent or purpose with which a prisoner arms himself with a prohibited weapon is not a necessary element under that statute. In 8 Ruling Case Law at page 288 it is said:

"In other jurisdictions the courts hold that the intent of one accused of carrying a concealed weapon is immaterial, and that if he has a weapon concealed on his person contrary to statute he is guilty of the crime denounced thereby regardless of the purpose for which he carried the weapon. In support of this rule it has been held that the guilty intent *is the intent to carry the weapon concealed,* and does not depend upon the intent to use it, and that the object of the statute is not to forbid the carrying of a deadly weapon *for use,* but to prevent the opportunity and temptation to use it arising from its concealment." (Italics added.)

It is not necessary for us to determine whether the mere possession of a prohibited weapon by a prisoner in a state prison, which is secured for the sole purpose of protecting himself against a threatened imminent assault by another inmate, would constitute a valid proper defense to the charge of violating the provisions of Section 4502 of the Penal Code. The defendant claimed that was the only reason he armed himself with the knife. Over the objection of the prosecuting officer the defendant was permitted to fully develop that alleged defense by the introduction of much evidence on that subject. The case was also argued to the jury on that theory. The jury found the defendant guilty as charged. In support of the verdict and judgment we must assume the jury did not believe that the defendant procured, carried, or used the knife in necessary self-defense to protect himself against threatened imminent danger of great bodily harm at the hands of a fellow prisoner. The defendant had the full benefit of that theory of necessary self-defense, even though it be conceded that evidence was competent, which we refrain from determining.

[9, 10] The purpose for which the knife was secured, carried and used by the defendant, together with the question as to who was the aggressor in the affray were problems for the determination of the jury, with which we may not interfere on appeal, except when there is an absence of evidence to support the implied findings in that regard. At most, the evidence of the affray and the question as to who was the aggressor are competent upon this charge only to the extent that they may tend to indicate whether the defendant was unlawfully in possession of the knife in violation of the provisions of Section 4502, supra. There are many circumstances in this case which would warrant the jury in deciding that the defendant was the aggressor in the affray and that he deliberately armed himself with the intention of provoking the affray with Brown. There is ample evidence to support the verdict of the jury and the judgment of conviction of the defendant's unlawful possession of a deadly weapon.

[11, 12] The fact that Section 4502, supra, does not prescribe a maximum penalty does not render it indefinite, uncertain or void. That section provides that one who has been convicted of that offense shall be punishable by imprisonment in the state prison "for a term not less than five (5) years." The defendant in this case was sentenced to imprisonment for the term prescribed by law "to run concurrently with the unexpired term of imprisonment of the sentence rendered on February 26, 1942." The term of the sentence in this case was properly undetermined by the trial judge in accordance with the provisions of Section 1168 of the Penal Code, providing for an indeterminate sentence. Since Section 4502 of the Penal Code provides only for the minimum term of imprisonment, the maximum penalty is presumed to be for life. People v. Ralph, 24 Cal.2d 575, 578, 150 P.2d 401; People v. McNabb, 3 Cal.2d 441, 456, 45 P.2d 334; In re Lee, 177 Cal. 690, 171 P. 958; People v. Meyers, 31 Cal.App.

2d 515, 88 P.2d 212; People v. Sigel, 55 Cal. App.2d 279, 130 P.2d 763.

The case of People v. Sama, 189 Cal. 153, 207 P. 893, 894, upon which the appellant relies in support of his alleged uncertainty of the maximum penalty prescribed, has no application to this appeal. In that case the defendant was convicted of an *attempt* to commit robbery. He was sentenced for the term "prescribed by law." The maximum term of imprisonment was properly deemed to be for defendant's lifetime. Section 664, paragraph 1, of the Penal Code prescribes the penalty for *attempted* crimes, when the penalty is not otherwise designated, to be "not exceeding *one-half the longest term of imprisonment prescribed.*" Quoting with approval from the case of People v. Burns, 138 Cal. 159, 69 P. 16, 70 P. 1087, 60 L.R.A. 270, the court said:

"'What the actual life of a particular person would be, and what would be the half of it, cannot be known; and if one-half of the life of the appellant were the only punishment prescribed for the crime of which he was convicted, such punishment would be too vague and indefinite to be possible of enforcement, and no judgment could be rendered against him.'"

The court therefore properly held in the Sama case that the penalty of one-half of the life of the defendant, which was the maximum penalty then provided for attempt to commit robbery, was invalid for uncertainty. That case was decided in June, 1922. The following year the legislature amended Section 664 of the Penal Code definitely fixing the penalty for the crime of attempted robbery at "not more than twenty years." Stats.1923, p. 625. No uncertainty regarding the maximum penalty, such as existed in the Sama case, is involved in this case. The maximum penalty under Section 4502, supra, under the authorities previously cited, is for the term of life, which is not uncertain or indefinite.

[13] It was not the duty of the trial judge to definitely fix the term of imprisonment in this case as provided by Section 671 of the Penal Code. That section was adopted in 1872. It is superseded in that respect by the enactment of the indeterminate sentence act, Penal Code, Sec. 1168, which was subsequently passed in 1917, and repeatedly amended, even as recently as 1941, specifically providing that "the court in imposing the sentence *shall not fix the term or duration of the period of imprisonment.*" (Italics added.) People v. Stratton, 136 Cal.App. 201, 208, 28 P.2d 695, 698. In the case last cited, in which a hearing by the Supreme Court was denied, the court said:

"Section 671, supra, does apparently provide that the court might have, in this instance, sentenced the defendant for a certain number of years. However, section 1168, supra, without direct reference to section 671, supra, *suspends the operation thereof by necessary implication. The very first sentence provides that the trial court shall not fix the term or duration of the period of imprisonment.*" (Italics added.)

In the present case the trial court properly disregarded the provisions of Section 671 in that regard, and conformed to the definite requirements of Section 1168, by merely adjudging that the defendant should be committed to state prison for the term provided by law.

For the foregoing reasons the judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.



68 Cal.App.2d 318

McDONOUGH v. GARRISON (two cases).
Civ. 12638, 12639.

District Court of Appeal, First District, Division 1, California.

March 12, 1945.

Hearing Denied May 10, 1945.

1. Judgment ⇐562

The denial without opinion of application for original prerogative writ is not res judicata of the legal issues presented by application unless the sole possible ground of denial was that the court acted on the merits, or unless it affirmatively appeared that such denial was intended to be on the merits.

2. Judgment ⇐552
Prohibition ⇐27

Although a trial court may have entered an interlocutory order in excess of its jurisdiction, an appellate court may assume the error will be corrected before entry of final order and may refuse to in-

terfere by prohibition, and this possibility prevents a denial of the writ, without opinion, from operating as res judicata in future proceedings.

3. Judgment ⇐552

Denials by the District Court of Appeal and by the Supreme Court, without opinion, of applications for writ of prohibition, to prevent trial court from proceeding with mandamus action against insurance commissioner to compel commissioner to issue to petitioners licenses as bail permittees, were not res judicata as to trial court's right to grant jury trial and determine on trial de novo petitioners' right to licenses. St.1937, p. 1796, §§ 1733(c) (e), 1734; St.1939, pp. 1695, 1700, §§ 1802.5, 1821.

4. Prohibition ⇐3(5)

Even though trial court is acting in excess of its jurisdiction, an appellate court may, in its discretion, refuse to interfere by prohibition if the same questions may be passed on by appeal after judgment and if, in the opinion of the appellate court, such remedy is plain, speedy and adequate.

5. Bail ⇐60

Under the Bail Bond Regulatory Act, the primary licensing authority is conferred upon the insurance commissioner, and in reviewing order denying license the power of the superior court is to determine whether the commissioner abused his discretion, but the court may not try de novo, with or without a jury, issue whether commissioner acted improperly. St.1937, pp. 1796, 1802, §§ 1733(c), 1734, 1806; St.1939, p. 1699, § 1818.

6. Certiorari ⇐21, 64(1), 65
Mandamus ⇐63, 172, 173

Certiorari or mandamus may be used to review determinations of local boards and officers, but whichever writ is used, the scope of review is limited to determining whether there has been an abuse of discretion, and court has no power to try the issue de novo.

7. Mandamus ⇐72

Mandamus will not be used to control the discretion or compel the exercise of discretion in a particular manner, and the writ may only direct a board to act, not how it shall act.

8. Bail ⇐60

Provision of Bail Bond Regulatory Act that insurance commissioner's determination denying application for license as bail permittee may be res judicata for period of five years is reasonable and constitutional. St.1937, p. 1796, § 1733(c).

9. Licenses ⇐22

The rule permitting a qualified trial de novo, applicable in certain cases for revocation or suspension of licenses, does not extend to the review of administrative determination denying licenses.

WARD, J., dissenting.

Appeal from Superior Court, San Francisco County; Sylvain J. Lazarus and Theresa Meikle, Judges.

Petitions by Peter P. McDonough and by Thomas McDonough for writs of mandate to compel Maynard Garrison, as Insurance Commissioner of the State of California, substituted in the place and stead of A. Caminetti, Jr., former commissioner, to issue to petitioners licenses as bail permittees. From adverse judgments, respondent appeals.

Reversed.

Robert W. Kenny, Atty. Gen., and Daniel N. Stevens, Deputy Atty. Gen., for appellant.

Joseph A. Brown, of San Francisco, for respondent.

PETERS, Presiding Justice.

On October 23, 1942, Peter and Thomas McDonough filed in the Superior Court petitions for writs of mandate to compel the State Insurance Commissioner to issue to them licenses as bail permittees. These petitions prayed for a trial de novo before a jury of the issue as to whether petitioners possessed the statutory qualifications required of all such permittees. The petitions allege that in August, 1942, petitioners filed with the Commissioner, in proper form, applications for bail permittee's licenses; that on October 16, 1942, the petitions were denied by the Commissioner without hearings; that petitioners are qualified for such licenses and are men of good character and reputation. Over the frequently expressed objections of the Commissioner that the trial court had no jurisdiction to grant a trial de novo before a jury of the issue set forth in the petitions, the trial court submitted such issue to a jury. The Commissioner declined to participate in the jury trial, with the result

that no evidence was offered by him in opposition to that produced by the petitioners. The evidence being uncontradicted, the jury rendered special verdicts on all the issues submitted to it favorable to petitioners. Judgments were entered on the verdicts that petitioners are entitled to peremptory writs of mandate compelling the Commissioner to issue to petitioners licenses as bail permittees. From these judgments the Commissioner appeals.

In 1937 the legislature of this state, in the exercise of its police power, determined that, for the reasonable protection of the public, bail bond brokers must be licensed by the Insurance Commissioner, and that no such license should be issued unless the Commissioner finds that the applicant is of good moral character and a fit and proper person to engage in the bail bond business. (Stats. of 1937, p. 1797, Chap. 653, p. 1800, Chap. 654, St.1939, p. 1693, Insurance Code, §§ 1800–1821.) Since 1937 Peter and Thomas McDonough have attempted, unsuccessfully, to convince the various Insurance Commissioners that they possess the requisite qualifications. On two occasions, after lengthy hearings, and after giving the applicants full opportunity to present all available relevant evidence on the issue, the Commissioner has determined that the two petitioners are not fit and proper persons to engage in the bail bond business. The petitioners have challenged the validity of the statute and the determinations of the Commissioner, in various ways, but every appellate court to which the problem has been presented has held that the statute was valid, and that the Commissioner acted properly, and well within his powers, in denying the applications. See McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; In re McDonough, 27 Cal.App.2d 155, 80 P.2d 485; Newport v. Caminetti, 56 Cal.App.2d 557, 132 P.2d 897.

The second of the applications referred to above was denied by the Commissioner, after a full hearing, in May, 1941. The McDonoughs did not seek to have these denials reviewed by the courts in the manner provided in the statute, but in August, 1942, filed new applications with the Commissioner. These applications are substantially identical with the two prior ones that had been denied after full hearings. The Commissioner, acting pursuant to the express provisions of §§ 1733 and 1821 of the Insurance Code, denied the applications without a hearing. Section 1733 provides that:

"The commissioner may, with or without hearing, suspend, revoke, or decline to grant or renew the license of an insurance agent, broker or solicitor, when any of the following facts exist in respect to the applicant or licensee: * * *

"(c) Suspension, revocation or refusal to grant or renew a license previously issued or applied for under this code when such action by the commissioner occurred within five years before the application and was based on reasonable notice to and hearing of the applicant or licensee."

Section 1821 of the Insurance Code, so far as pertinent here, provides: "The provisions of sections 1730 to 1736, inclusive, are applicable to persons licensed under this chapter [bail licensees] and the words 'insurance agent' used in those sections include persons licensed under this chapter."

The Commissioner denied the applications without a hearing on October 16, 1942. The order of denial sets forth in detail the facts and circumstances relating to the two prior applications which were denied after full hearings, and then states that the refusal to grant the applications is based on two grounds: First, that the "records of the acts of the Insurance Commissioner and of the Courts of this State" show that on two previous occasions, after full hearings, petitioners were denied licenses for reasons which indicated a lack of integrity, in that the applicants were not of good moral character and not fit and proper persons to carry on the bail bond business; and secondly, the Commissioner finds that petitioners are not fit and proper persons to hold licenses to carry on the bail bond business. On October 23, 1942, the petitions for writs of mandate were filed in the trial court. As already indicated, these petitions asked for a trial de novo and requested a jury trial of all issues of fact.

The demand for a trial de novo was based on petitioners' interpretation of Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457, which, at the time these proceedings were instituted, was the latest decision dealing with the nature of mandamus proceedings brought to review adverse rulings of state-wide administrative boards and officers. The request for a jury trial was based on § 1090 of the Code of Civil Procedure, which confers discretionary power on trial courts in

mandamus proceedings to try controverted fact questions before a jury.

In response to the alternative writs the Commissioner appeared, demurred to the petitions and filed answers thereto, urging that the Superior Court was without jurisdiction to grant trials de novo, with or without a jury. The answers placed in issue the main allegations of the petitions and, as an affirmative defense, facts were pleaded to show that §§ 1733 and 1821 of the Insurance Code, above quoted, were applicable. The answers set forth that in 1938 similar applications were denied by the Commissioner after a full hearing; that the propriety of this denial was tested and the Commissioner's findings approved in McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205; that the second similar application was denied by the Commissioner May 7, 1941, after a full hearing; that no attempt was made by petitioners to have the correctness of these last-mentioned determinations passed upon within the three-month-period expressly provided for in § 1734 of the Insurance Code.

The trial court overruled the demurrers, and granted petitioners' request for a jury trial of all issues of fact. To comply with § 1090 of the Code of Civil Procedure which requires the factual issues submitted to the jury to be "distinctly stated in the order for trial," the order stated that the issues to be tried by the jury were "(a) Whether or not the petitioner has had many years of experience in the bail bond business as a broker and is well qualified both financially and from the standpoint that he has been previously engaged in and conducted such business and has a broad experience in the bail bond business; (b) Whether or not the petitioner is a man of good business reputation and of good general reputation and is financially responsible to a substantial degree."

Thereafter the Commissioner moved for judgment on the pleadings on the same grounds he had urged in his demurrers and answers. These motions were denied April 2, 1943. Thereupon the Commissioner instituted a proceeding in prohibition in this court to restrain the trial court from further proceeding, alleging that the Superior Court was without jurisdiction to proceed, and requesting that the proceeding be dismissed. The briefs filed by both sides discussed the jurisdictional question on its merits, and neither side discussed any other point. This court, by a vote of two-to-one, denied the petition for a writ of prohibition, without opinion, on April 15, 1943.

Before this order of denial had become final, the consolidated causes were assigned to another department of the Superior Court, and came on for trial on April 21, 1943. Before the jury was impanelled the Commissioner was granted permission to introduce evidence by way of further return to the alternative writs and in support of his motion to terminate the proceedings. The evidence so introduced established the truth of the factual matters recited in the Commissioner's order of denial of October 16, 1942. After this evidence had been introduced the trial judge then presiding stated that, notwithstanding the previous rulings of the other trial judge who had ordered the jury trial, and regardless of the denial of the petition for a writ of prohibition by this court, he was nevertheless doubtful of his authority to proceed with a trial de novo, especially in view of the evidence that had just been introduced. He then suggested that the Attorney-General file with the Supreme Court an original petition for prohibition so that the Supreme Court could have before it not only the same record that was before this court, but also a full record of the proceedings and the evidence introduced before the trial court on the motion to terminate. The motion to terminate was denied, and the trial postponed to await the ruling of the Supreme Court. On May 19, 1943, a proceeding in prohibition based on this most complete record was filed in the Supreme Court, and about the same time a petition for hearing of the proceeding denied by this court was likewise filed in that court. As in the briefs before this court, the sole point briefed by the parties was the jurisdictional question. The Supreme Court on May 27, 1943, without opinion, unanimously denied the original petition for prohibition, and on the same day, by a four-to-three vote, denied the petition for hearing of the petition filed in this court.

The causes again came before the lower court for a trial de novo before a jury in June of 1943, and again the Commissioner urged his jurisdictional objections to a trial de novo with or without a jury. The trial judge expressed some doubts as to the propriety of a trial de novo before a jury, but stated that he accepted the negative ruling of the Supreme Court on the petition for a writ of prohibition to be a

direction to him to proceed with the trial of the causes, de novo, with a jury. The Commissioner thereupon declined to participate in the trial of the issues of fact. The jury was then impanelled, and the following questions, in the form of special verdicts, submitted to it. 1. Has the petitioner had many years of experience in the bail bond business as a broker? 2. Is the petitioner well qualified financially to engage in and conduct a bail bond business? 3. Is the petitioner qualified from the standpoint that he has been previously engaged in and conducted a bail bond business? 4. Has the petitioner a broad experience in the bail bond business? 5. Is the petitioner a man of good business reputation? 6. Is the petitioner a man of good general reputation? 7. Is the petitioner financially responsible to a substantial degree? The evidence being uncontradicted, the jury found in favor of petitioners on all the questions submitted, and, in due course, judgments were entered directing the Commissioner to issue the licenses.

At the threshold of this appeal we are met by the contention that, inasmuch as the precise jurisdictional points now urged for a reversal of the judgment were urged on the unsuccessful petitions for prohibition, and inasmuch as the only points briefed on those proceedings were the jurisdictional questions, the denials of such petitions must have been on the merits, and therefore such denials without opinion are res judicata, and constitute binding determinations that the trial court had jurisdiction to proceed as it did.

Until recently there has existed some doubt as to the legal effect of the denial, without opinion, of an application for an original writ. There was some language in some of the earlier cases that supported the view that ex parte denials of petitions for original writs without opinion were deemed to be adjudications upon the merits and in subsequent proceedings conclusive upon the parties as to the legal questions presented by the applications for the writs. Reilly v. Police Court, 194 Cal. 375, 228 P. 860; Gubin v. Superior Court, 104 Cal.App. 331, 285 P. 1071. There are also a series of cases which hold that denial of writs of review without opinion by the Supreme Court of petitions to review determinations of the Railroad Commission are final adjudications on the merits. Napa Valley Co. v. Railroad Comm., 251 U.S. 366, 40 S.Ct. 174, 64 L.Ed. 310; People v. Hadley, 66 Cal.App. 370, 226 P. 836. In Geibel v. State Bar, 14 Cal.2d 144, 93 P. 2d 97, it was held that where the Supreme Court, without written opinion, denied a petition to set aside a judgment of suspension from the practice of the law, and later a similar application was filed, the denial of the first was res judicata.

[1, 2] Whatever confusion existed by reason of the language used in these cases was set at rest by the recent decision of Funeral Directors Ass'n of Los Angeles and Southern California v. Board of Funeral Directors and Embalmers of California, 22 Cal.2d 104, 136 P.2d 785, in which some of the language used in some of the above cases was expressly disapproved and some of the cases differentiated. The court held that the denial without opinion of an application for a prerogative writ (except habeas corpus) is not res judicata of the legal issues presented by the application unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits. In the Funeral Directors' case a litigant petitioned the Supreme Court for a writ of mandate to compel a state-wide administrative board to act. The petition was denied without opinion. Subsequently, a substantially similar application was filed in the Superior Court. Counsel for petitioner argued to the Superior Court that the denial by the Supreme Court was not on the merits but was without prejudice to filing the application in a lower court. The records of the case disclose that the trial court suggested that petitioner test his theory by requesting the Supreme Court to modify its order of denial, nunc pro tunc, by adding thereto "without prejudice." Such an application was made to the Supreme Court and denied without opinion. The trial court interpreted this as an indication that the first denial was on the merits, and held that such denial was res judicata in the proceeding pending before it. On appeal the Supreme Court held that its denial was not res judicata. Mr. Justice Schauer, speaking for the court, stated: "The sole question before us is whether or not a minute order of this court denying, ex parte and without written decision, a petition made directly to this court for a writ of mandate to compel respondent Board of Funeral Directors and Embalmers to enforce a 'judgment and sentence' pronounced by such board, renders res ju-

dicata a subsequent petition for the writ, made to the superior court and containing averments and exhibits substantially identical with those of the earlier petition to this court. The parties are the same. We state unequivocally that such minute order was not intended to, and did not, constitute a decision upon the merits of the petition, and therefore is not a bar to the subsequent proceeding." 22 Cal.2d at page 105, 136 P.2d at page 786. The court then went on to discuss the apparent confusion in the cases. It distinguished the Railroad Commission and State Bar cases, disapproved the language used in some of the other cases, and concluded that a denial without opinion of an application for an original writ can only be res judicata in subsequent proceedings when the only possible ground to support such denial is that it was on the merits. Stated another way, if any other ground exists upon which the court could have acted, it will be presumed that such denial was not on the merits. In the particular case since the denial could have been based on the theory that the court denied jurisdiction because the application had not been first made to a lower court, the order of denial must be construed as having been based on that ground and cannot be construed as a denial on the merits.

Another case directly in point on this issue is State Board of Equalization v. Superior Court, 20 Cal.2d 467, 127 P.2d 4. In that case the Superior Court by mandate ordered the State Personnel Board to reinstate certain employees to their former positions with the State Board of Equalization. This judgment was affirmed. Brown v. State Personnel Board, 43 Cal. App.2d 70, 110 P.2d 497. The Board failed to comply with the order, and an order to show cause why they should not be punished for contempt was issued. While the contempt proceeding was pending the members of the Board petitioned the District Court of Appeal for a writ of prohibition to restrain the contempt proceeding. The petition was denied without opinion. Thereafter the petitioners were found to be in contempt. They thereupon sought to have that determination reviewed by writ of certiorari. The court's right to hear the certiorari proceeding was challenged on the ground that the denial of the petition for prohibition was res judicata. The court held it was not, because in denying the petition for a writ of prohibition "the District Court of Appeal did not necessarily pass upon the issues here involved." The court went on to hold that at the time the prohibition proceeding was instituted the orders of the trial court, although in excess of jurisdiction, were interlocutory, and therefore could have been corrected in the trial court. The District Court of Appeal may have assumed that the trial court would correct its error and not enter a final order in excess of jurisdiction. That possibility was sufficient to prevent the order of denial becoming res judicata on the merits.

What is to be gathered from these two cases? It seems clear that these cases establish the following two rules, the second of which is but a corollary of the first:

1. If there is any other possible ground other than the merits upon which the denial of the petition for a writ could have been based, such denial is not res judicata of the merits in a subsequent proceeding.

2. Even though a trial court may have entered interlocutory orders in excess of its jurisdiction, an appellate court may assume the error will be corrected before the entry of a final order, and may refuse to interfere by prohibition. This possibility prevents such a denial of the writ without opinion from operating as res judicata in future proceedings.

[3, 4] Both rules are applicable here. So far as the denial of the petition for prohibition filed directly in the Supreme Court is concerned, it may have been denied because it was not first filed in the District Court of Appeal. This brings this denial directly within the rule of the Funeral Directors case, supra. So far as the petition filed in this court is concerned, we have no record, official or unofficial, as to the reasons that motivated the majority of this court in denying the petition. We are not permitted to indulge in guess, surmise or conjecture as to what those reasons may have been, nor can we rely on the memory of any or all of the judges of this court to now give a reason for the order of denial. The doctrine of res judicata rests on no such frail foundation. The point is that it could have been denied, and this reasoning applies to the action of the Supreme Court in denying a hearing and in denying the direct petition filed in that court as well, for either of two reasons other than on the merits. The existence of these two possibilities prevents the doctrine of res judicata from arising. The various writs

could have been denied because the courts involved felt that, although there was an apparent excess of jurisdiction, an appeal from the final judgment was a plain, speedy and adequate remedy. It is elementary law that even though a trial court is acting in excess of its jurisdiction, an appellate court may, in its discretion, refuse to interfere by prohibition if the same questions may be passed on by an appeal after judgment, and if, in the opinion of the appellate court such remedy is plain, speedy and adequate. This fundamental rule, supported by citation to many cases, is stated as follows in 21 Cal.Jur. p. 586, § 6:

"While a right to appeal presents no obstacle to the issuance of a writ of prohibition where, under the circumstances of a particular case, the remedy is not plain, speedy and adequate, there is no right to prohibition when an appeal affords a complete and adequate remedy and will accomplish the same ends. * * * Nor is an appeal deemed inadequate because a question of jurisdiction is involved.

"While the delay incident to an appeal has been considered as bearing upon its adequacy, it has been laid down that an appeal does not fail to be adequate and speedy within the meaning of the rule, simply because it is not so expeditious as prohibition. * * *

"It has been observed that the question whether or not the remedy by appeal is adequate is, even in cases where jurisdiction is plainly lacking, a matter resting in the sound discretion of the court upon the particular circumstances of each case. * * *"

See Dunn v. Justice's Court, 136 Cal. App. 269, 28 P.2d 690; City of San Bruno v. Superior Court, 171 Cal. 272, 152 P. 731; Bullard v. Superior Court, 106 Cal. App. 513, 288 P. 629; Peck v. Municipal Court, 53 Cal.App.2d 267, 127 P.2d 668; Duke v. Justice's Court, 42 Cal.App.2d 178, 108 P.2d 707; Jordan v. Superior Court, 30 Cal.App.2d 436, 86 P.2d 847; Loftis v. Superior Court, 25 Cal.App.2d 346, 77 P.2d 491; Struck v. Superior Court, 138 Cal. App. 672, 32 P.2d 1110; C. S. Smith Metropolitan Market Co. v. Superior Court, 16 Cal.2d 226, 105 P.2d 587; Golden State Glass Corporation v. Superior Court, 13 Cal. 2d 384, 90 P.2d 75.

Under these authorities this court and the Supreme Court could have denied the writs solely on the ground that even though there was an excess of jurisdiction, the validity of the orders could be passed on by appeal, and that remedy was adequate. It is true that this point was not urged before this or the Supreme Court, but counsels' failure to urge it does not restrict the court's powers. It is common practice for an appellate court to decide such applications on grounds not urged by counsel.

It follows, under the rule of the Funeral Directors case, supra, that because the courts could have denied the applications on the ground that an appeal was an adequate remedy, such denials cannot now be held to have been based on the merits, and are therefore not res judicata.

The rule of the State Board of Equalization case, supra, is also applicable here. The lower court had ordered a trial de novo before a jury. That order was not final. It was no more final than an order on a demurrer prior to entry of judgment is final. The trial court could have changed its order any time before trial. When the petitions for writs of prohibition were filed the appellate courts may have denied them because they felt that the trial court would correct its error and not enter a final order in excess of its jurisdiction. The possibility that this may have been the basis of the denials prohibits such denials from becoming res judicata on the merits.

On the merits of these appeals we are here presented with another chapter in the long and not entirely consistent volume of California law dealing with the subject of the scope of judicial review of the determinations of state-wide administrative agencies. Since the inception of these proceedings the Commissioner has contended that under the facts here involved the Superior Court was without jurisdiction to grant a trial de novo with or without a jury. His reasons are, first, that under §§ 1733(c) and 1821 of the Insurance Code the Commissioner may deny an application for a license where within five years of the date of such application he has denied a similar application after a full hearing. In the present case, in 1941, on the ground the applicant was not of good moral character, substantially similar applications were denied after full hearings. It was under these sections that the Commissioner purported to act in denying the August, 1942, applications, without hearings. The second point is that the qualified trial de novo doctrine applied by the Supreme Court in several cases has no application at all to the review of state-wide adminis-

trative determinations denying a license, but applies only to cases of suspension or revocation of existing licenses by such agencies. This contention is based on the case of McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205. In our view both contentions are sound.

The provisions of the Insurance Code, starting with § 1800, set forth a complete statutory scheme for the licensing of bail permittees, and for a review of the determinations of the Commissioner in granting or revoking licenses. Section 1800 of the Insurance Code requires all persons who execute undertakings of bail to be licensed. The act defines bail bonds and excludes certain kinds of bonds from its operation. Section 1802.5 defines a bail permittee's license—the type here involved—and requires a $5,000 bond to be given by such licensees. Section 1804 requires the applicant for such licenses to file his application with the Commissioner and requires the Commissioner to investigate the licensees. Section 1805 provides that the Commissioner may decline to issue a bail license until he is satisfied that the applicant "is of good business reputation and of good general reputation"; that the applicant has never had a license revoked or refused because of his lack of honesty or integrity; that the applicant has an understanding of the obligations and duties of bail; that the applicant has not participated in any business transaction which "in the opinion of the commissioner tends to show unfitness to act in a fiduciary capacity"; that the applicant has not wilfully misstated any material fact in his application; that there is no outstanding judgment against the applicant of conviction of a misdemeanor or felony involving misappropriation of money; that the applicant has not committed an act forbidden by this code; that the applicant is a fit and proper person to hold the license. Section 1806 provides that the Commissioner "may suspend, revoke or refuse to issue any license under this chapter whenever it is made to appear to him that the holder of such permit is not a fit or proper person to be permitted to continue to hold or receive such license." Section 1807 permits the Commissioner to suspend or revoke any license for any cause for which he could deny the license, while § 1807.5 requires, except for a limited period, that such suspension or revocation shall only be after a hearing. The sections immediately following have to do with the issuance of the license, the regulation of certain phases of the bail bond business, the giving of examinations by the Commissioner to applicants for licenses, fees for licenses, and certain provisions imposing duties on the Commissioner. Section 1818 provides: "Any action to review an act of the commissioner denying, suspending, or revoking a license * * * shall be commenced within three months from and after the date of the act against which relief is sought * * *." Section 1821 requires that applications for licenses shall not be denied without a hearing, except that §§ 1730 through 1736 are made applicable to applications for such licenses. These sections set forth grounds for refusal, suspension or revocation of licenses substantially as outlined above. Section 1733 provides:

"The commissioner may, with or without hearing, suspend, revoke, or decline to grant or renew the license * * * when any of the following facts exist in respect to the applicant or licensee: * * *

"(c) Suspension, revocation or refusal to grant or renew a license previously issued or applied for under this code when such action by the commissioner occurred within five years before the application and was based on reasonable notice to and hearing of the applicant or licensee." Section 1734 provides: "An action to review an act of the commissioner denying, suspending, or revoking a license * * * shall be commenced and tried in the superior court of the county in which is located the principal office or residence of the party bringing it unless the parties thereto stipulate otherwise." The action must be brought within three months of the date of the act against which relief is sought.

These provisions have been summarized in order to show how completely the legislature has set up standards for such licensees, the powers of the Commissioner in issuing and revoking such licenses, and the methods of review of his determinations. The legislature in this respect seems to have anticipated Mr. Justice Schauer's observations in Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425, where, in his special concurring opinion, he stated that the Constitution of this state does not preclude the legislature "from setting up a form or forms of procedure in the nature of the mandamus review which has been developed. So long as it does not add to or subtract from the courts' constitutional

powers, express or inherent, it may prescribe regulations which would constitute a guide for the public, the administrative officers, and the courts. It should not be necessary for this court to have to improvise rules of procedure for review of the decisions of any of the several boards of the State * * * yet the need for such rules is patent. It seems highly probable that many of the seemingly arbitrary practices of such agencies and many of the claims of injustice to individuals would be obviated if there were legislatively established standards and plans of procedure, governing both the initial proceedings and the review thereof, known alike to the courts and boards and known by or available to the public." 22 Cal.2d at page 151, 137 P.2d at page 431. That is exactly what was here done by the legislature.

[5] A reading of the above provisions of the Insurance Code demonstrates that it was the intent of the legislature to confer primary licensing authority upon the Insurance Commissioner. Upon him was placed the primary duty of ascertaining and finding the facts relating to the fitness of the applicant for a license. Provision was then made, not for a trial de novo, but for a "review" of his determinations by the Superior Court. There is no doubt at all of the constitutionality of such procedure. But the trial court here substituted for the statutory procedure a trial de novo before a jury without regard to what had happened before the Commissioner—that is, just as if no proceedings had taken place before the Commissioner. The substituted procedure thus adopted by the trial court was palpably erroneous, because thereby the jury and not the Commissioner became the primary licensing agency of the state, which obviously was in direct violation of the provisions of the Insurance Code and of the legal doctrines built up by the courts during the past ten years for the review of the determination of state-wide administrative boards. An approval of the substituted procedure so adopted by the trial court would clearly operate as a complete nullification of all statutes regulating the issuance of licenses by state agencies and require juries primarily to pass upon the qualifications of all applicants for licenses. Without reference to the five-year provision of § 1733(c), at most we have here a state-wide administrative board refusing to grant an applicant a hearing. Assuming, contrary to the actual fact, that such refusal was improper and that a hearing should have been granted, the power of the Superior Court would have been limited to determining that there had been an abuse of discretion, and to ordering the Commissioner to grant the hearing. The statute places the determination of the issue as to whether the applicant has a good or bad character in the first instance in the Commissioner. The Superior Court has no statutory, inherent or constitutional power to decide that issue before the Commissioner has acted. The Superior Court in such case could determine whether there was an abuse of discretion, but it was reversible error to decide the issue in the first instance for itself. Bila v. Young, 20 Cal.2d 865, 129 P.2d 364; Universal Construction Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746. In both these cases the appellate court, after having determined that a board had improperly acted on certain law matters, remanded the case to the fact-finding body to pass upon the controverted factual issue.

[6] The many cases decided on the question of the scope of judicial review of determinations of administrative rulings do not suggest far less compel the conclusion that a trial court may try de novo, with or without a jury, a factual issue which by statute is required to be passed upon by a board, where the board has not acted. As to local boards, the law is now clear that either certiorari or mandamus may be used to review their determinations, but whichever writ is used the scope of review is the same. Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349, 142 A.L.R. 1383; Ware v. Retirement Board, 65 Cal.App.2d 781, 151 P.2d 549; Shewbridge v. Police Commission, 64 Cal.App.2d 787, 149 P.2d 429; Greif v. Dullea, 66 Cal.App.2d 986 153 P.2d 581. Where such a board has failed to pass on a factual issue the proper procedure is to refer the problem back to the board. It is error for the Superior Court to try the issue de novo. Greif v. Dullea, supra, 66 Cal.App.2d at page 986, 153 P.2d 581. When we come to the question of the scope of review of state-wide administrative boards we find that the scope of review is much broader but by no means unlimited. In Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, it was held that at least in certain cases the courts on review may exercise an independent judgment on the facts, and may grant a qualified trial de novo. But that so-called

trial de novo does not mean a trial in complete disregard of what the board has done. The findings of the board or officer come before the Superior Court with a strong presumption of their validity. Obviously, where the board or officer has not acted, or has refused a hearing, there is nothing upon which the presumption can be based. The obvious solution is that the case should be returned to the board or officer so it, or he, can act, so that there will be findings to which the rule can apply.

While there is language in Laisne v. California State Board of Optometry, 19 Cal. 2d 831, 123 P.2d 457 (which was the latest case on the subject when the trial court here granted the right to the trial de novo), that would imply that the trial de novo required was unlimited, the later cases have definitely repudiated that extreme view. Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Russell v. Miller, 21 Cal. 2d 817, 136 P.2d 318; Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425. In the last-named case Mr. Justice Schauer expressly placed his concurrence on the ground that "The complete trial de novo doctrine of the Laisne case has been abandoned." 22 Cal. 2d at page 144, 137 P.2d at page 427.

[7] We conclude this phase of the case with the holding, amply supported by the above authorities, that where an administrative board exercising state-wide powers has refused to grant a hearing, the Superior Court has no power to try de novo the factual issue the determination of which is conferred upon the board, but its power is limited to ordering the board to act, if an abuse of discretion is shown to exist. This is in accord with the elementary rule that mandamus will not be used to control discretion. The writ may not be used to compel the exercise of statutory discretion in a particular manner—it may only direct the board to act, not how it shall act. (See cases collected 16 Cal.Jur. p. 809, § 28). Thus, in the present case the only possible issue that could have come before the trial court was whether the Commissioner abused his discretion in denying to petitioners a hearing. Under no theory did the court have power to pass on the merits of the applications until the board had acted on the merits. This conclusion is reached without reference to the provisions of § 1733(c) of the Insurance Code.

[8] Section 1733(c), however, demonstrates that there was no abuse of discretion in denying the hearing. It provides that where an application has been denied, after a full hearing, within five years, the Commissioner may, with or without a hearing, deny the application. The record shows that in 1941, after a full and complete hearing, the applications of these petitioners were denied on the ground that they were not fit and proper persons to become bail permittees. Petitioners could have had the correctness of these determinations passed upon under §§ 1734 and 1818 of the Insurance Code. This, petitioners did not elect to do. They allowed these determinations to become final. Then, about one year later, they filed the present applications, which are substantially similar to the 1941 applications. No contention has ever been made that any circumstance intervened between 1941 and 1942 upon which a different ruling could be predicated, nor has any contention been made that any evidence is now available different from that produced in 1941. The 1941 denial is res judicata to the limited extent provided in § 1733(c). That section is a legislative declaration that in the discretion of the Commissioner his prior determination, based upon a hearing, may be res judicata for a period of five years. Such a statute is, of course, constitutional. If the statute provided that no application could be filed at all within five years of a previous denial, regardless of after discovered evidence, and regardless of changed circumstances, there might be some merit in the thought that then it would be unconstitutional. But the statute is permissive only. It confers discretion on the Commissioner. If he abuses that discretion such abuse could be reviewed in a mandate proceeding. But that is not the present case where no facts showing a possible abuse are pleaded. On the face of the pleadings it affirmatively appears that no abuse occurred. It therefore follows that, since it affirmatively appears from the pleadings that the denial of hearings and denials of the applications were proper under § 1733(c), there was nothing at all for the Superior Court to try.

The purpose of § 1733(c) is obvious. A person applies for a license. A full and complete hearing is had. The application is denied. The applicant is content with the ruling and does not seek to have it reviewed. He then files an identical application. If successive applications can be filed, and if the Commissioner must grant a full

hearing on each such successive application, the rich applicant can practically usurp the full time of the Commissioner and the facilities of his office, to pass on his applications—and this in a situation where the Commissioner has already heard the evidence and passed on its weight and credibility. No useful purpose would be served by such successive hearings and much useless expense would be incurred. The section is a sensible and intelligent attempt on the part of the legislature to prevent such abuses.

[9] There is an additional and alternative ground upon which it could be held that the trial court had no power to grant a trial de novo in these cases. It will be noted that petitioners are not licensees. They have never had a state license as bail permittees. They seek to secure such licenses. The Commissioner has denied their applications. The rule, first enunciated in the Drummey case, supra, that permits a qualified trial de novo in certain cases has never been held to extend to the review of administrative determinations denying licenses, but has been held to apply only to the revocation or suspension of licenses. This was the very point decided as to these very petitioners in McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205. The Drummey case had been decided in March of 1939. The McDonough case was decided in June of that year. In the latter case it was urged that the limited trial de novo doctrine of the Drummey case was applicable as well to the review of an administrative determination denying a license as it had been held to apply to the suspension or revocation of an existing license. The court, without a dissenting voice, held that the rule of the Drummey case had no application to the review of administrative refusals to grant a license. 13 Cal.2d at page 752, 91 P.2d at page 1042, 123 A.L.R. 1205. The court held that certain constitutional principles compelled the holding of the Drummey case and that those principles only applied to the revocation or suspension of existing licenses but had no applications to refusals to grant licenses. It was therefore held that as to the review of administrative refusals to grant licenses the scope of the review in the Superior Court was to determine whether the administrative board had abused its discretion, which, so far as the evidence is concerned, meant that the court's power was limited to ascertaining whether the board's findings were supported by the evidence. The qualified trial de novo theory was expressly held not to be applicable.

Whatever our view may be as to the correctness of this distinction, as an intermediate court we are bound by this holding of the Supreme Court. The rule of the McDonough case has never been repudiated or even questioned in the later cases. All of them cite the case with approval. It is binding upon us.

For any one of these reasons it is obvious that the trial court committed error, serious and prejudicial error, in granting a trial de novo in the present case. Under no theory can such procedure be approved.

The judgments appealed from are reversed.

KNIGHT, J., concurs.

WARD, Justice.

I dissent upon the ground that certain jurisdictional questions on this appeal are the precise questions raised on a petition for a writ of prohibition which was denied by the Supreme Court and are therefore res judicata. Further, when these questions and the additional questions raised are considered upon the merits, the conclusions reached thereon in the trial court should be affirmed.

The facts, as stated in the majority opinion, are favorable to the Commissioner and are sufficiently accurate to render unnecessary any further statement in considering the three petitions for writs of prohibition, namely, (1) the petition to this court upon the record of pleadings; (2) the application to the Supreme Court for a hearing after disposition of the same application to this court, and (3) the direct application to the Supreme Court upon the pleadings and a transcript of evidence. Each petition was denied. It is unnecessary to consider the petition (1) to this court as the matter was subsequently disposed of by the Supreme Court on the same record (2). The petition (3) direct to the Supreme Court disposed of on the same date, but subsequent to the denial of the application (1) for hearing after disposition in this court, may be eliminated for the reason that the question had already been adjudicated and it was not the duty of the Supreme Court to consider further the merits of the matter presented in said petition. Accordingly, whenever there is a mention herein of the petition

for a writ of prohibition and the ruling thereon, unless otherwise stated it has reference to the application (2) for hearing before the Supreme Court after disposition in this court. Upon the granting of a motion to transfer for a hearing before the Supreme Court, that court has jurisdiction for all purposes. Moore v. Purse Seine Net, 18 Cal.2d 835, 118 P.2d 1.

That the doctrine of res judicata applies to writs and judgments if the parties and questions are identical is held in Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 258 P. 387. The general principles therein approved, namely, that a fact or question which was in issue in a former proceeding between the same parties, and judicially determined by a court of competent jurisdiction is res judicata, though the immediate subject matter or the form of or remedy sought in the two proceedings be different. Caminetti v. Board of Trustees, 1 Cal.2d 354, 34 P.2d 1021; Goddard v. Security Title Insurance & Guarantee Co., 14 Cal.2d 47, 92 P.2d 804; Hamilton v. Carpenter, 15 Cal.2d 130, 98 P.2d 1027; Sutphin v. Speik, 15 Cal.2d 195, 99 P.2d 652, 101 P.2d 497; Panos v. Great Western Packing Co., 21 Cal.2d 636, 134 P.2d 242, and others. The decisions by the District Court of Appeal following the rules laid down in the Price case are too numerous to cite. It is sufficient to mention Progressive, etc., Bureau v. Whealton, 62 Cal. App.2d 873, 145 P.2d 912. (Petition for hearing by Supreme Court denied subsequent to decision in Funeral Directors Ass'n v. Board of Funeral Directors, 22 Cal.2d 104, 136 P.2d 785, relied upon on appeal by appellant Commissioner.) In the present case the issues presented relative to jurisdiction are identical with those determined by the Supreme Court on the denial of the petition for a writ of prohibition.

It is claimed by the Commissioner that a decision on an appeal wherein only jurisdictional questions were raised may not be declared to be res judicata when it was rendered without written opinion in a petition for a writ of prohibition. This contention is based upon Funeral Directors Ass'n v. Board of Funeral Directors, supra, which will be referred to herein as the Funeral Directors' case. The factual basis of that opinion differs from that disclosed in the Price case. In the Funeral Directors' case the court was dealing with successive applications for writs of mandamus. In the present case a petition for a prerogative writ was denied without written opinion and the same questions are presented on appeal.

The proceeding in the Funeral Directors' case was in mandamus, to compel a state board to enforce a judgment and sentence theretofore rendered and imposed by said board. The superior court and the District Court of Appeal and the Supreme Court were vested with concurrent jurisdiction to grant or deny the writ. The Supreme Court held, therefore, 22 Cal.2d at page 110, 136 P.2d at page 788, that the denial by it without written opinion "must be construed to constitute simply a refusal by this court to exercise its original jurisdiction." Here, the proceeding in prohibition was to prohibit the superior court from proceeding with the trial de novo before a jury, and to test the applicability of portions of certain Insurance Code sections; necessarily, therefore, the jurisdiction to grant or deny the writ rested only in the District Court of Appeal or the Supreme Court. The Price case is identical with this case except that a written opinion (County of Los Angeles v. Dodge, 51 Cal.App. 492, 197 P. 403) in a mandamus proceeding had been filed in the District Court of Appeal.

The opinion in Funeral Directors' case, written by Mr. Justice Schauer, in which four questions were raised, is a scholarly statement of the legal reasons impelling the decision upon the two main issues in that case. It was unnecessary to decide the last two questions. The opinion on the essential issues is persuasive in argument and analogy. There is no ambiguity in the language that might leave in doubt what was intended. It is not necessary to read anything into the opinion or garnish the views expressed therein. The opinion speaks for itself.

The Funeral Directors' case holds 1. The initial action in disposing of an ex parte application for a prerogative writ does not require a written opinion if there is a written decision by minute order; 2. In matters in which the Supreme Court has exclusive power of review, a denial of an application for such a writ is a determination of the question on the merits; 3. That certain language in prior opinions indicating that there was a fast and binding rule that any denial without opinion was a decision on the merits "may be considered to be in the nature of a dictum, so far as applicability to the *instant* case is concerned." (Italics added) 4. If a peti-

tion "*showed on its face* that the prior adjudication was final and had been rendered *on the merits* of the application, it was an effective bar to the later original application." (First italics added.) 5. The denial of the writ in that case must be construed as "simply a refusal by the court to exercise its original jurisdiction." "It does not appear that any sufficient reason was shown for not making the application to the superior court in the first instance. The minute order, *under such circumstances,* was not intended to be and is not an adjudication upon the merits of the facts presented in the application." (Italics added). Funeral Directors Ass'n v. Board of Funeral Directors, supra.

The opinion does not hold that a denial without written opinion of a petition for a prerogative writ may not be a decision on the merits; it does not hold that each denial is based upon the fact that the petitioner is afforded a plain, speedy remedy by appeal; it does not hold that it must be assumed from each denial that the petition is improperly and insufficiently set forth; it does not hold that a reviewing court is foreclosed from looking into the background of the case as it appears from the petition or the entire documentary record and determining that the previous decision was upon the merits; it does not hold that it must appear that the only possible ground to support such denial is that it was on the merits. If that were true the Supreme Court could deny an application upon two or more grounds, such as on "the merits" and for some technical reason. Adoption of that rule would mean that although that court had denied on the merits the court still would be forced to decide in a subsequent proceeding that it was not res judicata because there was a possible additional technical ground of denial. Had it been the intention to hold that a denial of a petition for a prerogative writ, except one of exclusive jurisdiction, must be assumed to be a denial upon some technical or trivial ground, it would have been an easy matter to say so.

State Board of Equalization v. Superior Court, 20 Cal.2d 467, 127 P.2d 4, is not applicable to the facts in the present case. There the Supreme Court's jurisdiction to entertain a certiorari proceeding to annul a judgment of contempt rendered for an alleged violation of a writ of mandate was challenged. Prior to the order of contempt a petition was filed for a writ of prohibition to restrain the superior court from taking further proceedings. Of course, the District Court of Appeal could not guess that the superior court would make an order in excess of its jurisdiction and properly denied the petition. The proceeding before the Supreme Court was after the contempt order was made. The proceeding before the District Court of Appeal was prior thereto. The Supreme Court declared in the State Board of Equalization case, 20 Cal.2d at page 470, 127 P.2d at page 7: "The two proceedings were separate and distinct." In the same case it is pointed out that one found guilty of contempt may immediately apply to a higher court for a writ of certiorari or habeas corpus and therefore that the order may have been made also upon the ground that the proper remedy had not been pursued. In the present case no question of the correctness of the remedy is involved. It is admitted on all sides that a petition for prohibition was the proper remedy.

In the State Board of Equalization case the language of the Supreme Court is as follows (20 Cal.2d at page 471, 127 P. 2d at page 7): "The writ of prohibition may have been refused because the District Court of Appeal did not assume at that time that the superior court would make any order in excess of its jurisdiction." The words "at that time" refer to the period before a contempt had been declared. In the present case, if there was error, it had been previously committed.

No question may be raised in the present case that the superior court did not have jurisdiction; no claim may be justly made that the petition was premature in the sense that the proceedings in the superior court were not ripe for determination. The petition was not demurrable upon some immaterial ground which might have been corrected; if so, it was not set forth in the special demurrer. In this case it could not be claimed that application should first be made to a lower court. The point presented was one of grave concern to the commissioner and to all applicants for insurance brokers' licenses, irrespective of the activity to be engaged in. The proper remedy was used. It was a matter of great importance. What could have been the reason, based upon the record, that actuated the Supreme Court to deny the petition other than "on the merits."

It has been suggested that the Supreme Court denied the petition because the mem-

bers thereof thought that the trial court would correct an error before entering judgment. As it will subsequently be developed the trial court did not commit a jurisdictional error. But let it be assumed that it had. Since when may a reviewing court deny to a litigant his right upon the assumption that another court will correct the injustice. Let it be assumed that a trial court *without jurisdiction* is about to commence a hearing, or actually is in the midst of a trial, may it be said that the Justices of the Supreme Court of this state would deny a petition for prohibition because they thought or *hoped* that the trial judge might change his mind on a vital question. A reviewing court is bound by the record as presented, and may not indulge in guess work, speculation or surmise in making or refraining from making orders that may affect the action of a judge of an inferior court whether the question involved be constitutional or jurisdictional.

I do not cite the next case as final authority because it has been certified for hearing to the United States Supreme Court, but rather as an illustration of the views of the Justices of the Supreme Court to the effect that an inference may be drawn from that case that it is not necessary that a minute order should show definitely on its face that an adjudication on the merits was intended. In Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, 155 P.2d 42, the defendant had moved to abate the action and in its answer pleaded an Oregon injunction decree. In addition a motion to continue the matters indefinitely was presented. The trial court denied the motions. On appeal, Mr. Justice Carter, who is meticulously careful to bear in mind the salient features and deciding points in previous cases and compare them with the facts and the law before the court in a given case, and to disapprove without equivocation any conflict or inconsistency in any prior opinion (dissenting opinion in Re Estate of Platt, 21 Cal.2d 343, 353, 131 P.2d 825, and many others), said at page 607 of 25 Cal.2d, at page 43 of 155 P.2d: "The court denied defendant's motions without opinion and it must be assumed the denial was on the merits." The pleadings and the ruling—without written opinion—was sufficient to warrant the assumption that the lower court acted on the merits, and the conclusion seemed so obvious that it was not necessary to cite in support thereof an authority. It is true that a forceful dissent was written by Mr. Justice Edmonds (who is noted for the power and vigor of his written opinions), attacking the assumption as contrary to the facts and the pleadings, but there is no suggestion that the assumption could not be indulged on a proper record. Neither in the majority nor in the minority opinion in the Leet case, nor in the opinion in the Funeral Directors' case is it indicated that it be assumed that a denial of a petition for a prerogative writ without written opinion is not on the merits. The Funeral Directors' case distinguished certain cases, and in doing so stated on page 109 of 22 Cal.2d, at page 788 of 136 P.2d that since the petition in Dawson v. Superior Court, 158 Cal. 73, 110 P. 479, *"showed on its face* that the prior adjudication was final and had been rendered *on the merits* of the application, it was an effective bar to the later original application here." (First italics added)

"Showed on its face" does not necessarily mean that the prior adjudication appeared in the minute order—though if it did that would be the end of the matter. The words "showed on its face" have reference to the face of the pleadings as distinguished from the evidence. People v. Megladdery, 40 Cal.App.2d 748, 757 et seq., 106 P.2d 84. "Showed on its face," so far as the facts of this case are concerned, means that from the language employed in the pleadings it is apparent (Pankowicz v. Jess, 27 Cal.App. 340, 149 P. 997, 25 Corpus Juris, p. 333, notes 44 and 48) that the order, without written opinion, was made on the merits of the application and not upon a technical ground.

Where an aggrieved party elects to apply for a writ of prohibition against a superior court to prohibit that court on jurisdictional grounds from proceeding with the trial of a cause then before it, and the petition for the writ is presented on a complete record of the pleadings out of which the jurisdictional points arise, and is denied without written opinion, and thereupon, on the assurance of such denial the trial court proceeds with the trial of the case, it should be and is the law that on appeal the reviewing court should not be foreclosed from looking into the background of the case, as shown by the pleadings and from holding, if the record so warrants, that such denial must have been based on the merits, even though it did not so appear from the order.

The question presented to the Supreme Court was one of jurisdiction. The Commissioner contended that the superior court had but one duty, namely, to dismiss the proceeding without any hearing in the superior court. Specifically, the question involved (1) the legal justification of the denial of a hearing before the Commissioner based upon Insurance Code sections 1821 and 1733; (2) the right of McDonough to a trial "de novo" and (3) the right to a jury trial. These three questions were disposed of on the petition for the writ to the Supreme Court and are now res judicata. They may be considered under that heading or as contentions raised on appeal. Whatever is said herein with reference to them has that alternative in mind, that is, it represents my conclusion on the res judicata question or on "the merits" on appeal. Contentions not directly involving jurisdiction, but rather excess of jurisdiction, will be considered as points on appeal.

That portion of section 1733 of the Insurance Code providing that the Commissioner may decline "with or without hearing" to grant the license "of an insurance agent, broker or solicitor" when within five years a previous application by the same party has been denied must be read in connection with section 1821. Newport v. Caminetti, 56 Cal.App.2d 557, 132 P.2d 897.

At the outset it should be made plain that I do not question the right of the legislature as a reasonable regulation to ban the filing of repeated applications. What constitutes reasonable regulation need not be discussed at this point except to comment that the provisions that a licensee's certificate of authority may be suspended "not exceeding one year" (sec. 704) and that an application may be refused without a hearing if made within five years of the denial of a previous application (sec. 1733) speak for themselves. I agree that the regulation could provide that the application could not be filed within a specified reasonable time, or that it might be filed and denied upon the sole ground that a previous application had been denied within a reasonable specified statutory time. My objection is that, as the statute does not prohibit the filing of a renewed application within the specified period, the Commissioner may not arbitrarily discriminate in granting a hearing to applicants. For example, A, B and C file applications. A's application is granted without hearing, and B's refused after hearing. C's is denied without a hearing. B at least had an opportunity to meet objections, which was denied to C. An applicant is required to make a showing "satisfactory to him," the Commissioner (sec. 1732), covering grounds for suspension or revocation as enumerated in section 1731, but an applicant may not be refused a license without an opportunity to be heard. (Section 1821.) The refusal to hear the application under such circumstances is a violation of section 1 of the Fourteenth Amendment to the Constitution of the United States and of sections 1, 13 and 21 of Art. 1 of the Constitution of the State of California.

There is nothing in Newport v. Caminetti, supra, holding that the power conferred by section 1733 to deny an application without a hearing is constitutional. On the contrary, the court called attention to section 1821 providing that a license shall not be refused without an opportunity to be heard, and held that the section covered an applicant for a bail bond license. It should be noted that section 1733 applicable to renewed applications for licenses was enacted in 1937. (Stats.1937, ch. 652.) Two years later the legislature, evidently realizing the unconstitutional power conferred upon the commissioner in this respect, enacted section 1821, which applies specifically to *applicants,* but the section declares that it is also applicable to persons theretofore licensed. The legislature may have enacted section 1821 because of views expressed in McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, which will be discussed in detail later.

The suggestion herein that the Supreme Court denied the application for hearing on the writ upon the ground that the Commissioner was justified in refusing respondent an opportunity to be heard, and that such conclusion might have been based upon the language used in McDonough v. Goodcell, supra, is without foundation. If there was any such thought, the Supreme Court would certainly know that, whatever views might have been entertained at the time of the filing of the opinion in McDonough v. Goodcell, supra, based upon the wording of section 1733, that such section must be read with that portion of section 1821—a new section—setting forth that a license shall not be refused without a hearing.

The thought that in denying the petition for hearing in this case the Supreme Court adhered to the Goodcell case is theoretical

and not substantial. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, which involved a state-wide administrative board, was decided less than four months prior to the Goodcell case, wherein, in speaking of the Drummey case, it was said "[T]he holding therein authorized an extension of the traditional functions of a proceeding in *mandamus*. * * * It was held that the superior court in such a proceeding had the power to exercise an independent judgment on the facts presented to it and thus inquire into and determine the question of the lawfulness of the order of the board, and that the petitioners had the right to require that the trial court conduct what would be in substance and effect a trial de novo in the course of which the parties would not be limited to the record made before the board." McDonough v. Goodcell, supra, 13 Cal.2d at page 752, 91 P.2d at page 1041, 123 A.L.R. 1205. The court then held that the ruling in the Drummey case "should be limited to the situation therein appearing, and as an exception to the general rule in *mandamus* proceedings in the superior court is not to be *applicable otherwise*." (Italics added) The interpretation followed in the Goodcell case is that because Drummey previously held a certificate or license he was entitled to a trial de novo, without being "limited to the record made before the board," but that McDonough, who had previously conducted the business of bail bond broker or agent for thirty-five years or more, and who was forced to apply for a license (Stats.1937, Ch. 652), was not entitled to a trial de novo after denial of the application.

The question whether the McDonough application could be determined without a hearing was a question of law to be decided by the court. If this was all that appeared in the petition for the writ of prohibition, and while the order of denial on the merits was legally justified, from a practical standpoint it might have been better to grant the writ and issue an order to the superior court to send the matter back to the commissioner for a hearing. But that was not all. The Commissioner made findings of fact based upon McDonough v. Goodcell, supra, and in part upon prior findings made by his predecessor and by himself "That the applicant was not of good moral character" and "not a fit person to engage in the bail bond business." The applicant for the license was not given an opportunity to submit evidence in his own behalf or to explain the above findings and others which will be considered later. (Section 1821.) So it appears the issues included not only the applicability and the interpretation of sections of the Insurance Code, but issues involving essential questions of fact necessary to the determination of the substantial rights of the parties.

The Commissioner does not deny that factual matters may be submitted to a jury but contends that the factual matters submitted here were improper,—in brief, that the question in the case was the right of the Commissioner to deny the application without a hearing de novo or otherwise.

The difficulty in California in handling appeals and writs pertaining to state-wide administrative boards arose upon the filing of the decision in Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P. 2d 119. In that case it was held that the long established rule that "certiorari" was applicable to state-wide administrative boards or commissions was incorrect. The ruling was based upon the ground that such bodies did not exercise judicial functions. Three years later in Drummey v. State Board of Funeral Directors, supra, it was held that the proper remedy to be invoked by those who claim to be aggrieved by an action of a state-wide board in exercising its power in respect of licenses is a writ of mandate, in which the court should hear the matter "de novo." It was held that the court in such a mandamus proceeding "must exercise an independent judgment on the facts" but "should be assisted by the findings of the board." [13 Cal.2d 75, 87 P.2d 854] Three months later it was determined that the rule set forth in the Drummey case was applicable only to a licensee, and not to an applicant for a license. (McDonough v. Goodcell, supra.) McDonough was not specifically confined to a writ of review. Such ruling would be contrary to Standard Oil Co. v. State Board of Equalization, supra, and Drummey v. State Board of Funeral Directors, supra. Referring to the Drummey case, it was held in the McDonough case, 13 Cal.2d at page 753, 91 P.2d at page 1042, 123 A.L.R. 1205: "[E]ven in the absence of such a statutory provision due process required that a party aggrieved by reason of a ruling of the officer or board involving a constitutional right be accorded an opportunity to resort to a judicial tribunal for redress."

It is suggested that the Goodcell opinion in this particular respect, namely, that McDonough was not entitled to a trial de novo, is binding on appeal, and that a member of an intermediate court must follow the ruling therein irrespective of conclusions reached by the Supreme Court in subsequent actions. Three years after the decision in McDonough v. Goodcell, supra, it was determined that a trial de novo was a trial wherein the independent judgment of the court must be given and that "[*T*]*he court must consider all material evidence and was not confined to the record of the proceedings before the board.*" Laisne v. California State Board of Optometry, 19 Cal.2d 831, 834, 123 P.2d 457, 459. (Italics added)

The provision in the Insurance Code that "Any action to review an act of the commissioner denying" etc. (section 1818) "shall be commenced and tried in the superior court" etc. (section 1734) makes no mention of a trial "de novo" for either a licensee or an applicant. In the absence of some special statutory provision therefor the code sections covering mandamus proceedings should be applied. (Code Civ. Proc. sections 1084 to 1089.) Assume, however, that the language in McDonough v. Goodcell, supra, though not based upon authority and without any stated reasons why there should be one test for the licensee and another for an applicant without license, does apply so far as an intermediate court is concerned, what is the duty of such court when subsequently the Supreme Court on similar questions has acted contrary to the holding in the Goodcell case?

McDonough v. Goodcell, supra, has often been cited as authority on many legal issues, but so far as I can find never by any appellate court on the subject at hand. That case adopted a new rule; which, however, has never since been followed in any case to which my attention has been called, whether one relating to insurance or otherwise. It stands alone, applicable only in that case. Another rule exists applying to applicants to practice or conduct a profession, vocation or business. Subsequent to such ruling the Supreme Court has issued writs of mandate in matters wherein it has original jurisdiction, and treated the hearing as a trial de novo, or, at least, has reviewed and weighed the evidence, though, as yet, the court has not permitted additional evidence.

In Staley v. State Bar, 17 Cal.2d 119, 109 P.2d 667, the supreme court issued an alternative writ of mandate requiring the bar examiners to show cause why the petitioner should not be permitted to practice law. The alternative writ was discharged and a peremptory writ denied. It was decided in that case that the petition was not sufficient to warrant a re-examination of the record, but the proceeding was treated as one in mandamus. In re Stepsay, 15 Cal. 2d 71, 98 P.2d 489, the Supreme Court not only overruled the state bar on a question of the "character" of an *applicant, but weighed the evidence and gave its independent judgment* that the applicant was of good moral character, and therefore entitled to take an examination. In McDonald v. State Bar, 22 Cal.2d 768, 141 P.2d 217, the Supreme Court thoroughly considered the evidence and passed upon the right of an applicant to withdraw an application. In Laisne v. California State Board of Optometry, supra, 19 Cal.2d at page 840, 123 P.2d at page 463, the court said: "The cases interpreting the State Bar Act * * * strengthen our conviction that if finality were given to the action of an administrative agency, such would be an unconstitutional exercise of judicial power." It may be suggested that in State Bar matters jurisdiction to review is given directly to the Supreme Court. The review of a denial of an application for an insurance broker's license is given directly to the superior court. (Insurance Code, sec. 1734.) The procedure should be, and is, the same in the court that first assumes jurisdiction.

During the oral argument the legal representative of the Commissioner, argued not only ably and well, but frankly and conscientiously cited McDonough v. Goodcell in support of many points in this case, but never advanced a claim that the opinion was sound on the question under consideration. He was interrogated by the court as follows: "You still contend, do you, Mr. Stevens * * * that the Superior Court was without jurisdiction to grant a trial before a jury? That is the basic contention is it? You still insist on that? [Answer]: No; I certainly haven't mentioned it in any of my briefs, Your Honor, I believe this, the Trial Court, as I have pointed out in my briefs, was expressly authorized by statute, by Section 1734 of the Insurance Code, to take jurisdiction and review the actions and orders of the Insurance Com-

missioner in denying licenses. Now I think unquestionably that the Superior Court had jurisdiction to make such a determination upon reviewing the actions taken by the Insurance Commissioner." On oral argument it was admitted that a rule which permitted a licensee a hearing de novo and denied the same privilege to an applicant was in effect illogical. Mr. Justice Spence, who recently received a merited promotion, in considering Insurance Code, sections 1821 and 1730 to 1736 said in Newport v. Caminetti, supra, 56 Cal.App.2d at page 559, 132 P.2d at page 899, "The only *logical* conclusion to be drawn is that the word 'licensed,' as used in section 1821, was intended to cover both persons already licensed and persons applying to be licensed under that chapter." (Italics added) Appellant's petition in the Newport case for a hearing by the Supreme Court was denied without a *dissenting vote*. The language in the Newport case undoubtedly took into consideration the fact that section 1821 became effective after the rendition of the decision in the Goodcell case. If that section had been effective at the time the Goodcell opinion was handed down the court would never have held that an applicant is not entitled to a hearing.

In Bodinson Mfg. Co. v. California Employment Comm., 17 Cal.2d 321, at pages 330, 331, 109 P.2d 935 at page 941, involving applications to award unemployment compensation the court said: "The writ of *mandamus* may therefore be used in this state, not only to compel the performance of a ministerial act, but also in a proper case for the purpose of reviewing the final acts and decisions of statewide administrative agencies which do not exercise judicial power. That being so, *mandamus* was the proper proceeding to bring in the present instance." "The adversary parties to these proceedings are entitled to such appeals as are permitted under the statute, and further, are entitled to appear in court to test the Commission's final decision, thus insuring compliance with the requirements of the law." In Jersey Maid Mill Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577, there appeared some doubt as to whether the language of the statute providing for a hearing after complaint applied to an applicant as well as to a licensee. It was determined that though the language "is not as clear as it might be" there is an implication that it is appropriate to applicants in the same manner as to licensees, 13 Cal. 2d at page 651, 91 P.2d at page 594. It has always been the policy of the courts of this state to grant a hearing, review, de novo or otherwise, to any applicant refused a license to conduct a business. Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665.

The ruling in the Goodcell case is explainable. The court did not say that the applicant was not entitled to a hearing but implied that he was not entitled to a trial de novo. It should be repeated; the provision that a license shall not be refused without a hearing and an opportunity to the applicant to produce evidence in support of his application did not become effective until after the Goodcell decision.

Acquainted with the facts and knowing the law, the Supreme Court could do nothing but deny the petition to hear the matter after decision in the District Court of Appeal. It is not reasonable to assume that the denial was based upon the ground that the court guessed or concluded that the trial court might change its ruling or that the Commissioner had an adequate remedy by appeal. The Attorney General argued as regards the petition that it was important, in connection with the administration of the Insurance Code, that the interpretation of section 1821 should be quickly and definitely determined, adverting to the fact that no final judgment had been entered in the mandate proceedings. It appears that the decision would affect others than McDonough. That the Commissioner did not have the right to dispose of a petition for a license without a hearing; that he in fact did so; that the superior court had jurisdiction to correct such an abuse of administrative functions, appeared so plainly on the face of the record that the Supreme Court did not have to consider technical matters but decided solely upon the merits.

The denial of the petition in the Supreme Court was a recognition of the change in statute and an abandonment of the holding in the Goodcell case that an applicant for a license was not entitled to a trial de novo. Otherwise it was the clear duty of the court to grant the writ and direct the trial court to confine the review to a hearing on questions of law. In view of the foregoing it must be concluded that on the second point, namely, whether McDonough was entitled to a trial de novo, the Supreme Court decided on the "merits" and not upon some conjectural technicality. As a matter of emphasis it may be repeated here that the petition for a writ of prohibition made di-

rect to the Supreme Court should, of necessity, be denied, as the court had ruled on the petition for hearing after decision in the District Court of Appeal. In Paige Co. of Northern California v. Superior Court, 194 Cal. 795, 796, 231 P. 344, the court said: "It appearing upon the face of the petition herein that the petitioner has heretofore applied for a similar writ of prohibition to the District Court of Appeal, in and for the Third Appellate District, and that its said application was, on the 14th day of November, 1924, denied by said court, the remedy of the petitioner herein was by application for a transfer and hearing in this court upon its aforesaid petition, and was not by way of an original application to this court for the writ herein sought. Its said application is for that reason denied." Dawson v. Superior Court, supra; Barbee v. Appellate Dept. of Superior Court, 209 Cal. 435, 287 P. 979; Linstead v. Superior Court, 7 Cal.2d 347, 60 P.2d 280.

If the only question raised on the petition before the Supreme Court was one of law then such question could be decided only by the court. However, it was made plain in the petition to the Supreme Court that factual matters were involved. The superior court *had jurisdiction* to try the issues of fact with a jury. (Code Civ.Proc., sec. 1090.) Code of Civil Procedure, sections 1084 to 1097 inclusive, deal with the rules and procedure governing the writ of "mandamus." (Section 1084.) If the answer to the petition for the writ raises a question of fact—as it did in this case—essential to the determination of the substantial rights of the parties, the court may in its discretion order a jury to pass upon such question. (Code Civ.Proc. sec. 1090.) Trial by jury under this section can not be demanded by either party as of right but is resorted to in the discretion of the court. Sparks v. Board of Dental Examiners, 54 Cal.App.2d 491, 129 P.2d 405. If a jury is ordered the procedure is the same as in an ordinary civil action. (18 R.C.L., p. 355, sec. 313; 35 Am.Jur., pp. 112–113, secs. 373, 374.) The provisions of code sections 1084 to 1097 are applicable to any petition for this writ.

The foregoing determines that the superior court directly by statute had jurisdiction to review an act of the Commissioner denying a license (Insurance Code, sec. 1734) in a mandate proceeding (Drummey v. State Board of Funeral Directors, supra) to pass upon the issues presented, and was empowered to empanel a jury. In Dare v. Board of Medical Examiners, 21 Cal.2d 790, at page 796, 136 P.2d 304, at page 307, the Supreme Court said: *"First, the petitioner comes before the court governed by the provisions of the Code of Civil Procedure applicable to mandamus proceedings, Code Civ.Proc., §§ 1084 to 1907 inclusive. In the disposition of such proceedings the court is likewise governed* by those code sections." (Italics added)

In passing it may be well to say that the Commissioner, on the application to the Supreme Court for the writ, vigorously contended that the impanelment of a jury in this proceeding was without legal authority. This contention has been abandoned on appeal. The Commissioner is now content to claim that the issues submitted were *in excess of jurisdiction;* in brief, that there was error. As bearing upon this question the findings of the Commissioner may be examined and considered as points raised on appeal.

The Commissioner made a finding, and assigned it as a reason for the refusal of the application for the license, to the effect that on a previous application, which was denied, "no action of any nature to review said denial of said application was commenced within three months after the date" of the order denying the application upon the ground that McDonough "was not of good general reputation." The subject of reputation will be considered later.

There is no statutory provision that the insurance commissioner in his official capacity as head of the administrative body may deny an application because after a previous denial there was no attempt to "review" the proceeding in a court of record. The failure to appeal from a prior order is not enumerated in either section 1805 or 1731 of the Insurance Code as a ground for refusing a license and therefore, in so far as the particular sections are concerned, refusal on that ground is in excess of the jurisdiction of the Commissioner. However, there is a section which provides in substance that before an applicant is entitled to follow his previous business "it must be made to appear" *to the commissioner* that the applicant is a fit and proper person to have a license. (Insurance Code, sec. 1806.) Assuming that under this broad provision the Commissioner could take into consideration as one of several although not the sole reason, the failure to apply for

an appropriate writ after a ruling by him as a ground for refusal of a subsequent application, may it be contended that such ground could be entitled to any weight if the Commissioner did not permit the applicant *to explain why* several years before he had failed to carry the matter to a court of record, and why, in view of that failure, he now reapplied for a license.

The reason why no action was taken appears plainly from the historical background of the McDonough and other cases which appears directly in the record or by reference to previous litigation. The Drummey case determined that an applicant for a certificate or license after hearing before a board or a commission was entitled to the "independent judgment on the facts" "assisted by the findings of the board." Three months later in McDonough v. Goodcell it was determined that the Drummey rule applied to licensees only and not to applicants. Why should McDonough seek a review of a purely factual question when it had been announced that he could not have the benefit of the independent judgment of the court?

Three years later it was decided that an independent judgment on the facts was not only appropriate but that "any material evidence *regardless of the record of the proceedings* before the board," should be received on a hearing of a writ of mandate. (Italics added.) Laisne v. California State Board of Optometry, supra. Though the Supreme Court has original and exclusive jurisdiction in Bar Association cases involving "applicants," that body has considered the evidence. In the present case the superior court had jurisdiction. (Insurance Code, sec. 1734). The Supreme Court has not adopted the Goodcell rule as suitable to applicants under the State Bar Act. The change of "rules" as set forth in the Supreme Court opinions, the difference of opinion as expressed in the four-three votes, the change of court personnel, may or may not have contributed to the present effort of McDonough to obtain a license.

That confusion has existed appears from the opinion in Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304. In that case the definition of trial de novo was explained, 21 Cal.2d at page 799, 136 P.2d at page 309, as follows: "As above noted the trial court is not confined to the record before the board. Nor is the court bound by the findings and determinations of the board. It must also be said that neither party is necessarily bound in all particulars by the record before the board." Whether a court may or *must* exercise independent judgment on the facts is still open to question in view of the change of definition of trial de novo. In Sipper v. Urban, 22 Cal.2d 138, at page 144, 137 P.2d 425, at page 427, Mr. Justice Schauer expresses himself as follows: "*The complete trial de novo doctrine of the Laisne case has been abandoned.* By the decision in the Dare case (Dare v. Board of Medical Examiners, supra [21 Cal.2d 790, 136 P.2d 304]), the majority of the court has receded from the extreme position taken in the Laisne case with respect to the right of a party to a complete trial de novo on mandamus review, and has thereby substantially rectified perhaps the most serious of the practical difficulties suggested in the dissenting opinion in the Laisne case as bound to be encountered in practice under the majority rule as then stated." It is also suggested that the problem of review of administrative decisions should be referred to the legislature.

In December 1944 the Judicial Council of the State of California, whose members are selected from the most eminent jurists in the state, including the distinguished and capable Chief Justice Gibson and the able and experienced senior Associate Justice Shenk, filed a report addressed to the Governor of the state. Relative to administrative agencies the council recommends certain changes in the law, including the proposal that "the case shall be heard * * * without a jury." Evidently this is consonant with the latest expression of thought on trial de novo and recognition of the fact that a court created method of review may not control the rules of evidence and procedure against the plain provisions of the statute. (Code Civ.Proc. sec. 1090.) "Provision is made for the cases in which the court has the power to exercise an independent judgment on the evidence and also for the cases in which the court merely examines the record to ascertain whether the decision is supported by substantial evidence." The appendix to the report (pp. 141–142), contains the following: "The extent of the court's power to take evidence in addition to that presented before the agency has varied from case to case in recent years [Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848; Laisne v. California State

Board of Optometry, 19 Cal.2d 831, 123 P. 2d 457], and some differences still exist as indicated by recent District Court of Appeal decisions [Wyatt v. Cerf, 64 Cal. App.2d 732, 149 P.2d 309] and concurring and dissenting opinions in Supreme Court cases [Laisne v. State Board of Optometry, supra; Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304; Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425; Russell v. Miller, 21 Cal.2d 817, 136 P.2d 318]." If there is confusion recognized by members of the judicial council, an applicant should not be penalized if he was unable to determine his proper remedy.

Take another step and assume that the Commissioner could still hold that had McDonough been given a hearing the statute of limitations as to the appeal from a former hearing must be strictly construed. Not so. Recently Mr. Justice Traynor, learned in principles of law, held that the running of the statute of limitations may be suspended for other reasons than those enacted into statutory form by the legislature and that the Supreme Court, and I assume an intermediate appellate court, "is not powerless to formulate rules of procedure where justice demands." Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 154 P.2d 399, 405. This is such a case. It may be remarked that murderers and thieves are freed from the state penitentiary to enter new walks in life, and that lawyers released from the state prisons return to honorably conduct their practice of the law. Surely a more severe test of "character" should not be demanded of one applying to conduct a business of bail bond broker than of one to practice the profession of the law.

The consideration of the finding that respondent is not a fit person to hold a license is appropriate at this time. The Commissioner found that "the undersigned Insurance Commissioner is not satisfied that * * * The applicant is a fit" or "proper person to hold the license applied for." Also, that the "records and acts of the Insurance Commissioner and of the Courts of this State" indicated "a lack of integrity" on the part of McDonough. Upon these former findings the Commissioner found that the applicant is not a fit and proper person to be granted a license.

The evidence to which the Commissioner refers is the evidence heard before the commission in the month of October 1937 and which he reconsidered as grounds for denial in October, 1942, a few days less than *five years thereafter.*

The finding—in effect that the Commissioner was not satisfied etc.—may be sufficient if the basic finding is sufficient. The right of a commissioner to be satisfied has been upheld but "There must exist facts which reasonably justify his conclusion that the applicant is not of good character and reputation. If such facts do not exist, it is his duty to issue the license, and this duty can be enforced by the courts." Riley v. Chambers, 181 Cal. 589, 595, 185 P. 855, 857, 8 A.L.R. 418. This case is quoted with approval in McDonough v. Goodcell, supra. In the absence of respondent the only "facts" found are the data referred to as the previous "acts" of the courts and the Commissioner.

The court case referred to by the Commissioner as holding that respondent was an unfit person to hold a license does not so hold. It holds merely that the evidence introduced at a hearing before the Commissioner was sufficient to sustain a finding that there was unfitness to hold a license. In this respect the Commissioner failed to note that "Unquestionably the testimony before the commissioner would sustain a conclusion either way upon the issue of the good moral character and fitness of the petitioners to engage in the bail bond business in San Francisco. If the trial had been before a court the evidence was sufficient to support findings either way or was sufficient to support a verdict either way on the issue." McDonough v. Goodcell, supra, 13 Cal.2d at page 749, 91 P.2d at page 1040, 123 A.L.R. 1205. However, in McDonald v. State Bar, supra, the court weighed the evidence and reversed the board.

That portion of the finding in the present proceeding to the effect that respondent is not a proper person now because he was previously so adjudged by the Commissioner has reference to a previous refusal of the former application as follows: "[T]hat said Order of Denial was based on the grounds that said Peter P. McDonough was not of good general reputation, [and] had heretofore been refused a license." In brief, each of the several denials was based in whole or in part upon a previous denial, which brings the consideration to the facts related in the Goodcell case.

I have no desire to elaborate on the infirmities of "reputation" evidence. It is sufficient to say that in the Goodcell case the court said that a conclusion either way

could be sustained. Under such circumstances the factual question of reputation was properly before the superior court in this mandamus proceeding. It was an issue, raised by the pleadings, essential to the determination of the substantial rights of the parties. (Code Civ.Proc. sec. 1090.) It was proper to submit this factual question to the jury. The lone commissioner is not in a better position to "exercise an independent judgment" upon *facts* than twelve jurors. If a jury in deciding substantially the same question relative to the character of an applicant should decide contrary to the view held by the Commissioner, it would be in effect a finding that the Commissioner had abused the discretionary powers given him by the provisions of the statute. In this case there is evidence of McDonough's good character covering a period of thirty years or more, and there is other evidence of good character confined to the time after the denial of the previous application, covering a period of two years. In this case two trial judges refrained from setting aside such verdict.

There is no claim made by the Commissioner on appeal that the verdicts of the jury upon which the judgments rest are in any way wanting in evidentiary support. In the inception of the proceeding the Commissioner was directed to issue a license or to show cause why he had not done so. He filed a demurrer and an answer. In the answer it was alleged that McDonough was not entitled to a hearing "either by a jury or by the court," and the allegation that he was "a man of good character and good business status and reputation, and is financially responsible to a substantial degree" was denied, thereby raising an issue upon the questions of fact, which the trial court submitted to a jury.

Whatever the position of the Commissioner on petition for a writ of prohibition might have been which is res judicata on jurisdictional questions, on appeal he does not claim that petitioner was not entitled to a court hearing. He has receded from his original position that as an applicant McDonough was not entitled to a trial by jury ent judgment of the court or that McDonough was not enttiled to a trial by jury on proper facts. It is now the Commissioner's contention that the superior court judicial review should have been limited to whether a prior application had been denied within five years and whether there was an abuse of discretion in denying a hearing or denying the application for license. The Commissioner also contends that if the provision in subd. (c) of section 1733 is unconstitutional, it was the duty of the superior court to send the matter back to the Commissioner for a hearing. This point has been previously considered. Since the enactment of section 1821 it is not necessary to do anything more than declare that under the code sections as now read together (Newport v. Caminetti, supra), a petition of an applicant may not be denied without a hearing. It was the Commissioner's duty under the terms of the alternative writ of mandate to issue the license or to show cause why he had not done so. He could have submitted to the jury the facts upon which he based his conclusion. He refused to do so. He should abide the result of the judgment based upon the verdict. In passing it should be noted from previous litigation referred to by the Commissioner, and from more recent litigation, that when McDonough appeared before a jury in an extraordinary proceeding, matter or in a criminal case based upon the "license" question, McDonough won, and when the matters of "license" appeared before the Commissioner, the Commissioner won. In his opening brief the Commissioner states his position as follows: "[W]here the Commissioner denies the application upon the ground that the applicant is not of good general reputation—the reviewing court must determine whether there is sufficient evidence to show a reasonable basis for the Commissioner's action." The reviewing court here was the superior court. The Commissioner refused to introduce evidence to support his position. He did not participate in the examination of witnesses, but his legal representative was present during the jury trial, and participated in motions and objections in the absence of the jury. A certificate of the Commissioner certifying facts found after a hearing is held to be prima facie evidence of such facts. (Insurance Code, sec. 1819.) Here there was no hearing.

Whatever has been said in reference to respondent Peter P. McDonough in Civil No. 12638 applies also to respondent Thomas McDonough, Civil No. 12639. As I view the facts and the law the Commissioner has put himself in such a position that the judgment of the superior court should be affirmed.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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